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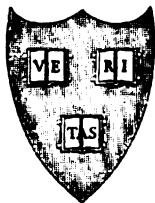
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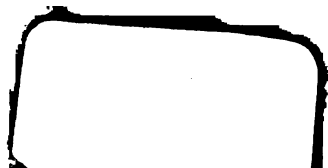


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# TABLE OF ABBREVIATIONS.

## A

Abb. Adm.....Abbott's Admiralty (U. S.)  
 Abb. Dec.....Abbott's Decisions (N. Y.)  
 Abb. N. C.....Abbott's New Cases (N. Y.)  
 Abbott's Law Dict.....Abbott's Law Dictionary.  
 Abb. Prac.....Abbott's Practice (N. Y.)  
 Abb. Prac. (N. S.)..Abbott's Practice, New Series (N. Y.)  
 Abb. (U. S.).....Abbott's United States.  
 Abr. ....Abridgment.  
 Adams .....Adams (N. H.)  
 Add. ....Addams' Ecclesiastical Reports.  
 Add. ....Addison (Pa.)  
 Add. Cont. ....Addison on Contracts.  
 Add. Torts ....Addison on Torts.  
 Adol. & E.....Adolphus and Ellis' English King's Bench Reports.  
 Adol. & E. (N. S.)..Adolphus and Ellis' English Queen's Bench Reports (New Series).  
 Aik. Dig.....Aikin's Digest of Laws, Alabama.  
 Aikens .....Aikens (Vt.)  
 A. K. Marsh.....A. K. Marshall (Ky)  
 Ala. ....Alabama.  
 Alb. Law J.....Albany Law Journal.  
 Allen .....Allen (Mass.)  
 Amb. ....Ambler's English Chancery Reports.  
 Am. Bankr. Rep...American Bankruptcy Reports.  
 Am. Dec.....American Decisions.  
 Am. Ed.....American Edition.  
 Am. Law J.....American Law Journal.  
 Am. Law Rec.....American Law Record (Cin.)  
 Am. Law Reg. (N. S.) .....American Law Register, New Series.  
 Am. Law Reg. (O. S.) .....American Law Register, Old Series.  
 Am. Law Rev.....American Law Review.  
 Am. Law T. Rep...American Law Times Reports.  
 Am. Lead. Cas....American Leading Cases (Hare & Wallace's).  
 Am. Reg.....American Law Register.  
 Am. Rep.....American Reports.  
 Am. St. Rep.....American State Reports.  
 Am. & Eng. Enc. Law .....American and English Encyclopedia of Law.  
 Am. & Eng. Ry. Cas.American and English Railway Cases.  
 And. Law Dict....Anderson's Law Dictionary.  
 Ang. Ins.....Angell on Insurance.  
 Ang. & A. Corp....Angell and Ames on Corporations.  
 Ann. Code.....Annotated Code.  
 Ann. Codes & St...Bellinger and Cotton's Annotated Codes and Statutes, Oregon.  
 Ann. St.....Annotated Statutes.  
 Ann. St. Ind. T....Annotated Statutes of Indian Territory.  
 Anstr. ....Anstruther's English Exchange Reports.  
 Anth. N. P.....Anthon's Nisi Prius Reports (N. Y.)

App. ....Appleton (Me.)  
 App. Cas.....Appeal Cases, English Law Reports.  
 App. D. C.....Appeal Cases (D. C.)  
 App. Div.....Appellate Division (N. Y.)  
 Ariz. ....Arizona.  
 Ark. ....Arkansas.  
 Arn. Ins.....Arnold's Marine Insurance.  
 Ashm. ....Ashmead (Pa.)  
 Atk. ....Atkyns' English Chancery Reports.  
 Atl. ....Atlantic Reporter.

## B

Bac. Abr. ....Bacon's Abridgment.  
 Balley .....Bailey (S. C.)  
 Balley, Eq.....Bailey's Equity (S. C.)  
 Baldw. ....Baldwin (U. S.)  
 Ballinger's Ann. Codes & St.....Ballinger's Annotated Codes and Statutes, Washington.  
 Bankr. Act.....Bankruptcy Act.  
 Bankr. Form.....Bankruptcy Forms.  
 Ban. & A.....Banning & Arden's Patent Cases (U. S.)  
 Barb. ....Barbour (N. Y.)  
 Barb. (Ark.).....Barber (Ark.)  
 Barb. Ch.....Barbour's Chancery (N. Y.)  
 Barn. & Adol.....Barnewall and Adolphus' English King's Bench Reports.  
 Barn. & Ald.....Barnewall and Alderson's English King's Bench Reports.  
 Barn. & C.....Barnewall and Cresswell's English King's Bench Reports.  
 Barr .....Barr (Pa.)  
 Baxt. ....Baxter (Tenn.)  
 Bay .....Bay (S. C.)  
 Beach, Contrib. Neg. Beach on Contributory Negligence.  
 Beach, Mod. Eq. Jur. Beach's Commentaries on Modern Equity Jurisprudence.  
 Beach, Priv. Corp. Beach on Private Corporations.  
 Beasl. ....Beasley (N. J.)  
 Beav. ....Beavan's English Rolls Court Reports.  
 Bee .....Bee (U. S.)  
 Ben. ....Benedict (U. S.)  
 Benj. Sales.....Benjamin on Sales.  
 Benn. ....Bennett (Cal.)  
 Best, Ev.....Best on Evidence.  
 Best & S.....Best and Smith's English Queen's Bench Reports.  
 Bibb .....Bibb (Ky.)  
 Bigelow, Lead. Cas. Bigelow's Leading Cases in Bills and Notes; Torts; or Wills.  
 Bin. ....Binney (Pa.)  
 Bing. ....Bingham's English Common Pleas Reports.  
 Bish. Cont.....Bishop on Contracts.  
 Bish. Cr. Law.....Bishop on Criminal Law.  
 Bish. Cr. Proc.....Bishop on Criminal Procedure.  
 Bish. Mar., Div. & Sep. ....Bishop on Marriage, Divorce, and Separation.  
 Bish. Mar. & Div...Bishop on Marriage and Divorce



Bish. New Cr. Law.	Bishop's New Criminal Law.	Car. & K.....	Carrington and Kirwan's English Nisi Prius Reports.
Biss. ....	Bissell (U. S.)	Car. & P.....	Carrington & Payne's English Nisi Prius Reports.
Black .....	Black (U. S.)	Casey .....	Casey (Pa.)
Black, Dict.....	Black's Law Dictionary.	C. B. ....	English Common Bench Reports (Manning, Granger & Scott).
Blackf. ....	Blackford (Ind.)	C. B. (N. S.).....	English Common Bench Reports (New Series).
Bland .....	Bland (Md.)	C. C. A.....	Circuit Court of Appeals (U. S.)
Blatchf. ....	Blatchford (U. S.)	C. E. Green.....	C. E. Green (N. J.)
Blatchf. Prize Cas.	Blatchford's Prize Cases (U. S.)	Cent. Dict.....	Century Dictionary.
Blatchf. & H.....	Blatchford & Howland (U. S.)	Cent. Law J.....	Central Law Journal, St. Louis, Mo.
Bl. Comm.....	Blackstone's Commentaries on the Laws of England.	Chand. ....	Chandler (Wis.)
Bliss, Code Pl....	Bliss on Code Pleading.	Chan. Sentinel ...	Chancery Sentinel (N. Y.)
B. Mon.....	B. Monroe (Ky.)	Charlt., R. M.....	R. M. Charlton (Ga.)
Bond .....	Bond (U. S.)	Charlt., T. U. P....	T. U. P. Charlton (Ga.)
Bosw. ....	Bosworth (N. Y.)	Chase .....	Chase (U. S.)
Boa. & P. (N. R.)..	Bosanquet and Puller's New Reports, English Common Pleas.	Chest. Co. Rep....	Chester County Reports (Pa.)
Bouv. Law Dict....	Bouvier's Law Dictionary.	Cheves .....	Cheves (S. C.)
Bradf. Sur. ....	Bradford's Surrogate (N. Y.)	Cheves, Eq.....	Cheves' Equity (S. C.)
Bradw. ....	Bradwell (Ill.)	Chi. Leg. N.....	Chicago Legal News (Ill.)
Branch .....	Branch (Fla.)	Chip., D.....	D. Chipman (Vt.)
Brandt, Sur.....	Brandt on Suretyship and Guaranty.	Chip., N.....	N. Chipman (Vt.)
Brayt. ....	Brayton (Vt.)	Chit. Bills .....	Chitty on Bills.
Breese .....	Breese (Ill.)	Chit. Cont. ....	Chitty on Contracts.
Brev. ....	Brevard (S. C.)	Chit. Cr. Law .....	Chitty's Criminal Law.
Brewst. ....	Brewster (Pa.)	Ch. Pl. ....	Chitty on Pleading.
Brightly, Elect. Cas.	Brightly's Leading Election Cases (Pa.)	Cin. R.....	Cincinnati Superior Court Reports (Ohio)
Brightly, N. P....	Brightly's Nisi Prius Reports (Pa.)	Cin. Super. Ct. Rep'r .....	Cincinnati Superior Court Reporter (Ohio)
Brock. ....	Brockenbrough (U. S.)	Cir. Ct. Dec.....	Circuit Decisions (Ohio)
Brock. & H.....	Brockenbrough & Holmes (Va.)	Cir. Ct. R.....	Circuit Court Reports (Ohio)
Brod. & B.....	Broderip & Bingham's English Common Pleas Reports.	City Ct. R.....	City Court Reports (N. Y.)
Brooke, Abr.....	Brooke's Abridgment.	City Ct. R. Supp....	City Court Reports, Supplement (N. Y.)
Brown, Adm.....	Brown's Admiralty (U. S.)	City H. Rec.....	City Hall Recorder (N. Y.)
Browne .....	Browne (Pa.)	Civ. Code.....	Civil Code.
Brunner, Col. Cas..	Brunner's Collected Cases (U. S.)	Civ. Code Practice..	Civil Code of Practice.
Bump. Fraud. Conv.	Bump on Fraudulent Conveyances.	Civ. Proc. R.....	Civil Procedure Reports (N. Y.)
Burge, Sur.....	Burge on Suretyship.	Clark .....	Clark (Pa.)
Burn. ....	Burnett (Wis.)	Clarke .....	Clarke (Iowa)
Burr. ....	Burrows' English King's Bench Reports.	Clarke, Ch.....	Clarke's Chancery (N. Y.)
Burrill, Circ. Ev...	Burrill on Circumstantial Evidence.	Clay's Dig.....	Clay's Digest of Laws of Alabama.
Burr. L. Dict.....	Burrill's Law Dictionary.	Cleva. Law Rec....	Cleveland Law Recorder (Ohio)
Burt. Real Prop....	Burton on Real Property.	Cleva. Law Rep....	Cleveland Law Reporter (Ohio)
Busb. ....	Busbee (N. C.)	Cliff. ....	Clifford (U. S.)
Busb. Eq.....	Busbee's Equity (N. C.)	Code Civ. Proc.....	Code of Civil Procedure.
Busb. ....	Busb (Ky.)	Code Cr. Proc.....	Code of Criminal Procedure.
B. & Ald.....	Barnewall and Alderson's English King's Bench Reports.	Code Prac.....	Code of Practice.
B. & C.....	Barnewall and Cresswell's English King's Bench Reports.	Code Proc. ....	Code of Procedure.
B. & P.....	Bosanquet & Puller's English Common Pleas Reports.	Code Pub. Gen. Laws .....	Code of Public General Laws.
<b>C</b>		Code R. (N. S.)....	Code Reports, New Series (N. Y.)
Caines .....	Caines (N. Y.)	Code Rep.....	Code Reporter (N. Y.)
Caines, Cas.....	Caines' Cases (N. Y.)	Code Supp.....	Supplement to the Code.
Cal. ....	California.	Co. Inst.....	Coke's Institutes.
Call .....	Call (Va.)	Coke .....	Coke's English King's Bench Reports.
Camp. ....	Campbell's English Nisi Prius Reports.	Cold. ....	Coldwell (Tenn.)
Cam. & N.....	Cameron & Norwood's Conference (N. C.)	Colem. Cas.....	Coleman's Cases (N. Y.)
Car. ....	Carolus. (as 22 & 23 Car. II)	Colem. & C. Cas...	Coleman & Caines' Cases (N. Y.)
Car. Law Repos....	Carolina Law Repository (N. C.)	Co. Litt.....	Coke on Littleton.
Cart. ....	Carter (Ind.)	Collier, Partn.....	Collyer on Partnership.
		Colo. ....	Colorado.
		Colo. App.....	Colorado Appeals.
		Colo. Law Rep....	Colorado Law Reporter.
		Comm. ....	Commentaries.
		Comp. Laws.....	Compiled Laws.
		Comp. St.....	Compiled Statutes.
		Comst. ....	Comstock (N. Y.)

Comyn ..... Comyns' English King's Bench Reports.  
 Conf. R. .... Conference Reports (N. C.)  
 Cong. .... Congress.  
 Conn. .... Connecticut.  
 Const. .... Constitution.  
 Const. Amend. .... Amendment to Constitution.  
 Const. U. S. Amend. .... Amendment to the Constitution of the United States.  
 Con. Sur. .... Connolly's Surrogate (N. Y.)  
 Cooke ..... Cooke (Tenn.)  
 Cook's Pen. Code .. Cook's Penal Code, New York.  
 Cooley, Const. Lim. .... Cooley's Constitutional Limitations.  
 Cooley, Tax'n .... Cooley on Taxation.  
 Coop. Eq. Pl. .... Cooper's Equity Pleading.  
 Cornish, Purch. Deeds ..... Cornish on Purchase Deeds.  
 Cow. .... Cowen (N. Y.)  
 Cow. Cr. Rep. .... Cowen's Criminal Reports, New York.  
 Cowp. .... Cowper's English King's Bench Reports.  
 Cox ..... Cox (Ark.)  
 Cox ..... Cox's English Chancery Cases.  
 Cox, Cr. Cas. .... Cox's English Criminal Cases.  
 Coxe ..... Coxe (N. J.)  
 C. P. Rep. .... Common Pleas Reporter (Pa.)  
 Crabbe ..... Crabbe (U. S.)  
 Cranch ..... Cranch (U. S.)  
 Cranch, C. C. .... Cranch's Circuit Court (U. S.)  
 Cranch, Pat. Dec. .... Cranch's Patent Decisions (U. S.)  
 Cr. Code. .... Criminal Code.  
 Cr. Law Mag. .... Criminal Law Magazine (N. J.)  
 C. Rob. .... Charles Robinson's English Admiralty Reports.  
 Cro. Eliz. .... Croke's English King's Bench Reports, temp. Elizabeth (1 Cro.)  
 Crompt. Just. .... Crompton's Office of Justice of the Peace.  
 Crompt. & J. .... Crompton & Jervis' English Exchequer Reports.  
 Cr. Prac. Act .... Criminal Practice Act.  
 Cr. Proc. Act .... Criminal Procedure Act.  
 Cruise's Dig. .... Cruise's Digest of the Law of Real Property.  
 Ct. Cl. .... Court of Claims (U. S.)  
 Curt. .... Curtis (U. S.)  
 Cushing ..... Cushing (Mass.)  
 Cushman ..... Cushman (Miss.)  
 Cyclop. Dict. .... Shumaker & Longsdorf's Cyclopedic Dictionary.

**D**

Dak. .... Dakota.  
 Dall. (Pa.) .... Dallas (Pa.)  
 Dall. (U. S.) .... Dallas (U. S.)  
 Dall. Dig. .... Dallam's Digest and Opinions (Tex.)  
 Daly ..... Daly (N. Y.)  
 Dana ..... Dana (Ky.)  
 Daniell, Ch. Pl. & Prac. .... Daniell's Chancery Pleading and Practice.  
 Daniel, Neg. Inst. .... Daniel's Negotiable Instruments.  
 Day ..... Day (Conn.)  
 D. C. .... District of Columbia.  
 D. Chip. .... D. Chipman (Vt.)  
 Deady ..... Deady (U. S.)  
 De Gex, F. & J. .... De Gex, Fisher & Jones' English Chancery Reports.  
 Del. .... Delaware.

Del. Ch. .... Delaware Chancery.  
 Del. Co. R. .... Delaware County Reports (Pa.)  
 Dem. Sur. .... Demarest's Surrogate (N. Y.)  
 Denio ..... Denio (N. Y.)  
 Desaus. .... Desaussure's Equity (S. C.)  
 Desty, Tax'n. .... Desty on Taxation.  
 Dev. .... Devereux (N. C.)  
 Dev. Ct. Cl. .... Devereux's Court of Claims (U. S.)  
 Dev. Eq. .... Devereux's Equity (N. C.)  
 Devl. Deeds. .... Devlin on Deeds.  
 Dev. & B. .... Devereux & Battle (N. C.)  
 Dev. & B. Eq. .... Devereux & Battle's Equity (N. C.)  
 Dick. .... Dickinson (N. J.)  
 Dickens ..... Dickens' English Chancery Reports.  
 Dict. .... Dictionary.  
 Dig. .... Digest.  
 Dill. .... Dillon (U. S.)  
 Dillon, Mun. Corp. .... Dillon on Municipal Corporations.  
 Disn. .... Disney (Ohio)  
 Doug. .... Douglas' English King's Bench Reports.  
 Doug. .... Douglass (Mich.)  
 Dowl. & L. .... Dowling & Lowndes' English Bail Court Reports.  
 Dud. .... Dudley (Ga.)  
 Dud. Eq. .... Dudley's Equity (S. C.)  
 Dud. Law. .... Dudley's Law (S. C.)  
 Duer ..... Duer's Superior Court (N. Y.)  
 Dup. Jur. .... Duponceau on Jurisdiction of United States Courts.  
 Dutch. .... Dutcher (N. J.)  
 Duv. .... Duval (Ky.)  
 Dyer ..... Dyer's English King's Bench Reports.

**E**

East ..... East's English King's Bench Reports.  
 Eccl. R. .... English Ecclesiastical Reports.  
 E. C. L. .... English Common Law Reports (American Reprint).  
 Ed. .... Edition.  
 Edm. Sel. Cas. .... Edmonds' Select Cases (N. Y.)  
 E. D. Smith. .... E. D. Smith (N. Y.)  
 Edw. .... King Edward (as 4 Edw. I.)  
 Edw. Bailm. .... Edwards on the Law of Bailments.  
 Edw. Bills & N. .... Edwards on Bills and Notes.  
 Edw. Ch. .... Edwards' Chancery (N. Y.)  
 Elis. .... Queen Elizabeth (as 13 Elis.)  
 Elliot, Supp. .... Elliot Supplement to the Indiana Revised Statutes.  
 Elliott, R. R. .... Elliott on Railroads.  
 El. & Bl. .... Ellis and Blackburn's English Queen's Bench Reports.  
 Enc. Amer. .... Encyclopædia Americana.  
 Enc. Pl. & Prac. .... Encyclopedia of Pleading and Practice.  
 Eng. .... English (Ark.)  
 Eng. Law & Eq. .... English Law and Equity Reports (American Reprint).  
 Eq. .... Equity.  
 Ersk. Inst. .... Erskine's Institutes of the Law of Scotland.  
 Escriche, Dict. .... Escriche's Dictionary of Jurisprudence.  
 Ev. .... Evidence.  
 Exch. .... English Exchequer Reports (Welsby, Hurlstone & Gordon).

El. & B..... Ellis and Blackburn's English Queen's Bench Reports.

## F

Fairf. .... Fairfield (Me.)  
 Fearn, Rem..... Fearn on Contingent Remainders.  
 Fed. .... Federal Reporter (U. S.)  
 Fed. Cas..... Federal Cases (U. S.)  
 Fish. Pat. Cas.... Fisher's Patent Cases.  
 Fish. Pat. Rep.... Fisher's Patent Reports.  
 Fish. Prize Cas.... Fisher's Prize Cases (U. S.)  
 Fla. .... Florida.  
 Flip. .... Flippin (U. S.)  
 Fost. .... Foster (N. H.)  
 Freem. .... Freeman (Ill.)  
 Freem. Ch..... Freeman's Chancery (Miss.)  
 Freem. Judgm..... Freeman on Judgments.

## G

Ga. .... Georgia.  
 Ga. Dec..... Georgia Decisions.  
 Gall. .... Gallison (U. S.)  
 Gantt's Dig..... Gantt's (& Caldwell's) Digest of Statutes, Arkansas.  
 Gav. & H. Rev. St... Gavin and Hord's Revised Statutes, Indiana.  
 Gen. Laws..... General Laws.  
 Gen. St..... General Statutes.  
 Geo. .... King George (as 15 Geo. II).  
 George .... George (Miss.)  
 Gil. .... Gillfillan (Minn.)  
 Gilbert, Tenures... Gilbert on Tenures.  
 Gill .... Gill (Md.)  
 Gill & J..... Gill & Johnson (Md.)  
 Gilman .... Gilman (Ill.)  
 Gilmer .... Gilmer (Va.)  
 Gilp. .... Gilpin (U. S.)  
 Gould, Pl..... Gould on the Principle of Pleading in Civil Actions.  
 Gould's Dig..... Gould's Digest of Laws, Arkansas.  
 Grant, Cas. .... Grant's Cases (Pa.)  
 Grat. .... Grattan (Va.)  
 Gray .... Gray (Mass.)  
 Green, C. E..... C. E. Green (N. J.)  
 Green, Cr. Law R... Green's Criminal Law Reports (N. Y.)  
 Green, H. W..... H. W. Green (N. J.)  
 Green, J. S..... J. S. Green (N. J.)  
 Greene, G..... G. Greene (Iowa)  
 Greenl. .... Greenleaf (Me.)  
 Greenl. Cruise, Real Prop. .... Greenleaf's Edition of Cruise's Digest of Real Property.  
 Greenl. Ev. .... Greenleaf on Evidence.  
 Gross, St..... Gross' Illinois Compiled Laws (or Statutes).

## H

Hagg. .... Haggard's English Admiralty Reports.  
 Hagg. Cona..... Haggard's English Consistory Reports.  
 Hagg. Ecc..... Haggard's English Ecclesiastical Reports.  
 Hall .... Hall's Superior Court (N. Y.)  
 Halleck, Int. Law.. Halleck's International Law.  
 Hall, Mex. Law... Hall's Mexican Law.  
 Halst. .... Halsted (N. J.)  
 Halst. Ch. .... Halsted's Chancery (N. J.)  
 Ham. .... Hammond (Ohio)  
 Hand .... Hand (N. Y.)  
 Handy .... Handy (Ohio)  
 Har. (Del.)..... Harrington (Del.)

Har. (Mich.)..... Harrington (Mich.)  
 Har. (N. J.)..... Harrison (N. J.)  
 Hardin .... Hardin (Ky.)  
 Harp. .... Harper (S. C.)  
 Harp. Eq. .... Harper's Equity (S. C.)  
 Harris .... Harris (Pa.)  
 Hart. Dig. .... Hartley's Digest of Laws, Texas.  
 Har. & G. .... Harris & Gill (Md.)  
 Har. & J. .... Harris & Johnson (Md.)  
 Har. & McH. .... Harris & McHenry (Md.)  
 Hasb. .... Hasbrouck's Reports, Idaho.  
 Hask. .... Haskell (U. S.)  
 Haw. .... Hawaiian Reports.  
 Hawk. P. C. .... Hawkins' Pleas of the Crown.  
 Hawks .... Hawks (N. C.)  
 Hayes .... Hayes' Irish Exchequer Reports.  
 Hayw. (N. C.)..... Haywood (N. C.)  
 Hayw. (Tenn.)..... Haywood (Tenn.)  
 Hayw. & H..... Hayward & Hazelton (U. S.)  
 Has. Reg. .... Hazard's Register (Pa.)  
 Head .... Head (Tenn.)  
 Heisk. .... Heiskell (Tenn.)  
 Hemp. .... Hempstead (U. S.)  
 Hen. .... King Henry (as 8 Hen. VI).  
 Hen. St..... Henning's Statutes, Virginia.  
 Hen. & M..... Henning & Munford (Va.)  
 Herm. Chat. Mortg. Hermanson on Chattel Mortgages.  
 Hill .... Hill (N. Y.)  
 Hill, Eq..... Hill's Equity (S. C.)  
 Hill, Law..... Hill's Law (S. C.)  
 Hill's Ann. Laws... Hill's Annotated Laws, Oregon.  
 Hill & D. Supp.... Hill & Denio, Lator's Supplement (N. Y.)  
 Hilt. .... Hilton (N. Y.)  
 Hil. Term 4, Will. IV. .... Hilary Term 4, William IV.  
 Hil. Torts..... Hilliard on the Law of Torts.  
 H. L. Cas. .... House of Lords' Cases, English.  
 Hodge, Presb. Law.. Hodge on Presbyterian Law.  
 Hoff. Ch. .... Hoffman's Chancery (N. Y.)  
 Hoff. Land Cas.... Hoffman's Land Cases (U. S.)  
 Holmes .... Holmes (U. S.)  
 Holt, Shipp..... Holt on Shipping.  
 Hopk. Ch..... Hopkins' Chancery (N. Y.)  
 Houst. .... Houston (Del.)  
 Houst. Cr. Cas.... Houston's Criminal Cases (Del.)  
 How. (Miss.)..... Howard (Miss.)  
 How. .... Howard (U. S.)  
 How. Ann. St..... Howell's Annotated Statutes, Michigan.  
 How. Prac..... Howard's Practice (N. Y.)  
 How. Prac. (N. S.).. Howard's Practice, New Series (N. Y.)  
 How. St..... Howell's Annotated Statutes, Michigan.  
 How. & H. St..... Howard and Hutchinson's Statutes, Mississippi.  
 Howell, N. P..... Howell's Nisi Prius Reports (Mich.)  
 Howell, St. Tr..... Howell's English State Trials.  
 Hughes (Ky.)..... Hughes (Ky.)  
 Hughes .... Hughes (U. S.)  
 Humph. .... Humphrey (Tenn.)  
 Hun. .... Hun (N. Y.)  
 Hurd's Rev. St.... Hurd's Revised Statutes, Illinois.  
 Hurl. & C..... Hurlstone & Coltman's English Exchequer Reports.  
 Hutch. Carr..... Hutchinson on Carriers.

I  
 Idaho ..... Idaho.  
 Ill. .... Illinois.  
 Ill. App. .... Illinois Appellate Court Reports.  
 Imp. Dict. .... Imperial Dictionary.  
 Ind. .... Indiana.  
 Ind. App. .... Indiana Appellate Court Reports.  
 Ind. T. .... Indian Territory.  
 Ins. Law J. .... Insurance Law Journal (Pa.)  
 Inst. .... Coke's Institutes.  
 Internat. Dict. .... Webster's International Dictionary.  
 Interst. Com. R. .... Interstate Commerce Reports.  
 Iowa ..... Iowa.  
 Ired. .... Iredell's Law (N. C.)  
 Ired. Eq. .... Iredell's Equity (N. O.)

J  
 Jac. .... King James (as 21 Jac. I).  
 Jac. Law Dict. .... Jacob's Law Dictionary.  
 Jarm. Wills. .... Jarman on Wills.  
 Jeff. .... Jefferson (Va.)  
 J. J. Marsh. .... J. J. Marshall (Ky.)  
 Johns. .... Johnson (N. Y.)  
 Johns. Cas. .... Johnson's Cases (N. Y.)  
 Johns. Ch. .... Johnson's Chancery (N. Y.)  
 Johnson's Quarto Dict. .... Johnson's Quarto Dictionary.  
 Jones ..... Jones (Pa.)  
 Jones, Chat. Mortg. .... Jones on Chattel Mortgages.  
 Jones, Eq. .... Jones' Equity (N. C.)  
 Jones, Law. .... Jones' Law (N. O.)  
 Jones, Mortg. .... Jones on Mortgages.  
 Jones & S. .... Jones & Spencer (N. Y.)  
 Jour. Juris. .... Journal of Jurisprudence.  
 Jud. Repos. .... Judicial Repository (N. Y.)

## K

Kar ..... Kansas.  
 Kan. App. .... Kansas Appeals.  
 Keener, Quasi Cont. .... Keener on Quasi Contracts.  
 Kelly ..... Kelly (Ga.)  
 Kent, Comm. .... Kent's Commentaries on American Law.  
 Kern. .... Kernan (N. Y.)  
 Keyes ..... Keyes (N. Y.)  
 Kirby ..... Kirby (Conn.)  
 Kulp ..... Kulp (Pa.)  
 Ky. .... Kentucky.  
 Kyd, Corp. .... Kyd on Corporations.  
 Ky. Dec. .... Kentucky Decisions.  
 Ky. Law Rep. .... Kentucky Law Reporter.

## L

La. .... Louisiana.  
 La. Ann. .... Louisiana Annual.  
 Lack. Jur. .... Lackawanna Jurist (Pa.)  
 Lack. Leg. N. .... Lackawanna Legal News (Pa.)  
 Lalor, Supp. .... Lalor's Supplement to Hill & Denio's Reports (N. Y.)  
 Lanc. Bar. .... Lancaster Bar.  
 Lanc. Law Rev. .... Lancaster Law Review.  
 Lans. .... Lansing (N. Y.)  
 Lans. Oh. .... Lansing's Chancery (N. Y.)  
 Law J. Q. B. .... Law Journal, New Series, Queen's Bench (English).  
 Law Rep. .... Law Reporter (Mass.)  
 Lawson, Rights, Rem. & Pr. .... Lawson on Rights, Remedies and Practice.  
 Law T. (N. S.) .... Law Times, New Series.  
 Ld. Raym. .... Lord Raymond's English King's Bench Reports.

Lea ..... Lea (Tenn.)  
 Leach, Cr. Cas. .... Leach's English Crown Cases.  
 Leach's C. L. .... Leach's Club Cases, London.  
 L. Ed. .... Lawyers' Edition Supreme Court Reports.  
 Lee ..... Lee (Cal.)  
 Leg. Chron. .... Legal Chronicle.  
 Leg. Gaz. .... Legal Gazette (Pa.)  
 Leg. Gaz. R. .... Legal Gazette Reports (Pa.)  
 Leg. Int. .... Legal Intelligencer (Pa.)  
 Leg. Op. .... Legal Opinions.  
 Leg. Rec. Rep. .... Legal Record Reports.  
 Leg. Rep. .... Legal Reporter (Tenn.)  
 Leg. & Ins. Rep. .... Legal & Insurance Reporter.  
 Lehigh Val. Law Rep. .... Lehigh Valley Law Reporter.  
 Leigh ..... Leigh (Va.)  
 Leon. .... Leonard's English King's Bench Reports.  
 Lill. Ab. .... Lilly's Abridgment, or Practical Register.  
 Litt. .... Coke on Littleton.  
 Litt. .... Littell (Ky.)  
 Litt. Sel. Cas. .... Littell's Select Cases (Ky.)  
 L. J. Ch. .... Law Journal, New Series, Chancery, English.  
 Low. .... Lowell (U. S.)  
 Lower Ct. Dec. .... Lower Court Decisions (Ohio)  
 L. R. A. .... Lawyers' Reports Annotated.  
 L. R. C. P. .... English Law Reports, Common Pleas.  
 L. R. Eq. .... English Law Reports, Equity.  
 L. R. Ex. Cas. .... English Law Reports, Exchequer.  
 L. R. Exch. .... English Law Reports, Exchequer.  
 L. R. H. L. .... English Law Reports, English and Irish Appeal Cases.  
 L. R. H. L. Sc. .... English Law Reports, Scotch and Divorce Appeal Cases.  
 L. R. Prov. & Div. .... English Law Reports, Probate and Divorce.  
 Luz. Law T. .... Luzerne Law Times.  
 Luz. Leg. Obs. .... Luzerne Legal Observer (Pa.)  
 Luz. Leg. Reg. .... Luzerne Legal Register (Pa.)

## M

McAll. .... McAllister (U. S.)  
 MacArthur .... MacArthur (D. C.)  
 MacArthur, Pat. Cas. .... MacArthur's Patent Cases (U. S.)  
 MacArthur & M. .... MacArthur & Mackey (D. C.)  
 McCahon .... McCahon (Kan.)  
 McCart. .... McCarter (N. J.)  
 McCarty, Civ. Proc. .... McCarty's Civil Procedure Reports (N. Y.)  
 McCord .... McCord's Law (S. C.)  
 McCord, Eq. .... McCord's Equity (S. C.)  
 McCrary .... McCrary (U. S.)  
 McCul. Dict. .... McCulloch's Commercial Dictionary.  
 McGloin .... McGloin (La.)  
 McKelvey, Ev. .... McKelvey on Evidence.  
 Mackey .... Mackey (D. C.)  
 McLean .... McLean (U. S.)  
 McMul. .... McMullan (S. C.)  
 McMul. Eq. .... McMullan's Equity (S. C.)  
 Man. .... Manning (Mich.)  
 Mansf. Dig. .... Mansfield's Digest of Statutes, Arkansas.  
 Man. Unrep. Cas. .... Manning's Unreported Cases (La.)



Man. & G.....	Manning & Granger's English Common Pleas Reports.	N. Chip.....	N. Chipman (Vt.)
Marsh., A. K.....	A. K. Marshall (Ky.)	N. D. ....	North Dakota.
Marsh., J. J.....	J. J. Marshall (Ky.)	N. El. ....	Northeastern Reporter.
Mart. (N. C.).....	Martin (N. C.)	Neb. ....	Nebraska.
Mart. (N. S.).....	Martin's New Series (La.)	Nev. ....	Nevada.
Mart. (O. S.).....	Martin's Old Series (La.)	Newb. Adm. ....	Newberry's Admiralty (U. S.)
Mart. & Y. ....	Martin & Yerger (Tenn.)	Newell, Defam. ....	Newell on Defamation, Slander and Libel.
Marv. ....	Marvel's Reports (Del.)	N. H. ....	New Hampshire.
Mason ....	Mason (U. S.)	Nix. Dig. ....	Nixon's Digest of Laws, New Jersey.
Mass. ....	Massachusetts.	N. J. Eq. ....	New Jersey Equity.
Maule & S.....	Maule and Selwyn's English King's Bench Reports.	N. J. Law ....	New Jersey Law.
Md. ....	Maryland.	N. J. Law J. ....	New Jersey Law Journal.
Md. Ch. ....	Maryland Chancery.	N. M. ....	New Mexico.
Me. ....	Maine.	Nisi Prius & Gen. T. Rep. ....	Nisi Prius & General Term Reports (Ohio)
Mees. & W.....	Meeson and Welsby's English Exchequer Reports.	Norris ....	Norris (Pa.)
Meigs ....	Meigs (Tenn.)	Northam. Law Rep..	Northampton County Law Reporter (Pa.)
Metc. (Ky.) ....	Metcalf (Ky.)	Northumb. Co. Leg. N. ....	Northumberland County Legal News.
Metc. (Mass.) ....	Metcalf (Mass.)	Nott & McC. ....	Nott & McCord (S. C.)
Mich. ....	Michigan.	N. R. L. ....	Revised Laws (New York) 1813.
Mich. N. P.....	Michigan Nisi Prius.	N. S. ....	New Series.
Miles ....	Miles (Pa.)	N. W. ....	Northwestern Reporter.
Mill, Const. ....	Mill's Constitutional Reports (S. C.)	N. Y. ....	New York.
Miller, Const. ....	Miller on the Constitution of the United States.	N. Y. Ann. Cas. ....	New York Annotated Cases.
Mills' Ann. St.....	Mills' Annotated Statutes, Colorado.	N. Y. Cr. R.....	New York Criminal Reports.
Mill. & V. Code....	Milliken & Vertrees' Code, Tennessee.	N. Y. Law J.....	New York Law Journal.
Minn. ....	Minnesota.	N. Y. Leg. Obs. ....	New York Legal Observer.
Minor ....	Minor (Ala.)	N. Y. St. Rep. ....	New York State Reporter.
Minor, Inst. ....	Minor's Institutes of Common and Statute Law.	N. Y. Super. Ct....	New York Superior Court.
Misc. Rep. ....	Miscellaneous Reports (N. Y.)	N. Y. Supp.....	New York Supplement.
Miss. ....	Mississippi.	0	
Mo. ....	Missouri.		
Mo. App. ....	Missouri Appeals.	O. C. D. ....	Ohio Circuit Decisions.
Mo. App. Rep'r ...	Missouri Appellate Reporter.	Ohio ....	Ohio.
Mod. ....	Modern Reports, English King's Bench.	Ohio Cir. Ct. R....	Ohio Circuit Court Reports.
Monag. ....	Monaghan (Pa.)	Ohio Dec.....	Ohio Decisions.
Mon., B. ....	B. Monroe (Ky.)	Ohio Law J.....	Ohio Law Journal.
Mon., T. B.....	T. B. Monroe (Ky.)	Ohio Leg. N.....	Ohio Legal News.
Mont. ....	Montana.	O. L. D.....	Ohio Lower Court Decisions.
Mont. & B.....	Montagu & Bligh's English Bankruptcy Reports.	Ohio N. P.....	Ohio Nisi Prius.
Month. Law Bul...	Monthly Law Bulletin (N. Y.)	Ohio St. ....	Ohio State.
Montg. Co. Law Rep'r .....	Montgomery County Law Reporter (Pa.)	Ohio S. & C. P. Dec. ....	Ohio Superior and Common Pleas Decisions.
Moore ....	Moore (Ark.)	Okl. ....	Oklahoma.
Moore, Presb. Dig..	Moore's Presbyterian Digest.	Olcott ....	Olcott (U. S.)
Mor. Priv. Corp....	Morawetz on Private Corporations.	Op. Attya. Gen....	Opinions of the United States Attorneys General.
Morrell, Bankr. Cas.	Morrell's English Bankruptcy Cases.	Or. ....	Oregon.
Morris ....	Morris (Iowa)	O. S. ....	Old Series.
Morse, Banks ....	Morse on the Law of Banks and Banking.	Outerbridge ....	Outerbridge (Pa.)
Munf. ....	Munford (Va.)	Overt. ....	Overton (Tenn.)
Murfree, Off. Bonds	Murfree on Official Bonds.	P	
Murph. ....	Murphey (N. C.)		
Myl. & C.....	Myline & Craig's English Chancery Reports.	Pac. ....	Pacific Reporter.
Myr. Prob. ....	Myrick's Probate Court Reports (Cal.)	Pa. Co. Ct. R.....	Pennsylvania County Court Reports.
N		Pa. Dist. R.....	Pennsylvania District Reports.
		Pa. ....	Pennsylvania State.
Nat. Bankr. Law..	National Bankruptcy Law.	Paige ....	Paige's Chancery (N. Y.)
Nat. B. R.....	National Bankruptcy Register (U. S.)	Paine ....	Paine (U. S.)
N. B. R.....	National Bankruptcy Register (U. S.)	Pa. Law J.....	Pennsylvania Law Journal.
N. C.....	North Carolina.	Pamphl. Laws....	Pamphlet Laws.
N. C. Term R.....	North Carolina Term Reports.	Parker, Cr. R.....	Parker's Criminal Reports (N. Y.)
		Para. Bills & N....	Parsons on Bills and Notes.
		Para. Cont.....	Parsons on Contracts.

Para. Eq. Cas. .... Parsons' Select Equity Cases (Pa.)  
 Para. Mar. Law .... Parsons on Maritime Law.  
 Pasch. Dig. .... Paschal's Texas Digest of Decisions.  
 Pa. Super. Ct. .... Pennsylvania Superior Court Reports.  
 Pat. .... Paterson's Laws.  
 Pat. & H. .... Patton & Heath (Va.)  
 Pears. .... Pearson (Pa.)  
 Peck (Ill.) .... Peck (Ill.)  
 Peck (Tenn.) .... Peck (Tenn.)  
 Pen. Code. .... Penal Code.  
 Penning. .... Pennington (N. J.)  
 Penny. .... Pennypacker (Pa.)  
 Pen. & W. .... Penrose & Watts (Pa.)  
 Perry, Trusts. .... Perry on Trusts.  
 Pet. .... Peters (U. S.)  
 Pet. Adm. .... Peters' Admiralty (U. S.)  
 Pet. C. C. .... Peters' Circuit Court (U. S.)  
 Petersd. Ab. .... Petersdorff's Abridgment.  
 P. F. Smith .... P. F. Smith (Pa.)  
 Phila. .... Philadelphia (Pa.)  
 Phil. .... Phillips' Law (N. C.)  
 Phil. Eq. .... Phillips' Equity (N. C.)  
 Phil. Ev. .... Phillips on Evidence.  
 Pick. .... Pickering (Mass.)  
 Pickle .... Pickle (Tenn.)  
 Pike .... Pike (Ark.)  
 Pin. .... Pinney (Wis.)  
 Pittsb. Leg. J. .... Pittsburgh Legal Journal (Pa.)  
 Pittsb. R. .... Pittsburgh Reports (Pa.)  
 P. L. .... Public Laws.  
 Plow. .... Plowden's English King's Bench Reports.  
 Pol. Code .... Political Code.  
 Pom. Eq. Jur. .... Pomeroy's Equity Jurisprudence.  
 Pom. Rem. .... Pomeroy on Civil Remedies.  
 Pom. Rem. & Rem. Rights .... Pomeroy on Civil Remedies & Remedial Rights.  
 Pom. Spec. Perf. .... Pomeroy on Specific Performance of Contracts.  
 Port. (Ala.) .... Porter (Ala.)  
 Posey, Unrep. Cas. .... Posey's Unreported Cases (Tex.)  
 Pow. Cont. .... Powell on Contracts.  
 Prac. Act. .... Practice Act.  
 Pr. Ch. .... Precedents in Chancery, by Finch.  
 Prob. Div. .... Probate Division, English Law Reports.  
 Prob. R. .... Probate Reports (Ohio)  
 Prov. St. .... Statutes (Laws) of the Province of Massachusetts.  
 Pub. Acts .... Public Acts.  
 Pub. Gen. Laws. .... Public General Laws.  
 Pub. Laws. .... Public Laws.  
 Pub. Loc. Laws. .... Public Local Laws.  
 Pub. St. .... Public Statutes.  
 Pub. & Loc. Laws. .... Public and Local Laws.  
 Purd. Dig. .... Purdon's Digest of Laws, Pennsylvania.  
 P. Wms. .... Peere Williams' English Chancery Reports.  
 P. & L. Dig. Laws. .... Pepper & Lewis' Digest of Laws, Pennsylvania.

## Q

Q. B. .... Queen's Bench Reports, Adolphus & Ellis, N. S. (English)  
 Q. B. Div. .... Queen's Bench Division (English Law Reports)  
 Quincy .... Quincy (Mass.)

## R

Rand. .... Randolph (Va.)  
 Rand. Com. Paper. .... Randolph on Commercial Paper.

Rap. Contempt .... Rapalje on Contempt.  
 Rap. & L. Law Dict. .... Rapalje and Lawrence Law Dictionary.  
 Rawle .... Rawle (Pa.)  
 Rawle, Cov. .... Rawle on Covenants for Title.  
 Redf. Sur. .... Redfield's Surrogate (N. Y.)  
 Redf. Wills. .... Redfield on the Law of Wills.  
 Rep. .... Coke's English King's Bench Reports.  
 Rev. Civ. Code. .... Revised Civil Code.  
 Rev. Code. .... Revised Code.  
 Rev. Laws. .... Revised Laws.  
 Rev. St. .... Revised Statutes.  
 R. I. .... Rhode Island.  
 Rice .... Rice's Law (S. C.)  
 Rice, Eq. .... Rice's Equity (S. C.)  
 Rich. Eq. .... Richardson's Equity (S. C.)  
 Rich. Eq. Cas. .... Richardson's Equity Cases (S. C.)  
 Rich. Law. .... Richardson's Law (S. C.)  
 Rich. (S. C.) .... Richardson (S. C.)  
 Riley .... Riley's Law (S. C.)  
 Riley, Eq. .... Riley's Equity (S. C.)  
 R. M. Charit. .... R. M. Charlton (Ga.)  
 Rob. (N. Y.) .... Robertson (N. Y.)  
 Rob. (La.) .... Robinson (La.)  
 Rob. (Va.) .... Robinson (Va.)  
 Robb, Pat. Cas. .... Robb's Patent Cases (U. S.)  
 Rob. Pat. .... Robinson on Patents.  
 Rolle .... Rolle's English King's Bench Reports.  
 Root .... Root (Conn.)  
 Rorer, Jud. Sales. .... Rorer on Void Judicial Sales.  
 Russ. .... Russell's English Chancery Reports.  
 Russ. & R. .... Russell and Ryan's English Crown Cases Reserved.

## S

Salk .... Salkeld's English King's Bench Reports.  
 Sanb. & B. Ann. St. .... Sanborn and Berryman's Annotated Statutes, Wisconsin.  
 Sandf. .... Sandford (N. Y.)  
 Sandf. Ch. .... Sandford's Chancery (N. Y.)  
 Sand. & H. Dig. .... Sandels and Hill's Digest of Statutes, Arkansas.  
 Saund. Pl. & Ev. .... Saunders' Pleading and Evidence.  
 Sawy. .... Sawyer (U. S.)  
 Saxt. Ch. .... Saxton's Chancery (N. J.)  
 Sayles' Ann. Civ. St. .... Sayles' Annotated Civil Statutes, Texas.  
 Sayles' Civ. St. .... Sayles' Revised Civil Statutes, Texas.  
 Sayles' St. .... Sayles' Revised Civil Statutes, Texas.  
 Sayles' Supp. .... Supplement to Sayles' Annotated Civil Statutes, Texas.  
 S. C. .... South Carolina.  
 Scam. .... Scammon (Ill.)  
 Schouler, Pers. Prop. .... Schouler on the Law of Personal Property.  
 S. D. .... South Dakota.  
 S. E. .... Southeastern Reporter.  
 Seld. .... Selden (N. Y.)  
 Seld. Notes. .... Selden's Notes (N. Y.)  
 Serg. & R. .... Sergeant & Rawle (Pa.)  
 Sess. Laws. .... Session Laws.  
 Sheld. .... Sheldon (N. Y.)  
 Shep. .... Shepley (Me.)  
 Shep. Touch. .... Sheppard's Touchstone of Common Assurances.  
 Silvernail .... Silvernail (N. Y.)  
 Sim. .... Simons' English Vice Chancery Reports.

Sim. & S.....Simons & Stuart's Eng-  
lish Vice Chancery Re-  
ports.  
Smedes & M.....Smedes & Marshall (Miss.)  
Smedes & M. Ch...Smedes & Marshall's  
Chancery (Miss.)  
Smith, E. D.....E. D. Smith (N. Y.)  
Smith (Ind.).....Smith (Ind.)  
Smith (N. H.).....Smith (N. H.)  
Smith (N. Y.).....Smith (N. Y.)  
Smith, P. F.....P. F. Smith (Pa.)  
Smith, Cont.....Smith on Contracts.  
Smith's Lead. Cas..Smith's Leading Cases.  
Sneed .....Sneed (Tenn.)  
South.....Southern Reporter.  
Southard .....Southard (N. J.)  
Speers .....Speers' Law (S. C.)  
Speers, Eq. ....Speers' Equity (S. C.)  
Spencer .....Spencer (N. J.)  
Sp. Laws.....Special Laws.  
Spr. ....Sprague (U. S.)  
Sp. Sess. ....Special Session.  
St. ....State, Statutes, Statutes  
at Large.  
Stand. Dict. ....Standard Dictionary.  
Starkie, Ev. ....Starkie on Evidence.  
Starr & C. Ann. St..Starr and Curtis' Annotat-  
ed Statutes, Illinois.  
Stat. ....Statutes at Large.  
Steph. Comm. ....Stephen's Commentaries on  
the Laws of England.  
Steph. Pl. ....Stephen on Pleading.  
Stew. (Ala.).....Stewart (Ala.)  
Stew. (N. J.).....Stewart (N. J.)  
Stew. & P.....Stewart & Porter (Ala.)  
Stiles .....Stiles (Iowa)  
Stockt. ....Stockton's Equity (N. J.)  
Story .....Story (U. S.)  
Story, Ballim. ....Story on Bailment.  
Story, Bills .....Story on Bills.  
Story, Comm. ....Story's Commentaries.  
Story, Const. ....Story on the United States  
Constitution.  
Story, Cont. ....Story on Contracts.  
Story, Eq. Jur. ....Story on Equity Jurispru-  
dence.  
Story, Eq. Pl.....Story on Equity Pleadings.  
Story, Prom. Notes.Story on Promissory Notes.  
Strange .....Strange's English King's  
Bench Reports.  
Strob. ....Strobhart's Law (S. C.)  
Strob. Eq. ....Strobhart's Equity (S. C.)  
Sumn. ....Sumner (U. S.)  
Sup. Ct. ....Supreme Court Reporter.  
Super. Ct. Rep....Superior Court Reports  
(Pa.)  
Supp. Rev. St.....Supplement to the Revised  
Statutes.  
Sus. Leg. Chron....Susquehanna Legal Chron-  
icle (Pa.)  
S. W.....Southwestern Reporter.  
Swab. ....Swabey's English Admiral-  
ty Reports.  
Swan .....Swan (Tenn.)  
Swan & C. St.....Swan and Critchfield's Re-  
vised Statutes, Ohio.  
Swan & S. St.....Swan and Sayler's Stat-  
utes, Ohio.  
Sweeny .....Sweeny (N. Y.)  
S. & R. on Neg....Shearman and Redfield on  
Negligence.

## T

Taney .....Taney (U. S.)  
Tapp. ....Tappan (Ohio)  
Taunt. ....Taunton's English Com-  
mon Pleas Reports.  
Tayl. ....Taylor (N. C.)  
Tayl. Corp.....Taylor on Private Corpo-  
rations.  
Tayl. Ev. ....Taylor on the Law of Evi-  
dence.  
Tayl. Landl. & T...Taylor's Landlord and  
Tenant.  
Tayl. Med. Jur....Taylor's Manual of Med-  
ical Jurisprudence.

Tayl. Priv. Corp....Taylor on Private Corpo-  
rations.  
Tayl. St.....Taylor's Statutes, Wiscon-  
sin.  
T. B. Mon.....T. B. Monroe (Ky.)  
Tenn. ....Tennessee.  
Tenn. Cas. ....Shannon's Tennessee Cas-  
es.  
Tenn. Ch.....Tennessee Chancery.  
Term R. ....Term Reports, English  
King's Bench (Durnford  
and East's Reports).  
Tex. ....Texas.  
Tex. App. ....Texas Appeals.  
Tex. Civ. App....Texas Civil Appeals.  
Tex. Cr. R.....Texas Criminal Reports.  
Tex. Supp.....Texas Supplement.  
Thacher, Cr. Cas...Thacher's Criminal Cases  
(Mass.)  
Thomp. Tenn. Cas..Thompson's Unreported  
Tennessee Cases.  
Thomp. & C.....Thompson & Cook (N. Y.)  
Tidd, Prac.....Tidd's Practice.  
Tiedman, Real Prop.Tiedman on Real Proper-  
ty.  
Tiffany .....Tiffany (N. Y.)  
Times L. Rep.....Times Law Reports.  
Toller .....Toller on Executors.  
Tom. Dict.....Tomlin's Law Dictionary.  
Tread. Const.....Treadway's Constitutional  
Reports (S. O.)  
Troub. & H. Prac..Troubat & Hal's Practice  
(Pa.)  
Tuck. ....Tucker's Surrogate (N. Y.)  
T. U. P. Charit....T. U. P. Charlton (Ga.)  
Turn. ....Turner (Ark.)  
Turn. & R.....Turner and Russell's Eng-  
lish Chancery Reports.  
Tyler .....Tyler (Vt.)

## U

U. S.....United States.  
U. S. App. ....United States Appeals.  
U. S. Comp. St....United States Compiled  
Statutes.  
U. S. Law Mag....United States Law Maga-  
zine, New York.  
U. S. Month. Law  
Mag. ....United States Monthly  
Law Magazine.  
Utah .....Utah.

## V

Va. ....Virginia.  
Va. Cas.....Virginia Cases.  
Va. Law J.....Virginia Law Journal,  
Richmond.  
Van Fleet, Coll. At-  
tack .....Van Fleet on Collateral  
Attack.  
Van Ness, Prize Cas.Van Ness' Prize Cases (U.  
S.)  
Ves. ....Vesey, Junior's English  
Chancery Reports.  
Ves. Jr.....Vesey, Junior's English  
Chancery Reports.  
Ves. Sr.....Vesey, Senior's English  
Chancery Reports.  
Vict. ....Queen Victoria (as 5 & 6  
Vict.)  
Vin. Abr.....Viner's Abridgment.  
Vroom .....Vroom (N. J.)  
V. S.....Vermont Statutes.  
Vt. ....Vermont.

## W

Wag. St. ....Wagner's Statutes (Mo.)  
Wait, Act. & Def..Wait's Actions and De-  
fenses.  
Walk. ....Walker (Miss.)  
Walk. (Pa.) .....Walker (Pa.)  
Walk. Ch.....Walker's Chancery (Mich.)  
Walk. Pat.....Walker on Patents.

Wall. ....	Wallace (U. S.)	Wilcox .....	Wilcox (Pa.)
Wall. Jr. ....	Wallace, Junior (U. S.)	Willes .....	Willes' English Common Pleas Reports.
Wall. Sr. ....	Wallace, Senior (U. S.)	Williams (Vt.) .....	Williams (Vt.)
Ware .....	Ware (U. S.)	Williams, Ex'rs .....	Williams on Executors.
Wash. ....	Washington.	Willson, Civ. Cas. ....	Willson's Civil Cases Court of Appeals (Tex.)
Washb. Real Prop. ....	Washburn on Real Property.	Wils. ....	Wilson (Ind.)
Wash. C. C. ....	Washington Circuit Court (U. S.)	Wils. ....	Wilson's English Common Pleas Reports.
Wash. Law Rep. ....	Washington Law Reporter (D. C.)	Winch .....	Winch's English Common Pleas Reports.
Wash. T. ....	Washington Territory.	Winch .....	Winch's Entries.
Watts .....	Watts (Pa.)	Winst. ....	Winston (N. C.)
Watts & S. ....	Watts & Sergeant (Pa.)	Winst. Eq. ....	Winston's Equity (N. C.)
W. Bl. ....	Sir William Blackstone's English King's Bench Reports.	Wis. ....	Wisconsin.
Webst. Dict. ....	Webster's Dictionary.	Wkly. Dig. ....	Weekly Digest (N. Y.)
Webster in Sen. Doc. ....	Webster in Senate Documents.	Wkly. Law Bul. ....	Weekly Law Bulletin (Ohio)
Webst. Int. Dict. ....	Webster's International Dictionary.	Wkly. Law Gaz. ....	Weekly Law Gazette (Ohio)
Wend. ....	Wendell (N. Y.)	Wkly. Notes Cas. ....	Weekly Notes Cases (Pa.)
West. Law J. ....	Western Law Journal, Cincinnati, Ohio.	Wkly. Rep. ....	Weekly Reporter, London (English).
West. Law Month. ....	Western Law Monthly (Ohio)	Wm. ....	William (as 9 Wm. III).
Whart. ....	Wharton (Pa.)	Wm. Rob. ....	William Robinson's English Admiralty Reports.
Whart. Ag. ....	Wharton on Agency.	Wms. Ex'rs .....	Williams on Executors.
Whart. Cr. Ev. ....	Wharton on Criminal Evidence.	Woodb. & M. ....	Woodbury & Minot (U. S.)
Whart. Cr. Law. ....	Wharton's American Criminal Law.	Wood, Inst. ....	Wood's Institutes of English Law.
Whart. Cr. Pl. & Prac. ....	Wharton's Criminal Pleading & Practice.	Wood, Landl. & Ten. ....	Wood on Landlord and Tenant.
Whart. Law Dict. ....	Wharton's Law Dictionary (or Law Lexicon).	Woods .....	Woods (U. S.)
Whart. Law Lexicon .....	Wharton's Law Dictionary (or Law Lexicon).	Woodw. Dec. ....	Woodward's Decisions (Pa.)
Whart. Neg. ....	Wharton on Negligence.	Woolw. ....	Woolworth (U. S.)
Whart. St. Tr. ....	Wharton's State Trials (U. S.)	Worcest. Dict. ....	Worcester Dictionary.
Wheat. ....	Wheaton (U. S.)	Wor. Dict. ....	Worcester Dictionary.
Wheat. Int. Law. ....	Wheaton's International Law.	Works, Courts .....	Works on Courts and Their Jurisdiction.
Wheeler, Cr. Cas. ....	Wheeler's Criminal Cases (N. Y.)	Wright .....	Wright (Ohio)
White .....	White's Recopilacion (Laud Laws of Spain and Mexico).	Wright (Pa.) .....	Wright (Pa.)
White & T. Lead. Cas. Eq. ....	White and Tudor's Leading Cases in Equity.	W. S. ....	Wagner's Statutes, Missouri.
White & W. Civ. Cas. Ct. App. ....	White & Willson's Civil Cases Court of Appeals (Tex.)	W. Va. ....	West Virginia.
		Wyo. ....	Wyoming.
		Wythe .....	Wythe's Chancery (Va.)

## Y

Yeates .....	Yeates (Pa.)
Yerg. ....	Yerger (Tenn.)
York. Leg. Rec. ....	York Legal Record.
Younge & C. Ch. ....	Younge & Collyer's English Chancery Reports.

## Z

Zab. ....	Zabriskie (N. J.)
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W

# JUDICIAL AND STATUTORY DEFINITIONS

## OF

# WORDS AND PHRASES.

### VOLUME 2.

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#### CASUAL

"Casual" means that which happens by accident, or is brought about by an unknown cause. *Lewis v. Lofley*, 19 S. E. 57, 59, 92 Ga. 804.

#### CASUAL CONDITION.

A casual condition is that which depends on chance, and is in no way in the power either of the creditor or of the debtor. Civ. Code La. 1900, art. 2023.

#### CASUAL DEFICIENCY.

"Casual" means that which happens by accident, or is brought about by an unknown cause, and, as used in the Constitution, forbidding any county to incur a debt without first submitting the matter to a popular vote, "except for a temporary loan or loans to supply casual deficiencies of revenue," means some unforeseen and unexpected deficiency, and does not include a debt incurred for the building of a courthouse. *Lewis v. Lofley*, 19 S. E. 57, 59, 92 Ga. 804.

A casual deficiency of a state's revenue is one that happens by chance or accident, and without any design or intention to evade the constitutional inhibition of such state against increasing the authorized expenditures of such state above a certain amount. In re Appropriations by General Assembly, 22 Pac. 464, 467, 13 Colo. 816.

#### CASUAL EJECTOR.

The term "casual ejector" was used in the common-law action of ejectment to designate the person against whom the action was usually brought, who had no interest in the suit, but whose duty it was to give notice to the actual possessor, who on application to the court would be substituted as defendant on confessing the lease, entry, and ouster alleged by plaintiff, thus leaving the

only fact to be proved by plaintiff the title of his lessor. *French v. Robb*, 51 Atl. 509, 510, 67 N. J. Law, 260, 57 L. R. A. 958, 91 Am. St. Rep. 433.

#### CASUAL POOR.

Casual poor "are such poor persons as are suddenly taken sick or meet with some accident when from home, and are thus providentially thrown upon the charities of those among whom they may happen to be. When in such cases parish officers or others afford relief, they have no remedy over for the money expended, not even against the parish where the person relieved was regularly chargeable." *Force v. Haines*, 17 N. J. Law (2 Har.) 335, 405.

#### CASUALTY.

See "Inevitable Casualty"; "Unavoidable Casualty."

Other casualty, see "Other."

"Casualty," like its synonyms "accident" and "misfortune," may proceed or result from negligence or other cause known or unknown. *McCarty v. New York & E. R. Co.*, 30 Pa. (6 Casey) 247, 251.

An "accident" or "casualty," according to the common understanding, proceeds from an unknown cause, or is the unusual effect of a known cause. Either may be said to occur by chance or unexpectedly. *Chicago, St. L. & N. O. R. Co. v. Pullman Southern Car Co.*, 11 Sup. Ct. 490, 493, 139 U. S. 79, 35 L. Ed. 97.

"Casualty," as used in Code, § 3154, authorizing the granting of a new trial for unavoidable casualty or misfortune, preventing the party from prosecuting or defending, is an inevitable accident—an event not to be foreseen or guarded against. *Ennis v. Fourth St. Bldg. Ass'n of Clinton*, 71 N. W. 428, 102 Iowa, 520.

"Casualty" means accident; that which comes by chance, or without design, or without being a foreseen contingency; and where the client was prevented by the dishonesty of his attorney from hearing and defending an action, so that judgment was rendered against him by default, it was such a casualty as entitled him to have the judgment set aside. *Anthony v. Karbach*, 90 N. W. 243, 244, 64 Neb. 509.

The word "casualty" as used in a statute providing that whenever a debtor shall cease to reside on his homestead it shall be liable for his debts, unless his removal be temporary by reason of some "casualty," refers to accident, as fire, flood, or social or family disaster or misfortune causing temporary absence. *Thompson v. Tillotson*, 56 Miss. 36, 38.

Deterioration in the value of land caused by the usual overflow of the Mississippi river is not a deterioration by any "casualty," within Ann. Code Miss. 1892, § 3799, authorizing a reduction of an assessment for taxation for such cause. *Forsdick v. Quitman County Sup'rs*, 25 South. 294.

Act Cong. May 28, 1880, c. 108, § 17, provides for an allowance for the loss of distilled spirits deposited in a bonded warehouse, not to exceed a fixed amount for given periods. Section 4, Act May 28, 1880, c. 108 [U. S. Comp. St. 1901, p. 2133], provides that when it shall appear that there has been a loss of such spirits, other than that provided for by Rev. St. U. S. § 3221, as amended [U. S. Comp. St. 1901, p. 2087], which in the opinion of the commissioner of internal revenue is excessive, he may require the collector to instruct the withdrawal of such spirits, and to collect the tax accrued on the quantity originally deposited in the warehouse, though the time specified in the bond given for the withdrawal of the spirits has not expired. Rev. St. § 3221, provides for the abatement of the tax accruing on distilled spirits actually destroyed "by accidental fire or other casualty" while the same were in a bonded warehouse. Held, that the term "casualty," as used in this section, does not include the warping of barrels from unusual and excessive summer heat, abnormal evaporation caused by such heat, or the existence of undiscovered wormholes in the barrels; and, where a loss has occurred from these causes which the commissioner regards as excessive, he may order the withdrawal of the balance and payment of the tax on the whole, as provided by the act of May 28, 1880. *Crystal Springs Distillery Co. v. Cox* (U. S.) 47 Fed. 693, 695.

#### Injury.

As used in a policy of insurance providing that a company should not be liable for any loss occurring by the bursting of a boiler or by explosion from any cause, and

if the premises be damaged or destroyed by the bursting of a boiler, or by explosion from any cause, the policy should be void the instant the casualty by explosion occurred, the word "casualty" did not mean fire, but referred to the damage or destruction of the insured premises, and not to a fire caused thereby. *Waldeck v. Springfield Fire & Marine Ins. Co.*, 14 N. W. 1, 2, 56 Wis. 96.

#### Result of lawful act.

"Casualty," as used in a lease providing that rent shall cease if the premises become untenable by fire or through casualty, means some fortuitous interruption of the use, and does not include an interruption of possession which takes place in pursuance of established law, as where a portion of the premises are torn down for the purpose of widening a street. *Mills v. Baehr's Ex'rs* (N. Y.) 24 Wend. 254, 255.

The necessity for additional light, caused by the subsequent construction of elevated railroads, and the additional expense of gas and electric lights, caused by a combination of the gas and electric light companies, do not constitute accidents or casualties, so as to authorize a further appropriation under Rev. St. c. 24, § 90, providing that the expenditures of a city cannot lawfully exceed the amount provided for in the annual appropriation bill, unless an improvement is necessitated by an accident or casualty happening after such annual appropriation is made. *City of Chicago v. Nichols*, 52 N. E. 359, 360, 177 Ill. 97.

#### CASUALTY INSURANCE.

"The distinguishing feature of what is known in our legislation as 'accident insurance' is that it indemnifies against the effects of accidents resulting in bodily injury or death. Its field is not to insure against loss or damage to property generally, although occasioned by accidents. So far as that class of insurance has been developed, it has been with reference to boilers, plate glass, and perhaps domestic animals, and injuries to property by street cars, and is known as 'casualty insurance.'" *Employers' Liability Assur. Corp. v. Merrill*, 29 N. E. 529, 530, 155 Mass. 404.

"Casualty insurance" has a well-defined meaning as insurance against loss through accidents or casualties resulting in bodily injury or death. As applied to injuries resulting in death, casualty insurance is really but a contract of life insurance limited to specified risks. *State v. Federal Investment Co.*, 48 Minn. 110, 111, 50 N. W. 1028.

#### CASUS FORTUITUS.

The term "casus fortuitus" means a loss happening in spite of all human effort and

sagacity. *The Majestic*, 17 Sup. Ct. 597, 602, 166 U. S. 375, 41 L. Ed. 1039.

## CAT.

A cat which is kept as a household pet may properly be considered a thing of value. It ministers to the pleasure of its owner, and serves ob vitæ solatium. *Ford v. Glennon*, 49 Atl. 189, 74 Conn. 6.

## CAT-HOLE.

A "cat-hole" is a wet, low place in a farm, covered with grass, weeds, and underbrush, known as "waste land." *Bolton v. Calkins*, 60 N. W. 297, 102 Mich. 69.

## CATALOGUE.

An expired lease according to the covenants of which, by an agreement of demise, the land was to be farmed, was not a "catalogue" containing conditions for the management of a farm, within a statute requiring such an instrument to be stamped. *Strut v. Robinson*, 3 Barn. & Adol. 395.

## CATCH.

The word "catch" "is not aptly employed to express the idea of obtaining possession of inanimate or motionless things, but of taking captive live and moving ones." As used in Pub. Laws, c. 292, providing that it is unlawful to catch or possess for any purpose any lobster less than 10½ inches in length, "catch" is equivalent to the expression "catch and have possession," since catching necessarily involves at least a momentary possession, and so an indictment charging defendant with catching and having in possession certain short lobsters is not bad for duplicity as alleging distinct transactions. *State v. Dunning*, 22 Atl. 109, 83 Me. 178.

## CATCHING BARGAIN.

"Catching bargains" are dealings with an expectant heir for the purchase of his expectancy. *Whelen v. Phillips*, 25 Atl. 44, 46, 151 Pa. 312.

## CATCHINGS.

"Catchings," as used in a policy of insurance on a whaler, stipulating that the "catchings" shipped from a certain point should be at the risk of the insured, was employed in the ordinary sense, meaning the "things caught," and when the blubber or pieces of whale flesh are cut from the whale and are on the deck, or at least, when they are stowed under deck, they are, in the sense of the trade, "catchings." *Rogers v. Mechanics' Ins. Co.* (U. S.) 20 Fed. Cas. 1118, 1119.

## CATHOLIC.

The term "Catholic" is a designation which, if not common to every branch of the Christian church, is certainly not exclusively applicable to a Roman Catholic church in a city. *Dolan v. Mayor, etc., of Baltimore* (Md.) 4 Gill, 394, 405.

"Catholic chapel," as used in a will bequeathing certain property to be used for the erection of a Catholic chapel, does not necessarily mean a place devoted to worship according to the terms of the Roman Catholic Church. The term "Catholic chapel" has no necessary, precise, and definite signification. The courtesy of private society, and all political and religious controversies, require us to concede to persons of any communion or party such appellations, by way of distinction, as they choose to assume for themselves. Large bodies of Christians not in communion with the Church of Rome assert in their creeds and daily worship a right to the name of "Catholic," and reject as heretical and schismatical any assumption that the terms "Catholic" and "Roman Catholic" are equivalent, or even allied in signification. Such term, when occurring in a will, therefore, must be explained by extrinsic evidence. *O'Hear v. De Goesbriand*, 33 Vt. 593, 608, 80 Am. Dec. 653.

## CATTLE.

See "Beef Cattle"; "Neat Cattle"; "Stock Cattle"; "Working Cattle." As merchandise, see "Merchandise." Ordinary cattle, see "Ordinary Stock."

"Cattle" means live stock; domestic quadrupeds which serve for tillage or other labor, or as food for man. *Mathews v. State*, 39 Tex. Cr. R. 553, 554, 47 S. W. 647.

In the construction of statutes, "cattle" includes horse, mule, ass, sheep, hog, or goat, of any age or sex, bull, cow, calf, and ox. *Ky. St.* 1903, § 456.

The word "cattle" may be either singular or plural in number, so that the use of the term "cattle" may mean one cattle. In its sense of "live stock," domestic quadrupeds which serve for tillage or other labor, or as food for man, it includes a number of different kinds of live stock. An indictment charging defendant with the theft of cattle is supported by proof of the theft of one animal. *Mathews v. State*, 47 S. W. 647, 648, 49 S. W. 189, 190, 39 Tex. Cr. R. 553.

"Cattle," as used in a will by which testator gave to legatees all of his cattle except oxen, cannot be construed to include fattening cattle bought to be fattened for the market by testator, subsequent to the making of his will, in order to convert and utilize the corn raised, but means the stock



of cattle proper belonging to the testator, though the term "cattle," as it is ordinarily understood, embraces all classes of animals of the cattle kind. *Hawes v. Foote*, 64 Tex. 22, 28.

Code, § 2901, making it grand larceny to steal any "cattle, swine, sheep or goats," means live animals, such as enumerated, and does not apply to a theft of the dead body of such animal. *Golden v. State*, 63 Miss. 466, 468.

"Cattle," in law, includes all of the domestic animals, so that an information charging the theft of "cattle" is too indefinite to support a charge for theft of steers. *State v. Brookhouse*, 38 Pac. 862, 10 Wash. 87.

#### As bovine species only.

The word "cattle," as used in the chapter relating to diseased cattle, means bovine cattle only, and does not relate to or include any other kind of domestic animals. *Comp. Laws N. M. 1897*, § 181.

"Cattle," as used in Code, § 1068, making it criminal to pursue, kill, or wound any horse, mule, jenny, cattle, hog, sheep, or goat of the property of another, is not used in its broad sense as embracing all such animals, but in the narrower and restricted but well-understood sense to "designate only that class of animals belonging to the bovine species as the bull, ox, cow, or heifer." *State v. Credle*, 91 N. C. 640, 645.

In common parlance "cattle" means bulls, cows, steers, yearlings, and calves of the bovine genus, which from time out of mind has been domesticated, and, while it may be true that an animal of the cattle species may be such as does not come within the meaning of domesticated animals of the bovine genus, still an allegation that the animal stolen was one of the cattle species sufficiently charges the theft of cattle. *McIntosh v. State*, 18 Tex. App. 284, 285.

The word "cattle" is defined by Webster to be a collected name for domestic quadrupeds, including the bovine tribe, also horses, mules, sheep, cattle, and goats, but is especially applicable to oxen, cows, and their young. The use of the word in an indictment charging the theft of "two cattle" does not render the indictment bad as being too indefinite, although it does not specify the kind of cattle. *People v. Barnes*, 2 Pac. 493, 494, 65 Cal. 16.

#### Buffalo.

"Cattle," as used in Rev. Code 1845, p. 364, § 2, making it criminal to willfully and maliciously kill, maim, or wound any cattle of another, is used in a general sense, and includes horses, but does not include a domesticated buffalo. *State v. Crenshaw*, 22 Mo. 457, 458.

#### Bulls and oxen.

"Cattle" is defined by Webster as meaning quadrupeds of the bovine tribe, and, used as a generic term, as including all domestic quadrupeds, as sheep, goats, horses, mules, asses, and swine, and, within a statute providing for damages for killing cattle, oxen are included. *Randall v. Richmond & R. R. Co.*, 107 N. C. 748, 749, 12 S. E. 605, 11 L. R. A. 460; *Id.*, 104 N. C. 410, 10 S. E. 691.

"Cattle," as used in St. 3 Geo. IV, c. 71, for preventing cruelty to cattle, does not include bulls, and bull-baiting is not punishable thereunder. *Ex parte Hill*, 3 Car. & P. 225.

"Cattle," as used in Pen. Code, art. 155, providing that any citizen taking up any estray cattle other than work oxen shall proceed in a certain manner, should be construed to include oxen which are not work oxen. *State v. Moreland*, 27 Tex. 728, 727.

#### Goats.

In Code, § 1003, making it a misdemeanor to willfully and unlawfully kill or abuse any horse, mule, hog, sheep, or other cattle, "cattle" is employed in its general sense, and embraces all domestic quadrupeds, including goats. *State v. Groves*, 25 S. E. 819, 820, 119 N. C. 822.

#### Hogs.

"Cattle," as used in a letter of credit, guarantying the drafts of a person against his shipments of cattle to a certain extent, included "hogs." Though the word "cattle" is often confined to cattle of the bovine genus, it is, according to Worcester, "also a collective name for domestic quadrupeds generally, including not only the bovine tribe, but horses, asses, mules, sheep, goats, and swine." In its limited sense it is used to designate the different varieties of horned animals, but it is also frequently used with a broader significance, as embracing animals in general which serve as food for man. In England, even in a criminal case (*Rex v. Chapple, Russ. & R. 77*), where there is a greater strictness of construction than in a civil controversy, pigs were held to be included within the words "any cattle." And in other cases in that country involving life and liberty, the word has been construed to embrace animals not used for food. *First Nat. Bank of Decatur v. Home Sav. Bank of St. Louis*, 88 U. S. (21 Wall.) 294, 299, 22 L. Ed. 560.

"Cattle" is a collective name for domestic quadrupeds generally, including not only the bovine tribe, but horses, mules, sheep, goats, and swine. As used in Rev. St. § 4848, which requires that a lawful partition fence should be such as could inclose and restrain sheep, unless the parties agreed to build a fence to restrain or inclose only horses, mules, or cattle, it is used, as it is commonly used in the United States, to signify only beasts of the bovine genus; that is, oxen,

bulls, cows, and their young, and it does not, as there used, include hogs. *Enders v. McDonald*, 81 N. E. 1056, 1057, 5 Ind. App. 297.

The word "cattle," as used in Rev. St. 1889, § 3621, making it a misdemeanor for any one to maim, wound, beat, or torture any horse, ox, or other cattle, designates all domestic quadrupeds, including horses, sheep, and hogs, and hence pigs are within the statute. *State v. Lawn*, 80 Mo. 241; *State v. Pruett*, 61 Mo. App. 156, 157.

The term "cattle," in a statute in relation to cruelty to animals, includes hogs; hence pigs are within the statute. *State v. Lawn*, 80 Mo. 241; *State v. Pruett*, 61 Mo. App. 156, 157.

Hogs may be included under the term "cattle," which is a collective name for domestic quadrupeds generally, as used in a letter accrediting a certain person whose drafts on shipments of cattle were guaranteed by the writer. *First Nat. Bank of Decatur v. Home Sav. Bank of St. Louis*, 88 U. S. (21 Wall.) 294, 299, 22 L. Ed. 560.

Under Rev. St. § 4848, requiring that a lawful fence should be such as would restrain sheep, unless the parties agreed to build a fence to restrain and inclose only horses, mules, or cattle, hogs are not included under the term "cattle." *Enders v. McDonald*, 81 N. E. 1056, 1057, 5 Ind. App. 297.

#### Horses.

Horses are included in the term "cattle" in the primary sense of the latter term, but in popular use in the United States the word is not so understood. *United States v. Mattock* (U. S.) 26 Fed. Cas. 1208, 1209.

In the Revised Statutes of Missouri, making it a crime to willfully and maliciously kill cattle of another, "cattle" includes most domestic animals, and, for the purpose of the statute, horses are regarded as cattle. *State v. Hambleton*, 22 Mo. 452, 454; *State v. Clifton*, 24 Mo. 376.

In a statute requiring a railroad company to erect and maintain fences sufficient to prevent cattle, horses, sheep, and hogs from getting on such railroad, "cattle" includes horses and asses, as well as domesticated horned animals. *Ohio & M. R. Co. v. Brubaker*, 47 Ill. 462, 463.

The word "cattle" is a collective name for domestic quadrupeds, including the bovine tribe, and also horses, asses, mules, sheep, goats, and swine, but especially bulls, oxen, cows, and their young, and in a statute rendering a railroad company liable for killing stock it includes horses and sheep. *Henderson v. Wabash, St. L. & P. Ry. Co.*, 81 Mo. 605, 606; *Louisville & F. R. Co. v. Ballard*, 59 Ky. (2 Metc.) 177, 183.

"Cattle" is defined as including all domestic quadrupeds, such as horses, mules,

etc., as well as oxen, cows, etc. It has been held to bear a legal significance which includes horses. Where the Legislature expressly gives power in respect to infectious diseases among animals, there is no reason to limit the intention within narrower bounds than will be set by the acceptance of the words giving power in their natural meaning. *Newark & S. O. H. C. Ry. Co. v. Hunt*, 12 Atl. 697, 699, 50 N. J. Law (21 Vroom) 308.

Lexicographers give the word "cattle" two meanings—one restricted to domestic, bovine animals, the other covering any stock kept for use or profit. The first is ordinarily given as its common meaning, the second as a special signification, less frequent now than formerly, and, when used in an insurance policy where the occupation was stated to be "cattle shipper," the term did not include horses in shipment. *Brock v. Brotherhood Acc. Co.*, 54 Atl. 176, 75 Vt. 249.

#### Mules.

A declaration for an injury to cattle is not supported by evidence of injury to mules. "Whatever may be the meaning given to the term 'cattle' elsewhere, it is certain that with us it never is construed in a common parlance to include either horses or mules." *Brown v. Bailey*, 4 Ala. 413.

"Cattle," as used in Act 1855, requiring railroad companies to make and maintain fences sufficient to prevent "cattle, horses," from getting on the road, and making them liable for injuries caused by such failure, should be construed to include a mule, for, though the term "cattle" in common parlance does not include horses or mules, yet the term "horses" embraces a mule. *Toledo, W. & W. Ry. Co. v. Cole*, 60 Ill. 184, 186.

Mules are included in the term "cattle," in the primary sense of the latter term, but in popular use in the United States the word is not so understood. *United States v. Mattock* (U. S.) 26 Fed. Cas. 1208, 1209.

#### Neat cattle.

The word "cattle," as used in the chapter relating to the inspection of cattle, shall be read and construed as if preceded by the word "neat." Code Va. 1887, § 2215.

#### Sheep.

As used in Act Cong. June 30, 1833, prohibiting any person from pasturing Indian lands with horses, mules, or cattle, the term "cattle" includes sheep, that being one meaning of the word in its primary sense. *United States v. Mattock* (U. S.) 26 Fed. Cas. 1208, 1209.

The term "cattle" includes sheep. *Davis v. Collier*, 13 Ga. 485, 491; *Henderson v. Wabash, St. L. & P. Ry. Co.*, 81 Mo. 605, 606.

**Steers and yearlings.**

"Cattle," as used in Pen. Code, art. 766, making the theft of cattle an offense, should be construed to include a steer and yearlings, though they are described as "neat cattle," for all cattle are neat cattle. *Arrington v. State*, 13 Tex. App. 551, 553.

The term "cattle" designates domestic quadrupeds collectively, and charging the theft of a steer is sufficient under a statute making the stealing of cattle or neat cattle grand larceny. *State v. Bowers* (Mo.) 1 S. W. 288; *State v. Lawn*, 80 Mo. 241, 242; *State v. Abbott*, 20 Vt. 537, 538; *State v. Lange*, 22 Tex. 591.

**CATTLE BEAST.**

The expression "cattle beast," as used in an indictment charging the injury of a cattle beast in violation of Code, § 1068, making it criminal to pursue, kill, or wound any horse, mule, Jenny, cattle, hog, sheep, or goat, is employed to "designate the singular number of the plural noun 'cattle,' as used in the statute, which only includes that class of animals belonging to the bovine species, as the bull, ox, cow, helper, etc. It is a sufficient description of the animal killed." *State v. Credle*, 91 N. C. 640, 645.

**CATTLE DROVER.**

Any person who shall drive or bring neat cattle into or through the state shall be deemed a cattle drover. *Cobbe's Ann. St. Neb.* 1903, § 3119.

**CATTLE GUARD.**

As fence, see "Fence."

"Cattle guards," as used in statutes requiring railroads to erect cattle guards at certain places along their lines, "mean such an appliance as will prevent animals from going upon the land adjoining the right of way." *Heskett v. Railway Co.*, 16 N. W. 525, 526, 61 Iowa, 467; *Missouri Pac. Ry. Co. v. Morrow*, 4 Pac. 87, 89, 32 Kan. 217; *Ford v. Chicago, R. I. & P. Ry. Co.*, 59 N. W. 5, 8, 91 Iowa, 179, 24 L. R. A. 657; *Atchison, T. & S. F. R. Co. v. Gabbert*, 8 Pac. 218, 223, 34 Kan. 132; *Hurd v. Rutland & B. R. Co.*, 25 Vt. 116; *Pittsburg & L. E. R. Co. v. Cunningham*, 13 Am. & Eng. Ry. Cas. 529; *Clarke v. Ohio River R. Co.*, 20 S. E. 696, 700, 39 W. Va. 732. The company, however, does not perform its duty when it constructs cattle guards which will be safe to turn back cattle, but which will be unsafe for the use of employes when required to use them, but must be constructed conformably to the safety of the traveling public and its employes, as well as to facilitate the turning back of the stock, though, in order to make it safe for the use of the public or employes,

it was necessary to construct it that it would not be so efficient for turning stock as it otherwise would be. *Ford v. Chicago, R. I. & P. Ry. Co.*, 59 N. W. 5, 8, 91 Iowa, 179, 24 L. R. A. 657. No particular form of appliance is prescribed by statute, but it cannot be contended that cattle guards should be so constructed that cattle could pass over them in safety, since this would defeat the very purpose of their requirement. *Louisville, H. & St. L. R. Co. v. Beauchamp*, 55 S. W. 716, 718, 108 Ky. 47. A pit under the track does not meet the requirement of the law. *Kansas City, M. & B. R. Co. v. Spencer*, 17 South. 168, 169, 72 Miss. 491.

A railroad is not bound to guard against unruly horses or other animals, and, if its cattle guards are reasonably sufficient to turn back such beasts as cattle guards are generally designed to restrain, it is sufficient, and the railroad will not be liable for not maintaining a better one. *Atchison, T. & S. F. R. Co. v. Gabbert*, 8 Pac. 218, 223, note 3, 34 Kan. 132.

"Cattle guards," as used in Laws 1869, c. 81, § 1, providing that any railroad running through any improved or fenced land shall make proper cattle guards on the railroad when it enters and leaves such improved or fenced lands, means such appliances as will prevent animals from going on the land adjoining the right of way, and is not limited to the track or roadbed merely, but extends the whole width of the right of way. *Missouri Pac. Ry. Co. v. Manson*, 2 Pac. 800, 803, 31 Kan. 337.

"Cattle guards," as used in *How. Ann. St.* § 3337, requiring railroad companies to construct and maintain cattle guards at highways and street crossings, does not mean such guards as will keep animals from getting over it in a great degree of excitement or in exceptional cases, but such as would turn back such beasts as are generally restrained under such ordinary circumstances as may occur at such places, or may be reasonably expected to occur there. *Smead v. Lake Shore & M. S. Ry. Co.*, 24 N. W. 761, 762, 58 Mich. 200.

**CATTLE RANGE.**

A cattle range is a large stretch of country, consisting generally of many square miles, which is usually uninclosed, and has no definite or fixed boundaries, on which cattle are permitted to run at large during the entire year. *Holcomb v. Keliher*, 59 N. W. 227, 5 S. D. 438.

**CAUCUS.**

The word "caucus," as employed in the act relating to elections, shall mean a meeting of the legal voters of any political party assembled for the purpose of choosing dele-

gates, or for the nomination of candidates for office. Pub. St. N. H. 1901, p. 140, c. 78, § 1.

In statutes relative to elections, the term "caucus" shall apply to any public meeting of the voters of a ward or a city, or of a town, or of a representative district, held under the provisions of the chapter relating to elections for the nomination of a candidate for election, for the election of a political committee, or of delegates to a political convention. Rev. Laws Mass. 1902, p. 104, c. 11, § 1.

#### CAUCUS OFFICER.

In statutes relative to elections, the term "caucus officers" shall apply to chairmen, wardens, secretaries, clerks, and inspectors, and, when on duty, to additional officers specially elected, or elected to fill a vacancy, and taking part in the conduct of caucuses. Rev. Laws Mass. 1902, p. 104, c. 11, § 1.

#### CAUGHT.

A statement that a certain person's moral character was not good, and that there was proof of his being "caught" with his house girl, will be construed to import that he was discovered in such a position that adultery would be inferred. *Lovejoy v. Whitcomb*, 55 N. E. 322, 174 Mass. 586.

#### CAUSA SINE QUA NON.

"Causa sine qua non," as used with reference to personal injury cases, means a cause, which, if it had not existed, the injury would not have taken place. *Hayes v. Michigan Cent. R. Co.*, 4 Sup. Ct. 369, 374, 111 U. S. 228, 28 L. Ed. 410.

#### CAUSE.

See "Adequate Cause"; "Challenge for Cause"; "Concurrent or Concurring Cause"; "Contributing Cause"; "Controlling Cause"; "Direct Cause"; "Due Cause"; "Efficient Cause"; "Good Cause"; "Immediate Cause of Injury"; "Independent Cause"; "Irresistible Superhuman Cause"; "Just Cause"; "Justifiable Cause"; "Natural Causes"; "Probable Cause"; "Procuring Cause"; "Proper Cause"; "Proximate Cause"; "Reasonable Cause"; "Remote Cause"; "Sole Cause of Death"; "Sufficient Cause."

Any cause, see "Any."

Any cause whatever, see "Any."

Any other cause, see "Any Other."

Artificial cause, see "Artificial."

Irresistible cause, see "Irresistible."

Other cause, see "Other."

Unforeseen cause, see "Unforeseen Cause."

Webster defines an "occasion," as distinguished from a "cause" to be that which incidentally brings to pass an event without being itself efficient cause or sufficient reason. *Pennsylvania Co. v. Congdon*, 83 N. E. 795, 796, 134 Ind. 226, 39 Am. St. Rep. 251.

"Cause," as used in statutes relating to contested elections, and requiring the person wishing to contest to give notice in writing, stating the "cause" of such contest briefly, means the fact or combination of facts which give rise to the right of contest or of action, as the case may be. *Whitney v. Blackburn*, 21 Pac. 874, 876, 17 Or. 504, 11 Am. St. Rep. 857.

As the phrase "cause to believe a trader insolvent" is used in the bankrupt and insolvent laws, it means knowledge of such a state of facts in respect to the affairs and pecuniary condition of the debtor as would lead a prudent business man to the conclusion that the debtor cannot meet his obligations as they mature in the ordinary course of business. *Goldsworthy v. Roger Williams Nat. Bank*, 10 Atl. 632, 633, 15 R. I. 586.

In contracts of mutual interest, the cause of the engagement is the thing given, or done, or engaged to be given or done, or the risk incurred by one of the parties; and in contracts of beneficence, the liberality which one of the parties wishes to extend to the other, is a sufficient consideration. The civilians used the term "cause" in relation to obligations, in the same sense as the word "consideration" is used in the jurisprudence of England and the United States. It means the motive, the inducement to the agreement *Mouton v. Noble*, 1 La. Ann. 192, 193.

#### For removal from office.

A cause which is sufficient to authorize a removal from office of a city officer means legal cause, and not any cause which the council may think sufficient. The cause must be one which specially relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. A cause must be one attaching to the qualifications of the officer or his performance of its duties, showing that he is not a fit or proper person to hold the office. *State v. Common Council of City of Duluth*, 55 N. W. 118, 120, 53 Minn. 238, 39 Am. St. Rep. 595.

In *State v. Common Council of City of Duluth*, 55 N. W. 118, 53 Minn. 238, 39 Am. St. Rep. 595, involving the construction of the provisions of the charter of the city of Duluth, under which any member of the board of fire commissioners might be removed by a vote of two-thirds of all of the members elected to the common council of said city for a sufficient cause, the Supreme

Court of Minnesota used this language: "Cause," or "sufficient cause," means legal cause, and not any cause which the common council may think sufficient. The cause must be one which specially relates to and affects the administration of the office, and must be restricted to something of a substantial nature directly affecting the rights and interests of the public. The cause may be one touching the qualifications of the officer, or his performance of his duties, showing that he is not a fit or proper person to hold the office. An attempt to remove the officer for any cause not affecting his competency or fitness would be an excess of power, and equivalent to an arbitrary removal. In the absence of any statutory specification the sufficiency of the cause should be determined with reference to the character of the office and qualifications necessary to fill it." *In re Guden*, 75 N. Y. Supp. 794, 798, 71 App. Div. 422.

"For cause," as used in New York City Charter (Laws 1873, c. 335) § 25, authorizing the removal of certain municipal officers for cause, means "a cause founded on some act of omission or commission by the officer in regard to his duties or affecting his general character, which the law and the public opinion will pronounce to be sufficient to justify a forfeiture of the office, and not in the political bias or personal dislike of the city's chief executive, nor in his leaning to another individual for whom the place is desired. Removals for cause are distinguishable from removals which are in the arbitrary will of the officer vested with the power, and which generally follow the changes of the removing power or of party ascendancy. A removal for cause must be for a substantial, reasonable, and just cause." *In re Nichols* (N. Y.) 6 Abb. N. C. 474, 480.

New York City Charter 1873, providing that the heads of all departments and all other persons whose appointment is provided for therein may be removed by the mayor for cause, means that "a reason must exist which is personal to the individual sought to be removed, which the law and a sound public opinion will recognize as a good cause for his no longer occupying the place. The removal must be for cause—that is, for some good reason which actually exists—and not for a false reason which the removing power honestly or mistakenly believes to be true." *People v. City of New York* (N. Y.) 19 Hun, 441, 448.

The New York City charter of 1873, prohibiting the removal of a regular clerk or head of a bureau by the head of the department until he has been informed of the cause of the proposed removal, is to be construed as meaning "reasonable cause," and hence the statute does not give unlimited discretion to the heads of the departments. *People v. Thompson*, 94 N. Y. 451, 452.

In Syracuse City Charter, § 199, providing that the city marshal may be removed for "cause" on charges duly furnished, the word "cause" implies some valid reason for the removal arising out of the nonperformance or improper performance of official duties by the incumbent. *People v. McGuire*, 50 N. Y. Supp. 520, 522, 27 App. Div. 598.

Const. 1870, art. 6, § 6, provides that judges may be removed from office by a concurrent vote of both houses of the General Assembly, and that the names of the members voting for or against the judge, with the cause or causes of removal, shall be entered on the journal of each house, etc. Under this constitutional provision it was held that the word "cause," as used in removal clause, means legal cause, and not any cause which the legislators might think sufficient, so that under that section the Legislature has no power to remove a judge for economic reasons or on grounds of policy not personal to the incumbent or his administration of the office. *McCully v. State*, 53 S. W. 184, 187, 102 Tenn. 509, 46 L. R. A. 567.

"Cause," as used in the New York City charter of 1873, limiting the power of the removal of clerks, employes, etc., given the board of fire commissioners, by declaring that it cannot be exercised in respect to any regular clerk until he has been informed of the cause of the proposed removal, and has had an opportunity of making an explanation, means "some delinquency, general neglect of duty, or incapacity to perform the duties, or some delinquency affecting his general character and his fitness for the office. The cause assigned should be personal to himself and imply an unfitness for the place, and such cause being assigned, if unexplained, the removal may be made." *People v. Fire Com'rs of City of New York*, 72 N. Y. 445, 449.

A city charter providing that the council may remove any person from office appointed by them, for cause, meant such cause as may be satisfactory to the council, and did not constitute the council a judicial tribunal to hear and determine, so as to require notice to be served on the party removed before they could obtain jurisdiction of his person, and the words "for cause" did not intend a judicial proceeding requiring notice. *City of Hoboken v. Gear*, 27 N. J. Law (3 Dutch.) 265, 287.

The word "cause," in a city charter empowering the mayor to remove an appointed officer for cause, in legal intentment, means upon sufficient charges, notice thereof, and a hearing. *State ex rel. Brennan v. Walbridge*, 62 Mo. App. 162, 164 (citing *State ex rel. Gallagher v. Brown*, 57 Mo. App. 199); *State ex rel. Bristol v. Walbridge*, 69 Mo. App. 657, 669.

Act March 24, 1873, authorizing the board of finance and taxation of Jersey City

to appoint a city collector and to remove the appointee for cause, means a just cause, and the power of removal can be exerted only after the officer has had an opportunity for defense. *Haight v. Love*, 39 N. J. Law (10 Vroom) 14, 22.

Pub. St. c. 237, § 3, declares that the Supreme Court, on the petition of any creditor interested in any assignment for the benefit of creditors, upon due notice and for cause shown, shall remove any assignee named who shall neglect to render an inventory, etc. Held, that the words "for cause shown" meant a cause connected with such neglect, and that the assignee could not, therefore, be removed for any other cause than a neglect to render an inventory, schedule, etc. *Case v. Mason*, 23 Atl. 48, 15 R. I. 51.

#### Of accident or injury.

Condition distinguished, see "Condition."

In *Moulton v. Inhabitants of Sanford*, 51 Me. 127, 134, Chief Justice Appleton, in speaking of the proximate cause of the injury, says: "Ordinarily that condition is usually termed the cause whose share in the matter is most conspicuous and is the most immediately preceding and proximate in the event." *Maryland Clay Co. v. Goodnow*, 51 Atl. 292, 298, 95 Md. 330; *Sturgis v. Kountz*, 30 Atl. 973, 979, 165 Pa. 353, 27 L. R. A. 390.

The word "cause" has two meanings—one as that which brings a thing to be, and the other as that on which a thing under given circumstances follows. So it was said in an action for injury to a fireman in a fireboat, whose foot was caught in an eye-splice while casting off lines from two coal-boats belonging to defendant, which had tied to the fireboat: "Undoubtedly in this case, if the line of defendant had not been on the Seth Low, the accident could not have happened. It was a thing on which, under the circumstances, the thing happened, but it was not the thing which brought the thing to be, for that was the starting of the Seth Low. Or, in the more familiar language of the law, the placing of the rope upon the Seth Low was the *causa sine qua non*, but the starting of the Seth Low was the *causa causans*." It was held that the proximate cause of the injury was the starting of the fireboat, and not in the rope or eye-splice, and therefore plaintiff could not recover from the owner of the coalboat. *Trapp v. McClellan*, 74 N. Y. Supp. 130, 133, 68 App. Div. 362.

Everything which induces or influences an accident does not necessarily and legally cause it. It might be the agency, or medium, or opportunity, or occasion, or situation, or condition, as it is variously styled, through or by which the accident happened, but no part of its real and controlling cause. Much must depend upon the circumstances of each

particular case and upon the common sense of the thing. *Cleveland v. City of Bangor*, 32 Atl. 892, 896, 87 Me. 259, 47 Am. St. Rep. 326 (citing *Spaulding v. Inhabitants of Winslow*, 74 Me. 528).

#### Of accusation.

The constitutional provision that in all criminal prosecutions the accused has the right "to be informed of the cause and nature of the accusation" against him, means that the offense must be set out with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged. *United States v. Noelke* (U. S.) 1 Fed. 426, 431 (citing *United States v. Cruikshank*, 92 U. S. 542, 568, 23 L. Ed. 588).

In *Cathcart v. Commonwealth*, 39 Pa. (1 Wright) 108, Mr. Justice Strong, in speaking of the constitutional guaranty that in all criminal prosecutions the accused shall have a right to be informed of the nature and cause of the accusation against him, says that "an indictment must exhibit the nature and cause of the accusation; that it must set out the crime laid to the charge of the accused; but the mode in which the crime was committed, the instrument with which the murder was effected, whether it was held in the right hand or the left, whether the wound was inflicted on the head or the body, are entirely apart from the nature and cause of the accusation." So it may be said of an indictment in which one who, in point of fact, was strictly an accessory before the fact, is charged as principal. It is not necessary to state the means or agency by which he accomplished the murder, whether it was done by his own hand or the hand of another employed by him for the purpose. It is sufficient if the charge be stated with such certainty that he may know what he is called upon to answer. *Campbell v. Commonwealth*, 84 Pa. 187, 199.

The word "cause" is defined to mean that which produces or effects a result; that from which anything proceeds, and without which it would not exist. It is said that the word is used in this sense in the usual constitutional provision that a person accused of crime is entitled to demand the nature and cause of the accusation against him, and that, inasmuch as the effect cannot exist without a cause, a good indictment cannot, as a rule, exist without a statement of the essential facts and circumstances which are the cause of the alleged crime or result. *State v. Dougherty*, 4 Or. 200, 203.

Const. art. 1, § 10, providing that in all criminal prosecutions the accused hath a right to demand the nature and cause of the accusation against him, means that the facts constituting the offense must be set forth in the indictment with sufficient certainty, that the accused may know what he is called on to answer, so that he may prepare his de-

fense accordingly. *Norris v. State*, 33 Miss. 373, 376.

#### Of imprisonment.

"The cause of imprisonment," as used in Act 1845, relating to the relief of persons imprisoned for debt, and providing that the debtor may petition that his property be assigned so that he may have the benefit of the provisions of the act, and providing, further, that the debtor must set forth in his petition the cause of his imprisonment, would embrace the name or names of, or the sum or sums due to, the creditor or creditors at whose suit the debtor is imprisoned. *Spear v. Wardell*, 1 N. Y. (1 Comst.) 144, 155.

#### CAUSE (Verb).

To cause a thing to be done is one thing; to direct it to be done is quite another thing. What is caused to be done is done; what is directed to be done is by no means always actually done. *Burnham v. Aiken*, 6 N. H. 306, 328.

In a declaration charging that defendant maliciously caused and procured plaintiff to be declared a bankrupt, the words "caused and procured," are to be interpreted in their ordinary sense, and the words are satisfied if a false statement by the defendant in fact occasioned such result, though the statement was, as a matter of law, insufficient to cause the adjudication which the court erroneously made. An interpretation of the words that nothing was a consequence of the defendant's untrue statement which would not be a necessary and legal result of the truth was incorrect. *Farley v. Danks*, 4 El. & Bl. 493, 499.

The destruction of property is caused by the owner's illegal or improper conduct, within the meaning of the term "caused," as used in Pamph. Laws 1854, c. 1519, if without such conduct on his part the destruction would not have occurred. *Palmer v. City of Concord*, 48 N. H. 211, 97 Am. Dec. 605.

#### As compel.

In a statute providing that in an action of trover the sheriff shall cause the defendant to give security for the protection of the chattel sued for, the word "cause" is synonymous with "compel," and authorizes the taking and holding of the body of the defendant until he does the act required. *Poole v. Vernon* (S. C.) 2 Hill, Law, 667, 670.

Comp. Laws, § 3322, declaring that the state board of education shall have power, and that it is made their duty, to prescribe and cause to be adopted, a uniform series of textbooks in the principal studies pursued in the public schools, means that the board must not only prescribe or select the books, but see that such books are adopt-

ed. *State v. Board of Education*, 1 Pac. 844, 849, 18 Nev. 173.

#### As permit.

In a declaration in an action against a town for injuries caused by a defective highway, alleging that the town "caused" and suffered the highway to remain out of repair, the word "caused" does not necessarily imply active and affirmative misconduct on the part of the town, its servants and agents. In other words, it does not necessarily mean that the town actually dug or caused to be dug in the highway the hole in question, but simply that the negligence of the town resulted in or caused the defect in question. *Carroll v. Allen*, 37 Atl. 704, 705, 20 R. I. 144.

Rev. Civ. Code La., declaring that he who causes, assists, or encourages another to commit an unlawful act is responsible in solido with the person causing the damage by such act, is not limited to persons who actually engage in some active assistance or encouragement, but includes as well persons whose duty it was to prevent the act, and who, through omission, neglected to do so. *Comitez v. Parkerson* (U. S.) 50 Fed. 170, 171.

#### As procure.

9 Geo. IV, c. 31, § 11, making it a felony to cause to be taken, by any person, poison or other destructive thing, does not mean that there must be any manual delivery of the poison, and where a servant puts the poison in a coffeepot, and sets it out for her mistress, stating that the coffee is for her, and the mistress pours and drinks it, there is "causing to be taken," within the meaning of the statute. *Rex v. Harley*, 4 Car. & P. 369, 371.

Gen. St. c. 35, § 9, providing that any person who causes the intoxication of another shall be compelled to pay for his care while so intoxicated, means the act of participating in causing such intoxication; and hence a liquor dealer is liable, though he only sells a portion of the liquor causing such intoxication. *Werner v. Edmiston*, 24 Kan. 147, 152.

An alternative writ of mandamus requiring the authorities of the port of Mobile to assess, levy, and "cause" to be collected a sufficient tax to pay the relator's judgment means that, so far as the authorities have control over the performance of duties by the tax collector, they shall exercise that control in favor of the collection of the taxes. *United States v. Port of Mobile* (U. S.) 12 Fed. 768, 770.

"Cause to be run," as used in Act March, 1828, appointing commissioners to settle the boundary line between the county of Gloucester and the counties of Salem and Cumberland, and providing that such commissioners "shall cause the line of partition to

be run, surveyed, marked, and ascertained" is equivalent to the expression "to run." The expression contemplates the fact that the commissioners might not be practical surveyors, and would in such case find the aid of professional artists requisite; but the work was to be performed under their inspection. *State v. Coleman*, 13 N. J. Law (1 J. S. Green) 98, 99.

#### CAUSE (In Practice).

See, also, "Case"; "Civil Action—Case—Suit—etc."; "Criminal Case or Cause."

The term "cause" is defined in Burrill's Law Dictionary as "the origin or foundation of a thing, as of a suit or action; a ground of action." *United States v. Rhodes* (U. S.) 27 Fed. Cas. 785, 786.

"Cause," in its ordinary legal acceptance, means the subject of difference between parties as settled by the pleadings, whether oral or written. *Davidson v. Farrell*, 8 Minn. 258, 262 (Gil. 225, 228).

A statute provided that "all actions upon any statute for any forfeiture or cause, the benefit and suit whereof shall be limited to the party aggrieved, shall be commenced," etc. The statute was entitled "of the time of commencing actions for penalties and forfeitures." Held, that the intention was that the word "cause" should be limited by the word "forfeiture," immediately preceding it, to mean "cause of the same or like nature." *Corning v. McCullough*, 1 N. Y. (1 Comst.) 47, 69, 49 Am. Dec. 287.

#### As action, case, or suit.

"Cause" is defined to be, in practice, any suit or action, or any question, civil or criminal, contested before a court of justice. *Taylor v. United States* (U. S.) 45 Fed. 531, 539; *Erwin v. United States* (U. S.) 37 Fed. 470, 479, 2 L. R. A. 229; *In re Farnum*, 51 N. H. 376, 383; *Nacoochee Hydraulic Min. Co. v. Davis*, 40 Ga. 309, 320.

"Cause" and "case" are used as synonyms in statutes and judicial decisions, each meaning a proceeding in court, a suit, an action. *Blyew v. United States*, 80 U. S. (13 Wall.) 581, 595, 20 L. Ed. 638; *Erwin v. United States* (U. S.) 37 Fed. 470, 479, 2 L. R. A. 229.

The word "cause," in a statute authorizing an aggrieved party to except to "any opinion, direction or judgment of a district court in any matter of law, in a cause not otherwise appealable," is sufficiently comprehensive to include suits by statutory process. A term more comprehensive could not have been readily selected. *Inhabitants of Bridgton v. Bennett*, 23 Me. (10 Shep.) 420, 425.

The word "cause," in a statute providing that no more than two new trials shall be

granted in the same cause, is used as synonymous with the word "case"; that is, that no more than two new trials shall be granted to the same party in the same suit or case. *Shirts v. Irons*, 47 Ind. 445, 447; *Roberts v. Robeson*, 22 Ind. 456, 458.

The word "cause," as used in Rev. St. 1874, p. 785, providing that, if any party shall fail to file in the circuit court the transcript of an order reversing the judgment below within two years, the cause shall be considered as abandoned and no further action had therein, means the particular suit in which the order of reversal is made shall be considered as abandoned, and not the cause of action. A new suit may, after such period, be brought on the original cause of action. *Koon v. Nichols*, 85 Ill. 155, 156; *Fish v. Farwell*, 43 N. E. 367, 372, 160 Ill. 236.

The term "causes," as used in Code 1881, § 409, providing that issues of law and issues of fact in causes that, prior to a certain time, were of equitable jurisdiction, should be tried by a certain court, is equivalent to and means the same as the word "suits." The word "cause" as used does not mean subjects. A court of equity might have exclusive jurisdiction of a suit relating to a subject of which it has only concurrent jurisdiction. *Hendricks v. Frank*, 86 Ind. 278, 283.

"Causes," as used in Act Cong. April 9, 1866 (14 Stat. 27) § 3, providing that the District Courts of the United States, within their respective districts, shall have, exclusively of the courts of the several states, cognizance of all crimes and offenses committed against the provisions of this act, and also, concurrently with the Circuit Courts of the United States, of all causes, civil and criminal, affecting persons who are denied, or cannot enforce in the courts or judicial tribunals of the states where they may be, any of the rights secured to them by the act, must be understood in the sense of causes of civil action and causes of criminal prosecution. "Burrill in his Law Dictionary thus defines 'cause': 'The origin or foundation of a thing, as of a suit or action.'" *United States v. Rhodes* (U. S.) 27 Fed. Cas. 785, 786.

The word "cause," as used in St. c. 133, § 17, providing that the caption of depositions shall state the "cause in which the deposition is to be used," is applicable to every species of action. The intention was that the adverse party should be apprised of the particular action in which a deposition might be intended to be used. This would be effectually done by naming the parties and the court where the action was pending, if no other action was pending between the same parties, as if the kind of action was named. If two actions were pending in the same court between the same parties, something more might be necessary to designate the



one in which the deposition was intended to be used. *Scott v. Perkins*, 28 Me. (15 Shep.) 22, 33, 48 Am. Dec. 470.

#### **Attachment proceedings.**

A cause is a suit, litigation, or action, any question, civil or criminal, contested before a court of justice, and thus includes an attachment proceeding. *Gibson v. Sidney*, 69 N. W. 314, 815, 50 Neb. 12.

The word "cause," as used in Rev. St. c. 69, § 4, allowing an application for the transfer of a cause from a justice court, means the civil action in the justice court, and not merely an attachment incident thereto, and hence the attachment alone cannot be removed, since the attachment is a proceeding in a cause, and not the cause itself. *Curtis v. Moore*, 3 Minn. 29, 84 (Gil. 7, 12).

#### **Election contest.**

A contest over the election of a mayor is not a "cause," within Act 1877, c. 97, enlarging the jurisdiction of the chancery court. *Baker v. Mitchell*, 59 S. W. 137, 138, 105 Tenn. 610.

#### **Ex parte order or decree.**

The word "cause," as used in Code, § 4192, enacting that either party in any civil cause in the superior courts of the state may except to any sentence, judgment, or decision or decree of such court, contemplates a hearing when both parties are before the judge, and does not embrace an ex parte order or decree. *Nacoochee Hydraulic Min. Co. v. Davis*, 40 Ga. 309, 320.

#### **Indictment distinguished.**

"Cause," as used in the statute providing that every recognizance entered into before any court having criminal jurisdiction shall remain in full force and effect until the cause in which such recognizance shall be entered into shall be finally determined, does not mean indictment. "The indictment is not the cause. The accusation of criminality is the cause, and the indictment is an incident in pursuing the accusation. It is true that the term 'cause' sometimes expresses a suit or action, but it has a broader signification, which comprises the prosecution of a purpose or an object, and, as used in this act, is to be taken in the sense of 'prosecution.'" *State v. Hancock*, 24 Atl. 723, 728, 54 N. J. Law (25 Vroom) 393.

#### **Mandamus.**

An action in mandamus, under the statute of Illinois, is a cause in law. *People v. Board of Trade of City of Chicago*, 62 N. E. 196, 193 Ill. 577.

#### **As party.**

Rev. St. § 1263, provides that clerks shall be paid a certain sum for indexing the

judgment in each "cause." Held, that the word was used in the sense of an action or lawsuit, and did not authorize a fee for each party to the case, but only one fee for the whole action. *Clark v. Lucas County Com'rs*, 50 N. E. 356, 357, 58 Ohio St. 107.

As used in Act 1864, c. 109, removing all disqualifications of a witness founded on the interest of the party, except where an original party to a contract or cause of action was dead, means the contract or cause of action in issue and on trial, and includes only an original party to the contract, who is also a party to the suit. *Robertson v. Mowell*, 8 Atl. 273, 274, 66 Md. 530.

#### **As question of law or fact.**

A "cause," in its usual and natural meaning, includes all questions that have arisen or may arise in it; and, where a judge before whom a cause or question has been heard or tried in the District or Circuit Court is disqualified to sit on the trial or hearing in such case in the Circuit Court of Appeals, there is a strong reason for holding that a judge who has once heard the cause, either upon the law or upon the facts, is therefore disqualified to take part in the Circuit Court of Appeals at the hearing and decision of the cause or any question arising therefrom, and certainly a judge who has once heard the cause upon its merits is disqualified. *Moran v. Dillingham*, 19 Sup. Ct. 620, 622, 174 U. S. 153, 43 L. Ed. 930.

#### **Special proceedings.**

Rev. St. § 828 [U. S. Comp. St. 1901, p. 635], allowing a clerk of a Circuit Court of the United States fees for docketing and indexing the cause, cannot be construed to include proceedings for the removal of a prisoner from one district to another for trial. "The application to the judge is a summary one, and accompanied by a copy of the indictment, information, or commitment of the commissioner before whom he has been examined, and ordinarily no evidence is required, except as to the identity of the accused, when the judge issues a warrant for his removal, and no papers are required to be filed with the clerk." *United States v. King*, 13 Sup. Ct. 439, 441, 147 U. S. 676, 37 L. Ed. 328.

Taylor St. 1323, § 84, providing that any cause or matter in the county court may be removed to the circuit court, in case the county judge shall be interested in the controversy, includes a proceeding for contempt. *Lamonte v. Ward*, 36 Wis. 558, 563.

"Cause," as used in Common Law Procedure Act 1852 (15 & 16 Vict. c. 76, § 148), enacting that a writ of error shall not be necessary or used in any cause, does not include informations in the nature of quo warranto. *Regina v. Seale*, 5 El. & Bl. 1, 7.

A contest over the election of a mayor is not a "cause," within Act 1877, c. 97, enlarging the jurisdiction of the chancery court of Tennessee. *Baker v. Mitchell*, 59 S. W. 137, 138, 105 Tenn. 610.

While a scire facias to revive a judgment is merely a continuation of the original suit, a scire facias upon a recognizance or to annul a patent, or for any other similar purpose, is as much an original cause as an action for debt upon a recognizance or a bill of equity to annul a patent. *United States v. Payne*, 13 Sup. Ct. 442, 443, 147 U. S. 697, 37 L. Ed. 332.

A "cause" is defined to be an action at law, a suit at law or in equity, a judicial proceeding. The filing of a transcript of a judgment of a justice is not a cause. *State v. Gordon*, 36 Pac. 498, 499, 8 Wash. 488.

### CAUSE IN LAW.

The term "cause in law," as used in Const. 1870, art. 6, § 12, providing that the circuit courts shall have original jurisdiction of all causes in law and equity, should be construed to include an action in mandamus. *People v. Board of Trade of City of Chicago*, 62 N. E. 196, 193 Ill. 577.

### CAUSE OF ACTION.

See "Good Cause of Action"; "New Cause of Action"; "Same Cause of Action"; "Separate Causes of Action."

The primary right belonging to plaintiff, and the corresponding duty belonging to defendant, and the delict or wrong done by the defendant, consisting in a breach of such primary right or duty, constitute a cause of action. Pom. Rem. § 452. Stated in brief, a cause of action may be said to consist of the right belonging to the plaintiff, and some wrongful act or omission done by the defendant by which that right has been violated. *Veeder v. Baker*, 83 N. Y. 156, 160; *Goodrich v. Alfred*, 43 Atl. 1041, 1042, 72 Conn. 257; *Harvey v. Parkersburg Ins. Co.*, 16 S. E. 580, 581, 87 W. Va. 272; *Rodgers v. Mutual Endowment Assessment Ass'n*, 17 S. C. 406, 410; *Kennerty v. Etiwan Phosphate Co.*, Id. 411, 414, 43 Am. Rep. 607; Id., 21 S. C. 226, 234, 53 Am. Rep. 669; *Drake v. Whaley*, 35 S. C. 187, 190, 14 S. E. 397; *Suber v. Chandler*, 18 S. C. 526, 530; *Mercantile Trust & Deposit Co. v. Roanoke & S. R. Co. (U. S.)* 109 Fed. 3, 8; *Davis v. State*, 22 N. E. 9, 10, 119 Ind. 555; *Baker v. State*, 9 N. E. 711, 718, 109 Ind. 47; *Wildman v. Wildman*, 41 Atl. 1, 2, 70 Conn. 700; *Howell v. Young*, 5 Barn. & C. 259, 266; *Jackson v. Spittall*, L. R. 5 Q. P. 542, 552; *Clark v. Eddy*, 10 Ohio Dec. 539, 544.

"Causes of action are very often confounded with remedies, and, being regarded

as synonymous, the rules established with reference to one are sometimes supposed to be applicable to the other. This, however, is a mistaken view of the subject. Causes of action may be defined in general terms to be legal rights invaded without justification or sufficient excuse. Upon such invasion a cause of action arises which entitles the party injured to some relief, but the cause of action and the remedy sought are different matters. The one precedes, and, it is true, gives rise to, the other, but they are separate and distinct from each other, and are governed by different rules and principles." *Emory v. Hazard Powder Co.*, 22 S. C. 476, 481, 58 Am. Rep. 730.

A "cause of action" is a wrong committed or threatened. It may consist of the wrongful conversion of property or of the nonperformance of an agreement. In one case the cause of action would sound in tort, and in the other in contract. *Miller v. Hallock*, 13 Pac. 541, 542, 9 Colo. 551.

A cause of action is that which produces or effects the result complained of. *Noonan v. Pardee*, 50 Atl. 255, 256, 200 Pa. 474, 55 L. R. A. 410, 86 Am. St. Rep. 722.

"Cause of action" implies a right to bring an action, and some one who has a right to sue and some one who may lawfully be sued. *Patterson v. Patterson*, 59 N. Y. 574, 578, 17 Am. Rep. 384.

A cause of action is that which produces the necessity for bringing action. A cause of action does not arise until there is a necessity for bringing the action. *Shelby Steel Tube Co. v. Burgess Gun Co.*, 40 N. Y. Supp. 871, 873, 8 App. Div. 444.

"Cause of action" is defined by Bouvier's Law Dictionary to be matter for which an action may be brought. A cause of action does not accrue until the existence of such a state of things as will enable a person having the proper relations to the property and persons concerned to bring an action. A cause of action is generally held to be a union of the right of plaintiff and its infringement by the defendant. *Columbia Bank v. Equitable Life Assur. Soc.*, 80 N. Y. Supp. 428, 434, 79 App. Div. 601.

"The elements of a cause of action are: First, the breach of duty owing by one person to another; second, the damage resulting to the other from the breach." *Post v. Campau*, 3 N. W. 272, 275, 42 Mich. 90. The commission or omission of an act by the defendant, and damage to the plaintiff in consequence thereof, must unite to give a good cause of action. No one of these facts by itself is a cause of action. *Fields v. Daisy Gold Min. Co.*, 73 Pac. 521, 522, 26 Utah, 373.

To constitute cause or right of action, two elements must concur—a duty and a

breach of it. There can be no actionable wrong unless there is a duty resting upon a person, and he breaks it. If there is no duty, though the act of the defendant may work harm or damage, there is no right of action; it is a case of *damnum absque injuria*. *Clarke v. Ohio River R. Co.*, 20 S. E. 696, 697, 39 W. Va. 732.

The elements of a cause of action are: (1) A right possessed by the plaintiff; (2) an infringement of such right by the defendant. And it can make no difference that such infringement is accomplished partly by a direct and immediate force, as that denominated "a false imprisonment," and partly by fraud or indirect force, as that denominated "a malicious prosecution"; for prosecutions for wrongs committed by direct force and those committed without direct force and merely by fraud or indirection are not necessarily kept separate. *Atchison, T. & S. F. R. Co. v. Rice*, 14 Pac. 229, 233, 86 Kan. 593.

Cause of action consists not only of the right of the plaintiff, but of the wrong of the defendant; and in an action to recover property the right of the plaintiff consists in being entitled to the possession of the property which is owned by him, and the wrong of the defendant consists in withholding from the plaintiff that which is rightfully his. And hence a cause of action is not changed, the complaint in which alleged that the plaintiff was the owner of the land under written evidence of title, by an amendment setting up that plaintiff was the equitable owner of the land. *McCandless v. Inland Acid Co.*, 42 S. E. 449, 451, 115 Ga. 968.

The cause of action in a supplemental proceeding, and in an action against a judgment debtor for fraudulently concealing, removing, and transferring his property to defraud and delay the judgment creditor in the collection of the judgment, are the same. The right of the creditor was to have the money in the possession of the debtor applied in satisfaction of the judgment. The duty of the debtor was to apply that money, and his wrong was in withholding it and refusing to apply it in payment of the judgment. The judgment in the proceeding supplemental to execution is a bar to the other action. *Baker v. State*, 9 N. E. 711, 718, 109 Ind. 47.

In *Jackson v. Spittall*, L. R. 5 C. P. 552, "cause of action" is defined as the act on the part of the defendant which gives the plaintiff his cause of complaint. *Matz v. Chicago & A. R. Co.* (U. S.) 85 Fed. 180, 187.

As used in the statute relating to uniting several causes of action in the same suit, the phrase "cause of action" relates to each transaction or class of transactions which form the foundation of the action. Of course, the subject of action is not the cause of action, or the cause of any action or any cause of action. It is simply one of the elements

of each of the several causes of action, uniting and binding them together in one action. Thus, in an action by one tenant in common against another for ejectment, rents and profits, and partition, the subject of the action is the real property; the causes of the action are the infringement by defendant of plaintiff's rights in that property. *Scarborough v. Smith*, 18 Kan. 399, 406.

A "cause of action," within Rev. St. art. 1194, subd. 25, providing that foreign corporations doing business in the state may be sued in any county where the cause of action arises, is made up of the contract and the breach of it. It takes these two parts, at least, to constitute the whole cause of action, within the meaning of the statute quoted. *Westinghouse Electric Mfg. Co. v. Troell*, 70 S. W. 324, 326, 30 Tex. Civ. App. 200.

The phrase "cause of action," as used in statutes fixing the jurisdiction of courts according to where the cause of action arises, means that which creates the necessity for bringing the action. It arises when that is not done which ought to have been done, and that is done which ought not to have been done. *Durham v. Spence*, L. R. 6 Ex. Cas. 46; *Hibernia Nat. Bank v. Lacombe*, 84 N. Y. 367, 384, 38 Am. Rep. 518.

The term "cause of action," as used in Rev. St. art. 1198, subd. 21, regarding venue, means "not only the right which the plaintiff has, but also the injury thereto. Thus, when there is a breach of contract which by its terms was to have been performed in any particular county, the cause of action arose there, and the defendant can be sued there." *Houston & T. C. Ry. Co. v. Hill*, 63 Tex. 381, 51 Am. Rep. 642.

The expression "cause of action," as used in Code Proc. N. Y. § 362, providing that the people will not sue for lands by reason of right or title in them unless the cause of action accrued within 40 years before the action is commenced, means that at some time previous to the action the people acquired the title, and that some person has wrongfully withheld the possession from the people, and that such wrongful withholding has not continued on the part of the present occupant, or his predecessors to whom he stands in privity of estate, for the period of 40 years before the action begun. *Wright v. Phipps* (U. S.) 90 Fed. 556, 575.

#### Action and suit distinguished.

See "Action"; "Suit."

#### As applicable to relief demanded.

The cause of action refers entirely to the facts stated, and not the relief demanded; so that, if the facts stated in the complaint constitute a single cause of action, a prayer for various and inconsistent kinds of relief will not render the pleading demurrable on

the ground of the misjoinder of causes of action. *Colstrum v. Minneapolis & St. L. Ry. Co.*, 18 N. W. 94, 95, 31 Minn. 367.

"Cause of action," as used in Code, § 56, declaring that if a cause of action exist against a defendant, as well as other facts mentioned therein, the court may order a summons to be served by publication, includes an application by a judgment creditor to obtain leave of court to issue an execution on a judgment which has become dormant by lapse of time. *Pursel v. Deal*, 18 Pac. 461, 463, 16 Or. 295.

#### As cause of one action.

"Cause of action," as used in 9 & 10 Vict. c. 95, § 123, relating to cases of concurrent jurisdiction, meant cause of one action, and were not to be limited to an action on one separate contract; and where a tradesman has a bill against a party for an amount due, in which the items are so connected together that it appears that the dealing is not intended to terminate with one contract, but to be continuous, so that one item, if not paid, shall be united with another, and form one continuous demand, the whole together forms but one cause of action, and cannot be divided. Where the plaintiff, who was carrying on business within the jurisdiction of the county court of A., sued defendant, who resided within the jurisdiction of the county court of B., for a bill, some of the items of which consisted of goods which had been ordered in the A. district, but delivered in the B. district, the whole formed one cause of action, within the meaning of the act. *Bonsey v. Wordsworth*, 18 C. B. 325, 334, (citing *Grimble v. Aykroyd*, 1 Exch. 479, 3 Dowl. & L. 701; *Wood v. Perry*, 3 Exch. 442, 6 Dowl. & L. 34).

#### As claim.

See "Claim."

#### As facts giving right of action.

A cause of action is the fact or combination of facts which gives rise to a right of action. *Mason v. Union Pac. Ry. Co.*, 24 Pac. 796, 798, 7 Utah, 77; *Full v. Northwestern Mut. Relief Ass'n*, 39 N.W. 529, 530, 72 Wis. 430. "A cause of action is said to accrue to any person when the person first comes to a right to bring an action." *Bruhl v. Northwestern Mut. Relief Ass'n*, 39 N.W. 529, 530, 72 Wis. 430. A cause of action is the existence of those facts which give a party a right to judicial interference in his behalf. *Billing v. Gilmer* (U. S.) 60 Fed. 31, 334, 8 C. C. A. 645. The Century dictionary defines a cause of action to be the situation or state of facts which entitles a party to suain an action. *Matz v. Chicago & A. R. Co.* (U. S.) 85 Fed. 180, 187.

When used with reference to the pleadings by which the cause of action is alleged,

the phrase signifies the facts upon which the plaintiff's right to sue is based, and upon which the defendant's duty has arisen, coupled with the facts which constitute the latter's wrong. *Hutchinson v. Ainsworth*, 15 Pac. 82, 84, 73 Cal. 452, 2 Am. St. Rep. 823; *Phoenix Lumber Co. v. Houston Water Co.*, 61 S. W. 707, 708, 94 Tex. 456.

A cause of action has been held to mean every fact which is material to be proved to entitle the plaintiff to succeed; "every fact which the defendant would have had right to traverse." It has also been held to mean, not the whole cause of action, but that which, in popular meaning, and for many purposes in legal meaning, is the cause of action, viz., the act on the part of the defendant which gives the plaintiff his cause of complaint. *Williamson v. Chicago, R. I. & P. Ry. Co.*, 51 N. W. 60, 62, 84 Iowa, 538.

The cause of the action is the fact or facts that justify it and show the right to maintain it; hence, when a material fact necessary to the recovery is omitted from a petition, we say it does not state a cause of action. The cause of action is the entire state of facts that give rise to an enforceable claim. The phrase comprises every fact which, if traversed, the plaintiff must prove to obtain judgment. *Read v. Brown*, 22 Q. B. Div. 128. There is a distinction between the term "cause of action" as used abstractly and as used in pleadings. In a general sense the term means a claim which may be enforced. It is the right which a party has to institute and carry through an action, while in pleadings it is the fact which gives rise to the action. It was contended that in an action for personal injury the cause of action was the injury wrongfully inflicted by the defendant through the negligence of the defendant—that is, that the cause of action was based on the defendant's negligence—but it was held that it was not such injury, but the fact or facts, that justify the action or show the right to maintain it; so that a complaint which alleged negligence in using defendant's system of bumpers in the coupling of its trains states a different cause of action from an amendment charging negligence in having the bumpers loose and out of repair. *Box v. Chicago, R. I. & P. Ry. Co.*, 78 N. W. 694, 696, 107 Iowa, 660.

A cause of action exists where the legal rights of one party have been invaded by another. *Chalmers v. Glenn*, 18 S. C. 469, 471. To allege a cause of action a person or persons must allege all the facts showing his right, and also those showing its invasion by the defendant; and the facts thus alleged must in law, on their face, on the one side entitle him to the right which he claims, and on the other amount to an invasion by the defendant. *Oliver v. Columbia, N. & L. R. Co.*, 33 S. E. 584, 585, 55 S. C. 541.

**As good cause of action.**

"If a person have a legal right to sue, he must necessarily have a 'good' (using that word, as it obviously is always used in this connection, in the sense of 'legally sufficient') cause of action. If he have no legal right to sue, he has not merely a bad cause of action, but no cause of action, so 'good cause of action' can mean no more than 'cause of action,' and the word 'good' in that connection is clearly superfluous." Hence an instruction that if plaintiff in good faith supposed he had a cause of action against the defendant on account of personal injuries, and threatened to sue the defendant on account thereof, and defendant executed a note in consideration that the plaintiff would not sue him for such injuries, such compromise and settlement was a good consideration for such note, and was sufficient without using the word "good" before "cause of action." *Parker v. Enslow*, 102 Ill. 272, 276, 40 Am. Rep. 588.

**Judgment.**

See "Judgment."

**Proceedings in error.**

2 Rev. St. p. 362 (2d Ed.) § 1, authorizing every poor person who shall have a cause of action against another to prosecute the same in forma pauperis, does not include a writ of error. *Moore v. Cooley* (N. Y.) 2 Hill, 412.

A cause of action embraces the facts that entitle a party to relief in an original action—the facts ordinarily stated in a petition. The cause of an action does not embrace within its signification a proceeding in error. The latter usually grows out of the proceedings had in a cause of action, and is distinguished from it by the name adopted. *Travelers' Ins. Co. v. Myers*, 52 N. E. 831, 832, 59 Ohio St. 332 (citing *Hobbs v. Beckwith*, 6 Ohio St. 252; *Bode v. Welch*, 29 Ohio St. 19; *Lafferty v. Shinn*, 38 Ohio St. 46; *O'Donnell v. Downing*, 43 Ohio St. 62. 1 N. E. 438).

**Real actions included.**

"Cause of action," as used in Code Proc. § 33, giving to the superior court jurisdiction when the cause of action shall have arisen or the subject of the action shall be situated within the city of New York, refers to personal actions only, and not to those where the subject of the action was land in another state. *Bennett v. Erving*, 27 N. Y. Super. Ct. (4 Rob.) 671, 672.

As used in the statute of limitations, § 21, the term "cause of action" included actions concerning realty as well as personal actions, applying to all causes of action. *Sutro Tunnel Co. v. Segregated Belcher Min. Co.*, 7 Pac. 271, 273, 19 Nev. 121.

A cause of action is defined to be the right which a party has to institute and carry through a proceeding. Actions may be real, personal, or mixed. Hence *Sayles' Civ. St. art. 3218*, providing that in the case of the death of any person against whom there may be a cause of action limitations shall cease to run for 12 months, applies as well to real as to personal actions. *Morgan v. Baker* (Tex.) 40 S. W. 27, 29.

**Remedy distinguished.**

An action is nothing less than the right or power to prosecute in a judicial proceeding what is owed to one, which is but to say an obligation. The action therefore springs from an obligation, and hence the cause of action is simply the obligation. The cause of action is to be distinguished from a remedy, which is simply a means by which the obligation or the corresponding action is effectuated, and also from a relief sought. *Frost v. Witter*, 64 Pac. 705, 77, 132 Cal. 421, 84 Am. St. Rep. 53.

**As requiring person to sue or be sued.**

A cause of action is the right to prosecute an action with effect. No one has a complete cause of action until there is somebody that he can sue. *Douglas v. Forrest*, 4 Bing. 686, 704.

A cause of action being the right to bring an action, it implies that there is some person in existence, who can assert, and also a person who can be sued. *Douglas v. Beasley*, 40 Ala. 142, 147; *Parker v. Enslow*, 102 Ill. 272, 276, 40 Am. Rep. 588.

**As right of action.**

The term "cause of action" is defined as the right which a party has to institute and carry through a proceeding. It is a matter for which an action may be brought; the ground on which an action may be sustained. *People v. Dodge*, 38 E. 208, 204, 104 Cal. 487.

A cause of action is a right to bring an action. The cause of action is a claim which may be enforced. It is the right which a party has to institute and carry through an action. The term "cause of action" is synonymous with the term "right of action." *Lewis v. Hyams*, 6 Pac. 126, 127, 26 Nev. 68.

"A cause of action may be defined to be the right which a party has to institute and carry on, through an ordinary proceeding in a court of justice, by one party against any other party for the enforcement or protection of a right; the redress or prevention of a wrong." *Meyer v. Van Collem* (N. Y.) 23 Barb. 230, 231; *Douglas v. Beasley*, 40 Ala. 142, 147; *Davis v. State*, 22 N. E. 9, 10, 119 Ind. 555; *Morgan v. Baker* (Tex.) 40 S. W. 27, 29. The duty of the right to be enforced or the wrong to be redressed constitutes the

unity of the action. In an action to collect debts, the wrong is the detention and non-payment of the debt. The ordinary action or proceeding for the collection of a debt ends with the judgment and execution. If in such an action the plaintiff seeks also to set aside a fraudulent judgment confessed by the defendant, and asks for a receiver and injunction, it does not follow that the complaint contains another cause of action, or more than one cause of action, because these remedies are asked for the purpose of collecting the same debt, or, in other words, as means to redress but one wrong and the same wrong. *Meyer v. Van Collem* (N. Y.) 28 Barb. 230, 231.

"Cause of action is what gives rise to the remedial right, or the right of remedy, which is evidently the same as the term 'right of action,' frequently used by judges and text-writers. \* \* \* The cause of action must always consist of two factors: First, the plaintiff's primary right and the defendant's corresponding primary duty, whatever be the subject to which they relate, person, character, property, or contract; and, second, the delict or wrongful act or omission of the defendant, by which the primary right and duty have been violated." *Hayes v. Clinkscales*, 9 S. C. (9 Rich.) 441, 453 (quoting *Pom. Rem. & Rem. Rights*, pp. 554, 555).

The Missouri statute giving an action to the representatives of a person killed by means of the negligence of a common carrier creates a new cause of action, since at common law the persons designated in the statute did not have the right to sue on the situation or state of facts as used in the first definition, nor the right to bring an action for injury resulting in death under the subsequent definition. *Matz v. Chicago & A. R. Co.* (U. S.) 85 Fed. 180, 187.

The right of the state, created by statute, to recover for a wrong done, and the wrong committed, constitute the very essence of a cause of action which survives against the personal representative of the wrongdoer. *Davis v. State*, 22 N. E. 9, 10, 119 Ind. 555.

A "cause of action," in the sense used in relation to the venue of an action, is synonymous with "right of action," and includes the act without which no right of recovery could exist. When a thing is done which ought not to have been done, or when a thing is not done which ought to have been done, a cause of action arises. *Bach v. Brown*, 53 Pac. 991, 992, 17 Utah, 435.

Code Proc. § 71, declares that no action shall be brought on a judgment rendered in any court in the state, except a court of a justice of the peace, between the same parties, without leave of the court, for good cause shown, on notice, etc. Held that, un-

der this provision, leave to prosecute first obtained was a condition precedent to the right of action on the judgment, which leave must therefore be alleged, or the complaint fails to show a "cause of action" which term is synonymous with "right of action," and "right of recovery"; and a complaint which does not show right of recovery fails to show a cause of action. *Graham v. Scripture* (N. Y.) 28 How. Prac. 501, 507.

#### As subject-matter.

In applying the rule that in order that a judgment in a former action may be a bar to a recovery in another action the cause of the action in the two cases should be the same, care must be taken to distinguish between the identity of the subject-matter of litigation and identity of the cause of action. The subject-matter in litigation may be the same, and yet the cause of action entirely different. Therefore, there is a well-settled rule of law on the subject of res adjudicata, that a former adjudication never affects after-acquired rights. *State of Wisconsin v. Torinus*, 9 N. W. 725, 727, 28 Minn. 175.

A cause of action is the subject-matter of the controversy, and is for all the purposes of the suit, whatever the plaintiff declares it to be in his pleadings. *Pirie v. Tvedt*, 5 Sup. Ct. 1034, 1035, 115 U. S. 41, 29 L. Ed. 831. See, also, *Borst v. Corey*, 15 N. Y. 505, 509.

#### Subject of action distinguished.

See "Subject (of action)."

#### Cause of action for tort.

The term "cause of action" includes suits for slander. *Jack v. Shoemaker* (Pa.) 3 Bin. 280, 284.

Rev. Code, c. 104, § 19, provides that a writ of foreign attachment may be issued against a nonresident 10 days after a return of a summons showing that he cannot be found, and proof satisfactory to the court of the cause of action; or upon affidavit that defendant resides out of the state, and is justly indebted to plaintiff. Held, that the phrase "cause of action" does not embrace a cause of action for tort. *Smith v. Armour* (Del.) 40 Atl. 720, 721, 1 Pennewill, 361.

#### CAUSE OF ACTION WHICH SURVIVES.

The clause, "the cause of action which survives," as used in Pub. St. c. 185, § 12, providing that, when there are several plaintiffs or defendants in an action, the cause of which survives, and one of them dies before final judgment, the action shall proceed, means survives to the surviving plaintiffs or against the surviving defendants. *Brown v. Kellogg*, 65 N. E. 378, 182 Mass. 297.

**CAUSE PENDING.**

"Cause pending," as used in Act 1790, providing that perjury may be committed in any "suit, controversy, matter, or cause pending" in any of the courts of the United States, should be construed to mean a first indictment with issue joined upon a plea of not guilty, though the indictment does not allege acts constituting a public offense at the time of their commission, and that on a demurrer it would have been so held, because the subsequent proceedings of the court thereon, including the requiring of bail for the appearance of the defendant, were not void. *United States v. Reese* (U. S.) 27 Fed. Cas. 746, 748.

**CAUSEWAY.**

As part of bridge, see "Bridge."

"Webster defines a 'causeway' as 'A way raised above the natural level of the ground by stone, earth, timber, fascines, etc., serving as a dry passage over wet or marshy ground, or as a mole to confine water to a pond or restrain it from overflowing lower ground;' and such is substantially the definition of the Century Dictionary." *Ocean Causeway v. Gilbert*, 66 N. Y. Supp. 401, 404, 54 App. Div. 118; *Omaha & R. V. R. Co. v. Severin*, 46 N. W. 842, 843, 30 Neb. 318. As used in a statute requiring a railroad to make one "causeway" or other adequate means of crossing its tracks, the term indicates the legislative judgment that a causeway, when applied to a railroad, is an adequate means of crossing its track. *Omaha & R. V. R. Co. v. Severin*, 46 N. W. 842, 843, 30 Neb. 318.

"Causeway," as used in Act 1849, § 12, requiring a railroad to make one "causeway" for each property through which the railroad passes, if necessary and if demanded, means a crossing so as to afford access to the lands separated by the railroad. *Port v. Huntingdon & B. T. R. R.*, 31 Atl. 950, 951, 168 Pa. 19.

"Causeway," as applied to railroads in Code, § 1268, requiring railroads to make and keep in repair a causeway, means a way raised above the road. *State v. Burlington, C. R. & N. Ry. Co.*, 68 N. W. 819, 99 Iowa, 565; *Gray v. Burlington & M. R. R. Co.*, 37 Iowa, 119, 123.

**CAUTION.**

See "Ordinarily Cautious Person"; "Ordinary Caution."

The caution which the law requires a man to exercise in order to excuse homicide by misadventure is not the utmost caution that can be used. The law is not so extravagant as to require that a man should always

do what is right to the very letter. It is sufficient that a reasonable precaution be taken, such as is usual and ordinary in similar cases, such as has been found by long experience, in the ordinary course of things, to answer the end of safety of life and property. *The Europa*, 2 U. S. Law Mag. 497, 500.

**CAUTIOUS.**

"Cautious" differs in meaning from "prudent." It suggests the idea of timidity, and Webster gives its secondary meaning as over-prudent; fearful; timorous. A man is cautious chiefly as a result of timidity; hence an instruction that probable cause means a reasonable ground of suspicion, supported by circumstances in themselves sufficiently strong to warrant a really cautious man in the belief that the person so accused is guilty of the offense charged, is erroneous in substituting cautious for prudent. *Eggett v. Allen*, 82 N. W. 556, 558, 106 Wis. 633; *McClafferty v. Philip*, 24 Atl. 1042, 1043, 151 Pa. 86.

**CAVEAT.**

The act of April 22, 1858, providing "that the probate by the register of the proper county of any will devising real estate shall be conclusive as to such realty, unless with five years from the date of such probate those interested to controvert it shall by caveat and action at law, duly pursued, contest the validity of such will as to such realty," is badly worded, and hence difficult of comprehension. The framer of the act knew that it would not do to make the probate absolutely conclusive of the execution of the will, that some time must be given within which to contest that execution, but he evidently was not acquainted with the legal forms necessary to reach that end. This is evident from the manner in which he has used the word "caveat," and also that in which he has connected it with the words "and action at law." He evidently regarded a caveat as a means or process for contesting a will, and an action or issue at law as a continuation thereof. Taking this view of the matter—and it is the only one that can be adopted without the rejection of a word which was evidently deemed material by the framer of the act—and the difficulty is of easy solution. Thus, the caveat will then mean the initiatory process, or notice preceding a contest before the register, and the action at law an issue triable in the common pleas, directed by the orphans' court, after an appeal thereto from the decree of the register, and this appeal may be taken, in the ordinary form, at any time within five years. *Wilson v. Gaston*, 92 P. 207, 213, 215 (cited and approved in *Appeal of McCort*, 98 Pa. 33, 37).

A caveat "is an intimation given to some judge or officer notifying him that he ought to beware how he acts in some particular affair, and suspend the proceedings until the merits of the caveat are determined." *Slocum v. Grandin*, 38 N. J. Eq. (11 Stew.) 485, 488.

A caveat is a caution entered in the court of probate to stop probates, administrations, faculties, and such like from being granted without the knowledge of the party that enters. *Ex parte Crafts*, 5 S. E. 718, 720, 28 S. C. 281 (citing *Williams*, Ex'rs, 581).

The office of a caveat, in proceedings to probate a will or other paper, is to arrest the proceedings until the truth of the facts alleged or affecting the validity of the will can be determined, and it inures to the benefit of all parties interested in the subject. In *re Miller's Estate*, 81 Atl. 58, 62, 166 Pa. 97.

### CAVEAT EMPTOR.

The rule of law that the purchaser buys at his own risk is usually expressed in the maxim caveat emptor. *Wood v. Ross* (Tex. Civ. App.) 28 S. W. 143, 149.

Caveat emptor is an ancient rule of the common law, and stands in contradistinction to the rule of caveat venditor, and means that where a sale of goods is not accompanied with an express warranty by the seller, or there is fraud on his part, the buyer must stand all losses arising from latent defects. *Hargous v. Stone*, 5 N. Y. (1 Seld.) 73, 82.

Caveat emptor means, "Let the purchaser beware." It is one of the best settled maxims in the law, applying exclusively to a purchaser who is bound by actual as well as constructive knowledge of any defect in the thing purchased which is obvious, or which might have been known by proper diligence. *Wissler v. Craig's Adm'r*, 80 Va. 22, 32; *Burwell's Adm'rs v. Fauber*, 21 Grat. 446, 463; *Tilley v. Bridges*, 105 Ill. 336, 339.

The maxim caveat emptor signifies that it is the business of the buyer to be upon his guard, and that he must abide the loss of any imprudent purchase unless the goodness and soundness of the thing sold are warranted by the seller. It is said, however, that this principle is now exploded, and a more reasonable principle has succeeded, to wit, that a fair price implies a warranty, and that a man is not supposed in the contract of sale to part with his money without expecting an adequate compensation. *Lynch v. Postlethwaite* (La.) 7 Mart. (O. S.) 69, 186, 12 Am. Dec. 495.

Caveat emptor is a rule of the common law which implies that the purchaser must take care to examine and ascertain the kind or quality of the article he is purchasing, or provide against any loss he may sustain

from his ignorance of the kind or quality of the article sold and from his inability to examine it fully, by an express agreement of warranty. *Wright v. Hart* (N. Y.) 18 Wend. 449, 453.

The rule is that every man dealing with another in reference to property that the other may have in his possession must take care. The property may be stolen or borrowed or pledged or in the possession of the bailee for some specific purpose, and, if so, the party in possession can convey no better or further right than he has himself. There are some exceptions, however, to this rule, as where the property is money or promissory notes not due, and also cases where the conduct of the true owner is such that he is estopped from setting up his title against an innocent purchaser. *First Nat. Bank of Macon v. Nelson*, 38 Ga. 391, 399, 95 Am. Dec. 400.

Caveat emptor means that where there is neither fraud nor warranty, and the buyer receives and retains the goods without objection, he waives the right to object afterwards, and is finally concluded, and the fact that he paid a full price for the goods does not raise an implied warranty that the goods were sound. *Miller v. Tiffany*, 68 U. S. (1 Wall.) 298, 309, 17 L. Ed. 540.

"As applied to sales of personality in the absence of express warranty, where the buyer has an opportunity to inspect the commodity, and the seller is guilty of no fraud and is not the manufacturer or grower of the article he sells, the rule of caveat emptor applies, and the seller is not liable for defects in the article sold. If the purchaser distrusts his judgment, he can require of the seller a warranty as to quality or condition, and he cannot relieve himself and charge the seller on the ground that the examination will occupy time and is attended with labor and inconvenience. The rule applies even in the case of sales by sample, since the buyer may in such case protect himself by requiring a warranty that the goods to be delivered shall be the same as the sample exhibited." *Barnard v. Kellogg*, 77 U. S. (10 Wall.) 383, 388, 19 L. Ed. 987.

The doctrine of caveat emptor is that where the means of information are at hand, and are equally open to both parties, and no concealment is made, an attempted misrepresentation on the part of the vendor furnishes no ground for a court of equity to refuse to enforce the contract of the parties, providing such misrepresentation was not relied on by the vendee, and he judged for himself without availing himself of the means of knowledge at his command. *Slaughter v. Gerson*, 80 U. S. (13 Wall.) 379, 383, 20 L. Ed. 627.

The rule caveat emptor applies to the making of the contract of purchase, the ne-



gotiations, the agreement, the inducements upon which the purchaser acts, the grounds on which the minds of the parties meet, but not to the formal, clerical process of giving the purchaser written evidence of the completed bargain. *Hitchins v. Pettingill*, 53 N. H. 3 (citing *Monroe v. Skelton*, 38 Ind. 302).

#### In judicial sales.

"It may be regarded as a general and well-settled rule that the doctrine caveat emptor applies to all judicial sales." *Tilley v. Bridges*, 106 Ill. 336, 339.

The rule caveat emptor applies to the purchase of lands at a sheriff's sale, not only as to existing incumbrances, or paramount titles, but as to whether or not there is in fact any judgment sufficient to support the sale and deed. *Brookfield v. Morse*, 12 N. J. Law (7 Halst.) 331, 333.

#### In sales of land.

The maxim is used with reference to sales of property with respect to which the buyer must use proper diligence to inform himself as to its quality, and, in the case of real estate, as to its location. The quality of land on which its value depends, and which is too various for a market standard, the purchaser can see, if he will but look. No action lies against the vendor of real estate for false and fraudulent representations as to the location of lands. Land is not like a ship at sea; it has a known location and can be approached, and, even should it be necessary to purchase the land unseen, covenants may be inserted respecting the quality as well as seisin or title. *Sherwood v. Salmon*, 2 Day, 128, 136. He must look to the title papers under which he buys, and is charged with notice of all the facts appearing upon their face, or to the knowledge of which anything there appearing will conduct him. He may not shut his eyes or his ears to the inlet of information, and then say he is a bona fide purchaser without notice. *Burwell's Adm'r v. Fauber*, 21 Grat. 446, 463.

#### CAVEAT VENDITOR.

Caveat venditor is a rule of the civil law, and means that, if the seller wishes to secure himself from future responsibility in case the article sold should afterwards be found to be different in kind or quality from what the party supposed it to be, he must take care or provide against such responsibility by a particular agreement with the purchaser. *Wright v. Hart* (N. Y.) 18 Wend. 449, 453.

#### CAVING.

Caving, as applied to land, means the falling in of the surface by reason of the taking away of its supports, either natural

or artificial. *Schultz v. Bower*, 59 N. W. 631, 632, 57 Minn. 493, 47 Am. St. Rep. 630.

#### CAYENNE PEPPERS.

The genuine Cayenne peppers are a product of Cayenne, South America. The article commercially known as "Cayenne pepper" is composed of capsicum, rice flour, and other mixtures. The *Encyclopaedia Britannica*, in describing Cayenne pepper, says: "Cayenne pepper is manufactured from the ripe fruits, which are dried, ground, mixed with wheat flour, and made into cakes with yeast. The cakes are baked hard, until like biscuit, and then ground and sifted. The pepper is sometimes prepared by simply drying the pods, and pounding them fine in a mortar." *Cruikshank v. United States* (U. S.) 59 Fed. 446, 447, 8 C. C. A. 171.

Cayenne pepper, as used in Tariff Act 1890, par. 326, relating to the duties on Cayenne pepper, unground, does not include Sierra Leone chilies, or bird peppers, whole, but in a dried state. *Cruikshank v. United States* (U. S.) 59 Fed. 446, 448, 8 C. C. A. 171.

#### CEASE.

The word "ceased," when used in speaking of a statute as having ceased to have any existence, means that it has passed out of existence as if repealed by a valid act of the Legislature. When it ceased to have existence, it was recalled or revoked. *Oakland Paving Co. v. Hilton*, 11 Pac. 3, 6, 69 Cal. 479.

"To cease is to put a stop to; to be done away with; to be an extinction. *Webst. Dict.* Thus, where a constitution declared that a statute should cease, it extinguished the statute as thoroughly as a legislative repeal would have done." *Thomason v. Rugles*, 11 Pac. 20, 26, 69 Cal. 465.

Where a contract recited that a sum of money was loaned to a certain seminary, to be repaid when such seminary should cease, the word "cease" had no reference to the physical existence of the institution, but meant cease to be conducted as an institution of learning. *Trustees of Canandarqua Academy v. McKechnie*, 90 N. Y. 618, 626.

#### Existence of what is to cease implied.

"Cease," as used in Rev. St. c. 11, § 33, providing that a schoolhouse lot shall revert to the owner when the schoolhouse has ceased to be thereon for two years, requires that a schoolhouse should have been once maintained on the lot; and hence the statute does not cause the land to revert to the owner in a case where there never has been a schoolhouse on the lot, and the ground is allowed to remain without a schoolhouse for

a period exceeding two years. *Jordan v. Haskell*, 63 Me. 189, 191.

**As be forfeited.**

The word "cease," in a corporation charter declaring that its corporate power shall cease for nonuser, etc., is equivalent to the phrase "shall be forfeited." *Wallamet Falls C. & L. Co. v. Kittridge* (U. S.) 29 Fed. Cas. 85, 86.

A policy of life insurance providing that, if the premium was not paid on the days named and in the lifetime of the insured, the policy should cease and determine, should be construed as meaning that it is suspended; that it ceases to bind the company and to protect the assured without any act or declaration on the part of the company. It does not require a formal forfeiture. It is voidable at the election of the company, and that election can be exercised without notice to the assured, for the reason that the policy itself is notice that his rights cease with the nonpayment of the premium. As to him it is a dead policy. *Lantz v. Vermont Life Ins. Co.*, 21 Atl. 80, 82, 189 Pa. 546, 10 L. R. A. 577, 23 Am. St. Rep. 202.

**CEASE TO BE OPERATED.**

An insurance policy conditioned that the policy shall be forfeited if the property insured has ceased to be operated, except to set up new machinery or make repairs, does not apply to a temporary suspension of the principal work of a cotton factory, the watchman and others still being employed, whether such suspension was to set up machinery or repair, or not. *American Fire Ins. Co. v. Brighton Cotton Mfg. Co.*, 17 N. E. 771, 775, 125 Ill. 131.

A fire policy on a sawmill providing that if the insured ceases to operate the mill it shall be void is to be construed as meaning its operation in the usual method, and is not violated by a temporary suspension of work by reason of sickness. *Ladd v. Aetna Ins. Co.*, 24 N. Y. Supp. 384, 386, 70 Hun, 490.

A policy of insurance on a steam tannery, stipulating that the policy should be void in case of the assured "ceasing to operate the establishment," did not mean a mere temporary suspension of the business of the establishment for the purpose of repairing or from want of a supply of materials. *Lebanon Mut. Ins. Co. v. Leathers* (Pa.) 8 Atl. 424, 425.

A policy of insurance providing that, if the mill insured cease to be operated without the consent of the company, the policy should be void, meant something more than a temporary suspension. It meant a closing with the intention of ceasing operation, not a shutting down for a few days or weeks because of the happening of events incident to the conducting of a mill in that locality and

which might be reasonably expected. *City Planing & Shingle Mill Co. v. Merchants' Manufacturers' & Citizens' Mut. Fire Ins. Co.*, 40 N. W. 777, 778, 72 Mich. 654, 16 Am. St. Rep. 552.

"Ceased to be operated," as used in a fire policy on the machinery, tools, etc., of a manufacturing company which provided that it should become void if the establishment should cease to be operated without special agreement indorsed thereon, meant a permanent cessation of operations, and did not apply to a mere temporary interruption of operations occasioned by the prevalence of an epidemic. *Poss v. Western Assur. Co.*, 75 Tenn. (7 Lea) 704, 707, 40 Am. Rep. 68.

Where a policy on a manufacturing establishment was renewed at the request of the assignee for the benefit of the assured's creditors, many days after the operation of the machinery ceased, but while the premises were occupied by the foreman, who was engaged in putting together and selling engines and other articles belonging to the assigned estate, the establishment has not "ceased to be operated," within the meaning of the policy providing that it should become void if the factory ceased to be operated for more than 10 consecutive days. *Bole v. New Hampshire Fire Ins. Co.*, 28 Atl. 205, 206, 159 Pa. 53.

**CEASE TO OCCUPY.**

"Cease to occupy," as used in the homestead exemption laws of this state in reference to the act of an owner in ceasing to occupy the premises, means "a cessation of actual occupancy and residence, though accompanied with an intention to return and resume such occupancy." *Quehl v. Peterson*, 49 N. W. 390, 391, 47 Minn. 13.

**CEASE TO RESIDE.**

A provision in the charter of the city of Camden, § 11 (Laws 1871, p. 210), that when any officer elected at any election under this act shall cease to reside in the city, or, if elected for any ward, shall cease to reside in such ward, his office shall thereby become vacant, means the loss of such a residence therein as will disqualify him to be an elector. When the officer removes himself and his family out of the city or ward for a mere temporary residence elsewhere, as to a cottage at the seaside for residence during the summer, he does not cease to reside in such city or ward. *State v. City Council of City of Camden*, 39 N. J. Law (10 Vroom) 57, 58.

"Ceasing to reside," as used in Const. providing that the commission of any justice of the peace shall become vacant upon his ceasing to reside in the township in which he is elected, means the changing of his residence, and he does not cease to reside in the town or ward in which he was elect-

ed by the changing of such town or ward and the throwing it into a new municipality. *State v. Dilloway*, 31 N. J. Law (2 Vroom) 42, 43.

## CEDAR.

The expression "cedar and other cabinet woods," as used in Tariff Act Aug. 27, 1894, par. 673, does not include lumber manufactured from the tree botanically known as "thuja gigantea," and commonly called "red cedar" or "canoe cedar." *In re Myers* (U. S.) 69 Fed. 237, 238.

## CEDE.

Where one nation cedes territory to another, it hands over the title and sovereignty good against all the world, but this does not necessarily determine in what way it shall be held by the new sovereign. *Goetz v. United States* (U. S.) 103 Fed. 72, 77.

"Cede," as used in Act 1825, c. 105 (Pub. Loc. Laws for Baltimore City, art. 4, § 818), providing that the president, directors, and companies of the different turnpike companies owning roads running into the city of Baltimore may cede to said city such parts of the roads as lie within the corporate limits of said city, is not synonymous with, and to be interpreted in the same sense as, the word "grant." This is a word in no sense a technical one, but one in everyday use, and about which there ought not to be any difficulty as to its natural import and meaning. Like many other words, its precise meaning and signification depend somewhat upon the subject-matter in connection with which it is used. In some instances, it may, it is true, be used in the sense of grant, but ordinarily it means to yield, surrender, give up. In this statute it means to surrender. *City of Baltimore v. Baltimore & Y. Turnpike Road*, 31 Atl. 420, 421, 80 Md. 535.

A will giving a life estate to testator's wife, and at her death the lands to "cede" to his son, his heirs and assigns, to all intents and purposes means to yield up. *Somers v. Pierson*, 16 N. J. Law (1 Har.) 181.

## CEDULE.

In the jurisprudence of France, "cedule" is the peculiar name of an act under private signature. "Obligation," when opposed to "cedule," means, in that jurisprudence, a notarial act. *Campbell v. Nicholson*, 3 La. Ann. 458, 461.

## CELEBRATE.

"Celebrate" is equivalent to "solemnize," as used in Rev. Laws, 181, providing that every justice of the peace of the state, every stated and ordained minister of the gospel, and ev-

ery religious society according to its rules shall be empowered to solemnize marriage, and means "nothing more than to be present at a marriage contract in order that it may have due publication before a third person or persons for the sake of notoriety and the certainty of its being made, and may be done before parents, friends, or strangers able to testify to the fact. In point of mere legal competency for witnessing or solemnizing a contract of marriage the law has made no distinction of persons." *Pearson v. Howey*, 11 N. J. Law (6 Halst.) 12, 19.

## CELESTIAL MARRIAGE.

See, also, "Sealed."

In the Mormon Church, instead of the ordinary marriage, the parties are said to be sealed for time and all eternity, and such part of the sealing as relates to eternity is called "celestial marriage." *Hilton v. Roylance*, 69 Pac. 660, 664, 25 Utah, 129, 58 L. R. A. 723, 95 Am. St. Rep. 821.

## CELLAR.

As building, see "Building."

## CEMENT.

As merchandise, see "Merchandise."

## CEMETERY.

See, also, "Burial Place"; "Burying Grounds."

Lexicographers define a cemetery "to be an area or place where the dead are buried." *Metalrie Cemetery Ass'n v. Board of Assessors*, 37 La. Ann. 32, 35 (citing Wor. Dict.).

The word "cemetery" is defined by Webster to be a place or ground set apart for the burial of the dead, and this is the popular idea. What creates the cemetery is the act of setting the ground apart for the burial of the dead—marking and distinguishing it from adjoining ground as a place of burial. *Concordia Cemetery Ass'n v. Minnesota & N. W. R. Co.*, 12 N. E. 536, 541, 121 Ill. 199.

"Cemetery" is synonymous with "burial ground." *Jenkins v. Inhabitants of Andover*, 103 Mass. 94, 104.

Six or more human bodies buried at one place constitutes the place a cemetery. *Pol. Code Mont.* 1895, § 2881.

Under *Pol. Code*, § 3016, a cemetery is created where six or more human bodies are buried at one place. *City of Stockton v. Weber*, 83 Pac. 332, 333, 98 Cal. 433.

A cemetery includes not only lots for depositing the bodies of the dead, but also avenues, walks, and grounds for shrubbery

and ornamental purposes. All must be regarded as consecrated to a public and sacred use. *Evergreen Cemetery Ass'n v. City of New Haven*, 43 Conn. 234, 243, 21 Am. Rep. 643.

#### All burial places.

"Cemetery," in its legal meaning and as commonly used, comprehends all Christian burial grounds. *Regina v. Justices of Manchester*, 5 El. & Bl. 701, 707.

By reasonable implication the words "cemetery" and "burial place" include both public and private cemeteries and burial places, and an indictment that a person removed certain gates from the fence of a cemetery or burial place reasonably implies that they were removed from a public or private cemetery or burial place; and hence the indictment is sufficient to charge a violation of Rev. St. 1894, § 2041 (Rev. St. 1881, § 1962), prohibiting the removal of any fence or other work in or around any public or private cemetery or burial place under penalty of fine. *Lay v. State*, 89 N. E. 768, 769, 12 Ind. App. 362.

"Cemetery," as used in Act 1852, § 71, defining misdemeanors and declaring it a misdemeanor to disfigure any tombstone, fence, tree, etc., in any cemetery, means only such burying grounds as are established as provided for by statutory enactment, and does not apply to any place where the dead bodies of human beings are buried. *Winters v. State*, 9 Ind. 172, 174.

#### As a public place.

A cemetery is as public a place as a courthouse or market. It may not be frequented as much, but visits to it are as necessary and as certain, and the accommodation of the public requires a highway to it over which all must travel, so as to permit its dedication by public use. *Cemetery Ass'n v. Meninger*, 14 Kan. 312, 313.

#### CEMETERY LOT.

"It is commonly understood, when a cemetery lot is spoken of, that a plot of ground larger than that embraced within a single grave is meant. It is common knowledge that, in the division of cemeteries, 'lots' and 'single graves' have a separate and distinct meaning. To refer to a grave as embraced within the term 'lot' would do violence to the language; and therefore a contract requiring the payment of a certain sum for lots and a less sum for each grave opening does not require payments for graves on lots sold." *Bennet v. Washington Cemetery*, 62 N. Y. Supp. 87, 90, 47 App. Div. 365.

#### CEMETERY VAULT.

As building, see "Building (In Criminal Law)."

## CENSO.

"Censo" is a term of the Spanish civil law, meaning "ground rent." It is also used by some authors as an equivalent of annuity, or a contract by which one person sells and another purchases a right to receive an annual pension or sum. It is further defined to be an incumbrance which one imposes on his property in favor of another who advances him a certain capital, and in that sense it is a right to receive an annual pension to secure the payment of which some other property is pledged. There are three species of censo, as known to the laws of Spain, to wit, the emphyteutic, the consignativo, and the reservativo. The emphyteutic is the right which one has to exact from another a certain annual pension or sum, by virtue of a transfer to him of the usufructuary right of real property, the legal title remaining in the grantor. The censo consignativo is the right to exact from another an annuity in virtue of having advanced money, and which money is made a charge upon lands of the person who promises to pay the annuity, the full title to such lands remaining in the grantor of the annuity. The censo reservativo is the right to receive from another an annual pension by virtue of having transferred land to him by full and perfect title. *Trevino v. Fernandez*, 13 Tex. 630, 635, 655.

#### CENSO AL QUITAR.

The expressions "censo al quitar" and "censo redimible" are identical with each other, and mean a redeemable annuity. *Trevino v. Fernandez*, 13 Tex. 630, 655.

#### CENSO ENFITEUTICO.

"Censo enfiteutico" is a term used in the Spanish law. "Eschriche says that the censo enfiteutico is the right which we retain to require of another a certain annual charge or rent by reason of having transferred to him forever, or for a great length of time, the useful ownership of some real estate, reserving to ourselves the direct dominion. Again, the same author says the direct owner or imposer of the censo is he who transfers the useful dominion of the real estate, while the grantee of enfiteutico is he who acquires the useful ownership of the thing charged." *Hart v. Burnett*, 15 Cal. 530, 557.

#### CENSO REDIMIBLE.

See "Censo al Quitar."

## CENSORIOUSNESS.

"Censoriousness is defined by Webster to be a disposition to blame and condemn; the habit of censure and reproaching. And such is its meaning in the definition of a libel as a censorious and ridiculing writing

towards an individual. The degree of censure does not enter into the definition." *Cooper v. Greeley* (N. Y.) 1 Denio, 347, 359.

## CENSURE.

The word "censure" is synonymous with the words "reproach" and "obloquy." *Bettner v. Holt*, 11 Pac. 713, 716, 70 Cal. 270.

## CENSUS.

See "State Census."

A "census" is the official registration of the number of the people; an official enumeration of the inhabitants of a state or country with details of sex and age; in the Roman law, a numbering or enrollment of the people with the valuation of their fortunes; the official counting or enumeration of the people of a state or nation with statistics, etc.; official reckoning or enumeration of the inhabitants and wealth of a country. *City of Huntington v. Cast*, 48 N. E. 1025, 1026, 149 Ind. 255.

The word "census," as used in the statute directing the board of education to make a complete census of the inhabitants, showing the number of inhabitants in each district, the number of each sex, and such other particulars as the board may direct, does not authorize the board to make a census of the wealth of the inhabitants. *Republic v. Paris*, 10 Hawaii, 579, 581.

## CENSUS CHILDREN.

"Census children," as used in Gen. St. p. 387, relating to the organization of school districts out of parts of two counties, and providing that the commissioners of the county having the larger number of census children shall appoint two trustees, etc., means the number of children officially registered, as "census" means the official registration of the number of the people. *State v. Sweeney*, 55 Pac. 88, 90, 24 Nev. 350.

## CENTER.

2 Rev. Laws, 283, providing that in case of persons meeting each other on any road or public highway, traveling with carriages, sleighs, or wagons, the persons so meeting shall seasonably turn to the right of the center of the road, means the center of the worked part of the road, irrespective of the smooth or traveled track, although the whole of the smooth or traveled path may be on one side of that center. *Earing v. Lansingh* (N. Y.) 7 Wend. 185, 187.

1 Rev. St. p. 695, § 1, providing that whenever any persons traveling with carriages shall meet on any public highway, the persons so meeting shall seasonably turn to

the right of the center of the road, must be construed to mean, when the center of the road is obscured by snow, to be the center of the beaten or traveled track, without reference to the worked part of the road. *Smith v. Dygert*, 12 Barb. 613, 616.

## CENTER LINE.

The center line of a road or railroad is the line equidistant from each of the side lines, and is usually the line surveyed when the road is laid out. The term is used in distinction from the side lines of the road, as all public roads and highways and railroads are regarded as having three lines—the center line and the two side lines. *Maynard v. Weeks*, 41 Vt. 617, 619.

A deed describing land as lying adjoining and parallel with a certain railroad, the nearest part of the land being 20 feet distant from the center line of the railroad, should be construed to refer to the center of the track, and to indicate the track as a monument which aids in determining a certain boundary, and not to the right of way. *Peoria & P. U. Ry. Co. v. Tamplin*, 40 N. E. 960, 962, 156 Ill. 285.

## CENTRAL TIME.

What is known as simple standard time—central time—is merely the solar time of the ninetieth meridian west of Greenwich. It is used and extends between the ninetieth meridian running west to the one hundred and fifth. *Ex parte Parker*, 29 S. W. 480, 481, 35 Tex. Cr. R. 12.

## CENTS.

See "C.—Ct.—Cts."

In construing a contract made in one of the rebellious states in 1864, requiring the payment of a certain sum in dollars and cents, it was said on appeal that the trial court erred in refusing to give an instruction that the legal meaning of the terms "dollars and cents" is specie—that is, gold or silver, or whatever thing or article, or paper, the laws of the United States declared to be a legal tender—and that the word "dollars," in the note, means specie or legal tender notes of the United States. *Miller v. Lacy*, 33 Tex. 351, 353.

"Dollars and cents" have a well-recognized meaning as commonly used. The common definition is the unity of money by which values of commodities are measured. It is thus apparent that a defendant must have understood that he was charged with having in his possession, custody, and control money of the amount and value specified by the allegation in an indictment charging him with having in his possession and control a certain number of dollars and

cents. *People v. Lammerts*, 58 N. E. 22, 28, 164 N. Y. 137.

## CERA IMPRESSA.

"Cera impressa" means a seal. "It need not necessarily refer to an impression on wax, but an impression made on wafers or other adhesive substances capable of receiving an impression, will come within the definition of 'cera impressa.' If, then, 'wax' be construed to be merely a general term, including within it any substance capable of receiving and retaining the impression of a seal, we cannot perceive why paper, if it have that capacity, should not as well be included in the category. The simple and powerful machines now used to impress public seals do not require any soft or adhesive substance to receive or retain their impression. The impression made by such a power on paper is as well defined as durable, and less likely to be destroyed or defaced by vermin, accident, or intention, than that made on wax. It is the seal which authenticates, and not the substance on which it is impressed; and, where the court can recognize its identity, they should not be called upon to analyze the material which exhibits it." *Pierce v. Indseth*, 1 Sup. Ct. 418, 421, 106 U. S. 546, 27 L. Ed. 254.

## CEREBRAL EMBOLISM.

Cerebral embolism, according to Gould's Dictionary of Medicine, is the obstruction of an artery or capillary, usually by a blood clot or embolus brought from another point by the blood current, and that, around the seat of an embolus, thrombosis occurs, with the production of an infarct. In other words, using simply plain English, that in such case there is some lesion of the brain; and, where such lesion has rendered the party incapable of continuous or connected thought, he will be considered of unsound mind or insane. *Cundall v. Haswell*, 51 Atl. 426, 428, 28 R. I. 508.

## CERTAIN.

See "Place Certain"; "Reasonably Certain."

A writing acknowledging the receipt of a note as collateral security for certain notes held by the receptor against the giver, on which the time was extended, means all notes and not a particular portion or description of those notes of the giver in the hands of the receiver. *Martin v. Bell*, 18 N. J. Law (3 Har.) 167.

"Certain powers and privileges," as used in Act Feb. 10, 1883 (Acts 1882-83, p. 342), entitled an act to establish a separate school district and for the appointment of a board of trustees therefor with certain powers and

privileges, has no force under the constitutional provision that each law shall contain but one subject, which shall be clearly expressed in its title, nor does it enlarge the comprehensiveness of the subject expressed in its title—the establishment of a separate school district without expressing the appointment of trustees in the title. Provisions for their appointment with proper powers and privileges follow as a compliment to the general subject necessary or proper to the control and management of the public schools in the district, and the full accomplishment of the purposes indicated. The words "certain powers and privileges" would not apprise either the Legislature or the public that the act contained provisions authorizing the organization of a local police government, and conferring the power on the trustees to enact and enforce in the district police regulations foreign to the natural purposes and objects of a separate school district. *Glenn v. Lynn*, 7 South. 924, 89 Ala. 608.

"Certain and determinate," in the rule that, before a remainder is vested, the person taking the same must be certain and determinate, imports that the person must be one to whose competency to take no further or other condition attaches; one in respect to whom it is not necessary that any event shall occur or condition be satisfied save only that the precedent estate shall determine. *Bunting v. Speck*, 21 Pac. 288, 291, 41 Kan. 424, 3 L. R. A. 690.

### As capable of being rendered certain.

In matters of obligations, a thing is certain when its essence, quality, and quantity are sufficiently described, such as one hundred dollars, such a house, or such a horse. Civ. Code La. 1900, art. 3556, subd. 7.

In a deed containing the usual clauses of warranty, but excepting from the warranty and the covenant against incumbrances "a certain mortgage," the date and amount thereof and the mortgagee's name being left blank, the description of the mortgage excepted is sufficient where there was only one mortgage on the premises. That is certain which can be made certain, and, until two mortgages appear, there is no ambiguity. *Cooper v. Bigly*, 18 Mich. 463, 479.

A contract is certain when the thing to be done is supposed to depend on the will of the party, or when in the usual course of events it must happen in the manner stipulated; hence a contract for the purchase of crops of fruit to be grown in subsequent years is a certain contract. *Losecco v. Gregory* (La.) 32 South. 985, 986.

## CERTAIN ATTORNEY.

The words "certain attorney," in an appeal bond made payable to the appellee cor-

poration or its certain attorney, mean its authorized attorney. Such a bond is not subject to the objection that it is in the alternative, as such attorney could have enforced the bond, in the absence of such provision, as the representative of the appellee. *Brazoria County v. Grand Rapids School Furniture Co.* (Tex. Civ. App.) 43 S. W. 900, 901.

#### **CERTAIN DEMAND.**

The term "certain demand" has been held in *Duncan v. Magrette*, 25 Tex. 245, to have the same meaning as debt. *Worley v. Smith*, 63 S. W. 903, 904, 26 Tex. Civ. App. 270.

#### **CERTAIN DUTY.**

A duty is certain when by law it must be absolutely performed, and the occasion and mode of its exercise are fixed, so that nothing remains subject to the discretion of the officer. *Morton v. Comptroller General*, 4 S. C. (4 Rich.) 490, 473.

#### **CERTAIN PIECE OF LAND.**

Pub. St. c. 146, § 3, authorizes the shellfish commissioners to lease "any piece of land in certain ponds not exceeding one acre in one lot or parcel to any one person." A lease described premises, consisting of 10 acres lying together in a single parcel, as "a certain piece of land." Held, that the words quoted *prima facie* signified a single parcel or lot of land, and hence it could not be presumed that the 10-acre piece was divided into separate lots and leased together, by reason of which the lease was void. *State v. Burdick*, 2 Atl. 764, 766, 15 R. I. 239.

#### **CERTAIN RENT.**

Within the meaning of the statute declaring that it shall be unlawful to commence or prosecute any proceedings to obtain possession of any land or tenement under the provisions of Act Dec. 14, 1863, unless such proceeding shall be founded upon a written lease or contract, or upon a parol agreement by which the relation of landlord and tenant is established between the parties and a certain rent is therein reserved, a reservation of interest and taxes accruing on land is not a certain rent. *Davis v. Davis*, 7 Atl. 746, 115 Pa. 261.

"Certain," as used in the law authorizing landlords to distrain for rent where the same is certain, means such rent as is capable of being rendered certain, as where it was a certain sum per acre, and the number of acres demised was capable of being ascertained by proof. *Smith v. Fyler* (N. Y.) 2 Hill, 648, 649.

"Certain rents," as used in Act March 21, 1772 (1 Smith's Laws, 370), relating to lands and tenements leased to any person for

a term of years or at will, paying certain rents, and the method of procedure to be followed by the landlord to repossess himself of the estate on the termination of the lease, should be construed to include the payment of taxes, and daubing and chinking a house of certain dimensions, as rent, for there was certainty in the rent, the taxes could be exactly ascertained, and the work to be done on the house accurately described. *Shaffer v. Sutton*, 5 Bin. 228, 230.

#### **CERTAIN SUM OF MONEY.**

A "definitive or certain sum of money," within the meaning of a statute imposing a duty on bonds given as security for the payment of any definitive or certain sum of money, not exceeding, etc., means the principal of the bond, to be ascertained from the bond itself, and does not include interest thereon. *Barker v. Smark*, 7 Mees. & W. 590, 592.

#### **CERTAINTY.**

See "Convenient Certainty"; "Moral Certainty"; "Reasonable Certainty."

"Certainty" may be defined to be "the clear and distinct setting down of facts so that they may be understood by the party who is to answer the matters stated against him, the counsel who are to argue them, the jury who are to decide on their existence, and the court, who are the judges of the law arising out of them. *State v. Hayward*, 83 Mo. 299, 309; *State v. Terry*, 19 S. W. 206, 211, 108 Mo. 601.

"'Certainty' means the absence of doubt." *Gulf, C. & S. F. Ry. Co. v. Harriett*, 15 S. W. 558, 558, 80 Tex. 73; *State v. Shaw*, 49 N. C. 440, 443.

"Certainty" means that which, upon a fair and reasonable construction, may be called certain without recurring to possible facts. *Spencer v. Southwick*, 9 Johns. 314, 317.

It has been held that by the term "certainty," as applied to the degree of proof required, is meant generally that there must be sufficient positive facts proved to take the matter out of the realm of conjecture and presumption. *Reynolds v. Blaisdell*, 49 Atl. 42, 43, 23 R. I. 16.

"The principal rule as to the certainty required in an indictment must be stated thus: That where the definition of an offense, whether by a rule of common law or by statute, includes general terms, it is not sufficient that the indictment should charge the offense in the same terms as in the definition, but it must state the species—it must descend to particulars. *State v. Burke*, 52 S. W. 226, 227, 151 Mo. 136, 143.

Certainty in pleadings includes both precision and particularity, but these words are

used in a sense opposed to ambiguity and generality. Reasonable certainty of description is all that can be required, even in reference to written instruments, involving such particularity only as would lead to the identification of the property, and enable the sheriff to seize it under process. *David v. David's Adm'r*, 66 Ala. 139, 148.

#### **CERTAINTY TO A CERTAIN INTENT IN GENERAL.**

In the case of *Rex v. Mayor, etc.*, of Lyme Regis, 1 Doug. 149, 158, Mr. Justus Buller says, "Certainty to a certain intent in general means what upon a fair and reasonable construction may be called certain, without recurring to possible facts which do not appear, and is what is required in declarations, replications, and indictments in the charge or accusation, and returns to writs of mandamus." "The charge must contain such a description of the crime, etc., that, without intending anything but what appears, the defendant may know what he is to answer, and what is intended to be proved, in order that the jury may be warranted in their verdict and the court in the judgment they are to give." *United States v. Watkins* (U. S.) 28 Fed. Cas. 419, 427 (quoting *Rex v. Horne*, Cowp. 682). See, also, *State v. Schmitt*, 9 Atl. 774, 775, 49 N. J. Law (20 Vroom) 579; *Moseley v. White* (Ala.) 1 Port. 410, 417.

#### **CERTAINTY TO A COMMON INTENT.**

"Certainty to a common intent," as it is technically called, can mean no more than that. *David v. David's Adm'r*, 66 Ala. 139, 148.

"Certainty to a common intent," as the term is used in relation to indictments for larceny, when applied to description of stolen property, means such certainty as will enable the jury to say whether the chattel proved to be stolen is the same as that upon which the indictment is founded, and will judicially show to the court that it could have been the subject-matter of the offense charged. *State v. Parker*, 34 Ark. 158, 159, 36 Am. Rep. 5.

#### **CERTIFICATE.**

See "Headright Certificates"; "Liquor Tax Certificate"; "Location Certificate"; "Official Certificate"; "Teacher's Certificate."

A certificate is a declaration in writing. *Ticonic Bank v. Stackpole*, 41 Me. 302, 305.

A certificate is defined (1) as a documentary declaration regarding facts from the public authority, as an attestation of facts contained in a public record; (2) in law, a writing so signed and authenticated as to be legal evidence. *Stand. Dict.* It is de-

fined by Bouvier as a writing by which testimony is given that the fact has or has not taken place. A statement of the vote of the town on the question of local option over the signature of the town clerk is a certified copy of the statement of the result of the vote within the definition of the term "certificate." *People v. Foster*, 58 N. Y. Supp. 574, 579, 27 Misc. Rep. 576.

"Certificate," as used in Rev. St. § 5392 [U. S. Comp. St. 1901, p. 3653], declaring that every person who, having taken an oath that he will certify truly any declaration, deposition, or certificate, willfully subscribes to any material matter which he does not believe to be true, is guilty of perjury, is not used as a term of art or in any technical sense, but is used in its ordinary popular sense to signify a certificate to any statement or material matter of fact, sworn to and certified by the party charged with perjury. *United States v. Ambrose*, 2 Sup. Ct. 682, 684, 108 U. S. 336, 27 L. Ed. 746.

When a person delivers to the officer whose duty it is to issue marriage licenses a paper purporting to be a request from the father of the girl to issue a license to marry her, such paper is not a "certificate," within Code 1873, §§ 3917, 3918, inflicting penalties for falsely making, altering, forging, etc., or uttering and publishing, any attestation or certificate of any public officer or other person in relation to any matter wherein such attestation or certificate is required by law, or may be received or be taken as legal proof, as section 2191 provides that, if either party is a minor, the consent of the parent or guardian must be filed in the clerk's office after being acknowledged by the said parent or guardian or proved to be genuine; and the writing contemplated by the section is not mere proof of a fact. It is the act or deed itself constituting the consent of the parent or guardian which must be filed with the clerk, and the proof of that consent is the acknowledgment of the person who gave it or other competent evidence. *State v. Rhine*, 50 N. W. 676, 677, 84 Iowa, 169.

A certificate of acknowledgment by a notary public or other authority is simply an additional solemnity in the execution of a deed or mortgage, and is required by statute chiefly for the purpose of affording proof of the due execution of the instrument by the grantor, sufficient to authorize the recorder to make the same matter of public record. *Read v. Toledo Loan Co.*, 67 N. E. 729, 730, 68 Ohio St. 280, 62 L. R. A. 790, 96 Am. St. Rep. 663.

#### **Jurat.**

The term "certificate," as used in the statute fixing the fees of officers, means a formal certification of some fact, such as the certificate attached to a judgment roll, or to a certified copy of a record or paper, and does



not embrace a jurat. *Comstock Mill & Min. Co. v. Allen*, 81 Pac. 434, 436, 21 Nev. 325. See, also, *United States v. Julian*, 16 Sup. Ct. 801, 162 U. S. 324, 40 L. Ed. 984.

A jurat, when spoken of as the certificate of an officer who administers an oath, is included in the term "certificate." *United States v. McDermott*, 11 Sup. Ct. 746, 747, 140 U. S. 151, 85 L. Ed. 391.

#### License.

The term "certificate," in Act July 1, 1897, entitled "An act to provide for licensing of plumbers, and to supervise and inspect plumbing," which directs a certificate to be issued by a board of the city to a plumber on examination and payment of a fee of \$5, is to be construed as meaning a license, which Webster defines to be a formal permission from proper authority to perform certain acts or carry on a certain business, which without such permission would be illegal; and therefore the act operates to preclude the city from exacting a higher license fee. *Wilkie v. City of Chicago*, 58 N. E. 1004, 1007, 188 Ill. 444, 80 Am. St. Rep. 182.

#### Protest.

"Certificate," as used in Act 1841, c. 44, § 6, which provides that every notary public shall record at length in a book of record all acts, protests, depositions, and other things by him noted or done in his official capacity, and that all acts or "certificates" by him granted shall be under his hand and seal, and shall be received as evidence of such transaction, is equivalent to the word "protest," as used in section 12, which provides that the protest of any foreign or other bill of exchange shall be legal evidence of the facts stated in such protest. *Ticonic Bank v. Stackpole*, 41 Me. 302, 305.

#### Warrant.

The word "certificates," as used in a will giving the testatrix's certificates in the hands of her brother to her husband, does not include warrants for a large amount of bounty lands which belonged to the testatrix, as the words "certificates" and "warrants" are not synonymous. *Edmonson v. Bloomshire*, 78 U. S. (11 Wall.) 382, 388, 20 L. Ed. 44.

### CERTIFICATE OF DEPOSIT.

A certificate of deposit, like a deposit credited in a passbook, represents money actually left with the bank for safekeeping, which are to be retained until the depositor demands them. *Bank of Commerce v. Harrison* (N. M.) 66 Pac. 460, 461. And it is generally made negotiable. *Reed v. Board of Education*, 89 Ohio St. 635, 638.

A certificate of deposit is simply an acknowledgment of so much money deposited with a bank, and has the same force and ef-

fect as a receipt for money. The word "certify" adds no additional force to the instrument, as purporting a contract. A certificate or acknowledgment that another has deposited a sum of money has the effect of an acknowledgment by one party that he has received a sum of money from another, and such certificate is not the basis of an action, like a promise in writing, but, like a receipt, would be evidence of an implied promise to pay in an action for money had and received. *Hotchkiss v. Mosher*, 48 N. Y. 478, 482.

A certificate of deposit is a subsisting chose in action, and represents the funds it describes, as in case of notes, bonds, and other securities, so that delivery of it as a gift constitutes an equitable assignment of the money for which it calls. *Commonwealth v. Compton*, 20 Atl. 417, 418, 137 Pa. 188.

The phrase "certificate of deposit," as used in Rev. St. § 5413 [U. S. Comp. St. 1901, p. 3662], defining the words "obligation or other security," and directing that they shall mean, among other things, certificates of indebtedness and certificates of deposit, includes a certificate issued by an army paymaster to an enlisted man, acknowledging the receipt of money deposited under the provision of Rev. St. § 1305 [U. S. Comp. St. 1901, p. 925]. It is true it does not contain all the incidents which belong to a "certificate of deposit," as that term is understood in banking, but it acknowledges the receipt of money from the depositor for deposit with the United States, and the date, place, and amount thereof, but it does not state the time when it is repayable. Notwithstanding this omission, the paper is substantially a certificate of deposit. *Neall v. United States* (U. S.) 118 Fed. 699, 706, 56 C. C. A. 31.

#### As current funds or money.

See "Current Funds"; "Money."

#### As a promissory note.

See, also, "Promissory Note."

A "certificate of deposit" is a negotiable security, and to that extent is upon the same footing as promissory notes. *McCully v. Cooper*, 46 Pac. 82, 83, 114 Cal. 258, 35 L. R. A. 492, 55 Am. St. Rep. 66.

A certificate of deposit is a receipt of a bank or banker, generally framed in such a form as to constitute a promissory note payable to the depositor or order, or to bearer. It is a negotiable paper, within the definition of the instruments which are made subject to forgery. *State v. Patch*, 55 Pac. 108, 109, 21 Mont. 534.

A certificate of deposit "is neither more nor less than an ordinary promissory note, to be paid on presentation, like any other note, to any one who has become the holder, and is totally different from a deposit ac-

count, which no one but the depositor can withdraw. It negatives the idea that the amount which it represents is a fund on deposit belonging to any one as depositor." *City of Lansing v. Wood*, 28 N. W. 769, 773, 57 Mich. 201; *Talladega Ins. Co. v. Woodward*, 44 Ala. 287, 289.

A certificate of deposit is ordinarily defined to be a written acknowledgment by a bank or banker of the receipt of a sum of money on deposit, which the bank or banker promises to pay to the depositor, to bearer, to the order of the depositor, or to some other person or to his order, and its form must determine its negotiability. To give to an instrument the character of a certificate of deposit, the deposit on which it is based must be one of money, and, when this appears to be the case from the face of the paper, the word "payable," as used in such certificates, becomes certain as to the mode or medium in which payment must be made; for the law implies, under such a state of facts, a promise to pay money for money deposited and to pay a sum equal to the deposit. It has frequently been said that certificates of deposit have most of the characteristics of promissory notes, and this seems to be true; but a paper, to be entitled to the force and effect which paper of those classes has, whether negotiable or nonnegotiable, must contain a promise in writing by one person to pay another person therein named, or to his order, or to bearer, a specified sum of money absolutely and at all events. *First Nat. Bank v. Greenville Nat. Bank*, 19 S. W. 834, 84 Tex. 40 (citing *Daniel*, Neg. Inst. 28); *Welton v. Adams*, 4 Cal. 37, 40, 60 Am. Dec. 579.

Certificates of deposit are understood to represent money left with the bank or banker, and which is to be retained until the depositor demands it; a certificate being in the nature of a receipt executed by the bank therefor, in which is usually recited the fact that the money has been deposited in the bank by the person to whom the certificate is issued. A certificate of deposit issued by a bank is not known as a promissory note, though it is negotiable and for a sum certain, payable to a specified person's order, and, no time of payment being specified, it is payable immediately. *Murphy v. Pacific Bank*, 62 Pac. 1059, 1061, 130 Cal. 542.

A certificate of deposit reciting that the company had on that day executed and delivered to defendant a certificate of deposit payable 12 months from date, with interest, is a promissory note, no matter what names the parties may give it, since it is an engagement to pay a certain sum of money to the persons named therein at a specified time and at all events. *Leavitt v. Palmer*, 3 N. Y. (3 Comst.) 19, 35, 51 Am. Dec. 333.

**As security.**

See "Security."

## CERTIFICATE OF INCORPORATION.

The instrument by which a private corporation is formed is called "articles of incorporation" or "certificate of incorporation." Civ. Code S. D. 1903, § 404.

## CERTIFICATE OF INDEBTEDNESS.

The term "certificate of indebtedness," as used in Gen. Laws 1899, c. 351, § 10, authorizing the issuance of "certificates of indebtedness" for the purpose of a permanent improvement revolving fund, is used as equivalent to the term "bond," as employed in the latter part of the section, and not as a special form of obligation different from a bond. *Christie v. City of Duluth*, 84 N. W. 754, 755, 82 Minn. 202.

## CERTIFICATE OF MEMBERSHIP.

The certificate of membership issued by a mutual benefit association constitutes the contract, but it is to be construed and governed by the company's charter. *Supreme Council Catholic Knights of America v. Densford*, 56 S. W. 172, 175, 21 Ky. Law Rep. 1574, 49 L. R. A. 776 (citing *Van Bibber's Adm'r v. Van Bibber*, 82 Ky. 347, 350).

## CERTIFICATE OF PURCHASE.

A certificate of purchase of land from the state is a mere evidence of a contract to convey, and gives merely an equitable interest in the land. *Taylor v. Weston*, 20 Pac. 62, 65, 77 Cal. 534.

A certificate of purchase of real estate at a foreclosure sale does not purport to convey title, but on its face shows the contrary by stating the amount of the bid, and when the holder will be entitled to title if the premises are not redeemed. *Lightcap v. Bradley*, 58 N. E. 221, 223, 186 Ill. 510.

## CERTIFICATE OF QUALIFICATION.

The words "license," "diploma," and "certificate of qualification," in a statute making it criminal to practice medicine without having first obtained a license or diploma or certificate of qualification, were considered in the case of *Brooks v. State*, 6 South. 902, 88 Ala. 122, in which it was held that the words did not refer to and mean the same thing. *Nelson v. State*, 12 South. 421, 422, 97 Ala. 79.

## CERTIFICATE OF SALE.

See "Sheriff's Certificate."

As conveyance, see "Conveyance."

A certificate of sale executed by a sheriff does not pass title. At most it is only evidence of an inchoate estate, which may

or may not ripen into an absolute title. *De Roberts v. Stiles*, 64 Pac. 795, 798, 24 Wash. 611; *Singly v. Warren*, 51 Pac. 1066, 1069, 18 Wash. 434, 445.

In a judicial sale the sheriff is required to give the purchaser a certificate of sale containing a specification of the facts enumerated in the statute. A certificate is a memorial signed by the sheriff, in which what has taken place at the sale is set forth. It is the evidence of the sale, whereby, subject to the right of redemption and of possession in the judgment debtor for the time allowed therefor, the entire equitable title is conditionally vested in the purchaser, subject to be defeated by redemption. The sheriff's certificate to the purchaser is evidence of the equitable interest which the purchaser has in the land, and is an instrument whereby an interest or title is created. *Footman v. Wallace*, 17 Pac. 680, 682, 75 Cal. 552.

#### CERTIFICATE OF STOCK.

A certificate of stock is the evidence of the shareholder's right to a share of the net proceeds of all the property of the corporation. *Donnell v. Wyckoff*, 7 Atl. 672, 674, 49 N. J. Law (20 Vroom) 48. Or to a given share in the property and franchises of a corporation. Certificates of stock are not securities for money, nor are they negotiable instruments. *Barstow v. Savage Min. Co.*, 1 Pac. 349, 351, 64 Cal. 388, 49 Am. Rep. 705.

The certificate of stock in a corporation is only evidence of title thereto. It partakes of the nature of a deed to real estate; is simply evidence of title—nothing more. The stock certificates are the declarations in writing by the company's officers as to who are entitled to participate in its benefits—its profits or losses, the latter being limited by the extent of stock owned. It is then a misuse of terms to designate certificates of stock as "negotiable paper," in the sense in which such term is applied to commercial notes, bonds, and the like. Differing, however, from other muniments of title, the stock is considered as transferred when the certificate (the paper evidencing such title) is assigned. *Watson v. Sidney F. Woody Printing Co.*, 56 Mo. App. 145, 151.

Certificates of stock are the written representations of the interest which the stockholders have in the capital of the corporation. In the issuance of stock the corporation parts with nothing, but simply gives an evidence of ownership of that which he receives in trust from the stockholders, which forms the capital of the company with which it does business. *Gibbons v. Mahon*, 10 Sup. Ct. 1057, 1062, 136 U. S. 549, 34 L. Ed. 525.

A stock certificate operates merely as evidence to the stockholder of his ownership of the stock, which he may require for his own satisfaction, or to enable him to effect the transfer of his interests. It is not necessary to constitute him a stockholder but he becomes a stockholder on subscribing for the corporation stock, and therefore stock so subscribed for is corporation stock, within the meaning of statutes authorizing the taxation of such stock. *American Pig Iron Storage Co. v. State Board of Assessors*, 29 Atl. 160, 161, 56 N. J. Law (27 Vroom) 389.

Stock, whether preferred or common, is capital, and, generally speaking, a "certificate of stock" merely evidences the amount which the holder has contributed to or ventured in the enterprise. Such a certificate, representing nothing more than the extent of his ownership in the capital, cannot well be treated as indicating that he is, by virtue of it alone, also to the same extent a creditor, who may compete with other creditors in the distribution of the funds arising from the conversion of the corporation's assets into money. *Heller v. National Marine Bank*, 43 Atl. 800, 801, 89 Md. 602, 45 L. R. A. 438, 73 Am. St. Rep. 212.

A certificate of stock is not the evidence of a debt, but of an interest in some business enterprise. *Skillman v. Wiegand*, 33 Atl. 929, 931, 54 N. J. Eq. 198.

Stock certificates are written evidences of a certain interest in corporate property, but in the business world they are treated as something more than mere muniments of title. They are daily bought and sold like ordinary chattels; they may be pledged, and are generally classified as personal property. *Merritt v. American Steel-Barge Co.* (U. S.) 79 Fed. 228, 235, 24 C. C. A. 530.

Certificates of stock are treated by business men as property for all practical purposes. They are sold in the market, and they are transferred as collateral security for loans, and they are used in various ways as property. They pass by delivery from hand to hand, and are the subject of larceny. Such certificates of stock are subject to attachment. *Simpson v. Jersey City Contracting Co.*, 58 N. E. 896, 898, 165 N. Y. 193, 55 L. R. A. 796.

#### As negotiable instrument.

Shares of stock are usually represented by "certificates." Although these certificates are in their origin merely evidences of the holders' rights, they are really something more. They are treated in many respects as if they were shares themselves, and, when passed from hand to hand, are considered as passing to the assignee all the equitable rights of the holder. The certificates thus have a value in themselves, and may be

rightly treated as property. They are similar in this respect to negotiable paper. Succession of *Sinnot v. Hibernia Nat. Bank*, 30 South. 233, 236, 103 La. 705.

The authors with common unanimity hold that certificates of stock are not, strictly speaking, negotiable instruments. And the term "quasi negotiable" is not considered altogether satisfactory, although, as said in *Daniel on Negotiable Instruments*, it describes, better than any other shorthand expression, the nature of those instruments which, while not negotiable in the sense of the law merchant, are so framed and so dealt with as frequently to convey as good a title to the transferee as if they were negotiable. *Real Estate Trust Co. v. Bird*, 44 Atl. 1048, 1050, 90 Md. 229.

"Certificates of stock are not securities for money in any sense, much less are they negotiable securities. They are simply the muniments and evidence of the holder's title to a given share in the property and franchises of the corporation." *Barstow v. Savage Min. Co.*, 1 Pac. 349, 351, 64 Cal. 388, 49 Am. Rep. 705; *Mechanics' Bank v. New York & N. H. R. Co.*, 13 N. Y. (3 Kern.) 599, 627.

A certificate of stock in an incorporated company is not negotiable paper. *Hawes v. Gas Consumers' Benefit Co.*, 9 N. Y. Supp. 490.

A certificate of stock is in some respects like a bill of lading or a warehouse or a wharfinger's receipt. They are all alike transferable by indorsement and delivery, and the title of the property thus represented passes by such transfer. Bills of lading and wharfingers' receipts are commercial instruments, but certificates of stock are not, and the title to the property they represent passes in equity only by indorsement and delivery where, by any law or rule of the corporation, the transfer is required to be made on the books. *Mechanics' Bank v. New York & N. H. R. Co.*, 13 N. Y. (3 Kern.) 599, 627.

A "certificate of stock" is treated by business men as property for all practical purposes. They are sold in the market, and they are transferred as security for loans, and they are used in various ways as property. They pass by delivery from hand to hand, and they are the subject of larceny. *Page v. Boggess*, 83 N. Y. Supp. 569, 571, 41 Misc. Rep. 46.

A certificate of stock is a certificate which is evidence that the holder is entitled to a share in the capital stock of some corporation or unincorporated association. It is a chose in action and is not negotiable. *Appeal of Henke (Pa.)* 14 Atl. 45, 48.

A certificate in common form purports to represent a perfect title to corporate stock.

The transfer of the certificate transfers the title as against all parties, including attaching creditors, within a statute providing that delivery of a stock certificate shall be a sufficient delivery to transfer title. *Clews v. Friedman*, 66 N. E. 201, 202, 182 Mass. 555.

Certificates of stock are frequently spoken of as "securities." They are not such in the proper signification of the term. They have none of the characteristics of negotiable paper. They are simply paper evidence of the right of the holder to the interest in the corporation described in them. *Culp v. Mulvane*, 71 Pac. 273, 276, 66 Kan. 143.

#### Share of stock distinguished.

See "Share of Stock."

#### CERTIFICATE CREDITORS.

Certificate or warrant creditors of a city are those that become creditors from the fact that the money is not on hand, derived from the revenues, to pay them when the debt is created. *Johnson v. City of New Orleans*, 15 South. 100, 101, 46 La. Ann. 714.

#### CERTIFICATION.

"Certification," as applied to bank checks, means a doing of everything needed to bind the bank, and, among other things, a redelivery by the bank of the possession of the check, if the law supposes such redelivery a necessary element. *United States v. Potter (U. S.)* 56 Fed. 83, 91.

#### CERTIFY.

See "Duly Certify"; "This is To Certify."

The term "to certify," as used with reference to legal documents, means to testify to a thing in writing; and, in the absence of statutory provision declaring the particular form of certification, any form which affirms the fact in writing is sufficient. *State v. Brill*, 59 N. W. 989, 990, 58 Minn. 152; *Kipp v. Dawson*, 60 N. W. 845, 846, 59 Minn. 82; *State v. Schwin*, 26 N. W. 568, 570, 65 Wis. 207.

St. 1792 (1 Dig. 310) declares that a husband and wife may acknowledge and subscribe a deed in the presence of two justices of the peace in the county where they reside, and that the said justices, having examined the wife and ascertained that she fairly relinquished her right to dower, should certify the same. Held, that the expression "certify" should be construed as meaning everything which prior provisions required to be done. *Kay v. Jones*, 30 Ky. (7 J. J. Marsh.) 38, 40.

To certify means to testify in writing; to make a declaration in writing; so that, as used in *Hill's Ann. Laws*, requiring a road

supervisor to certify to his accounts for labor performed and materials furnished to the county court, it does not require any particular form, nor is it necessary to use the word "certify" or certified, but it is sufficient if the required statutory fact be made known in writing under the hand of the writer. *State v. Gee*, 42 Pac. 7, 9, 28 Or. 100.

To certify is to testify in writing; to make known or establish a fact. *State v. Schwin*, 65 Wis. 207, 28 N. W. 568. And a verbal statement by commissioners of highways as to the amount of a levy necessary was not a certificate, within the statute requiring the commissioners to certify the amount needed. *Chicago & E. I. R. Co. v. People*, 65 N. E. 701, 704, 200 Ill. 237.

*Horne's Rev. St. 1897, § 649*, requiring that the clerk on appeal shall transmit the transcript of the record in the cause certified and sealed, means that the statements contained in the certificate should be authenticated by the clerk subscribing his name thereto and affixing the seal of the court. *Watson v. Finch*, 48 N. E. 245, 150 Ind. 183 (citing *Conkey v. Conder*, 37 N. E. 132, 187 Ind. 441).

The words "certified as authentic," in a recital in a warrant that a demand for the arrest of fugitives was accompanied by a copy of the affidavit on which it was based, duly certified as authentic, is equivalent to the phrase "certified as authentic by the Governor of the state who made the demand," as it could not be certified by any other authority. *Ex parte Stanley*, 8 S. W. 645, 647, 25 Tex. App. 372, 8 Am. St. Rep. 440.

The statute which directs that the "foreman of the grand jury shall certify" under his hand that the indictment is a true bill is sufficiently complied with when the foreman indorses on the back of the indictment "A true bill," and subscribes his name to such indorsement. *McDonald v. State*, 8 Mo. 283, 284.

# **CERTIFIED CHECK.**

"I assume that the practice of having the drawee mark and certify upon the face of the check that it is good for the sum therein expressed is of recent origin, for I find nothing said of it by the early writers, and but few reported cases where the practice is referred to. It is, however, at the present day, a prevalent custom. Checks drawn upon banks or bankers, thus marked and certified, enter largely into the commercial and financial transactions of the county. The paper upon which the certificate is impressed is negotiable by delivery or by indorsement, and designed for circulation, and in respect to all the subsequent holders the party making and uttering the certificate stands in the position of an ac-

ceptor, with all the responsibilities incident to that relation. The certificate means nothing less than this, but it means something more. It imports that the drawer has funds or means convertible into funds in the hands of the drawee at the time, which shall be retained and devoted to the payment of the paper on presentation." *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 28 N. Y. 425, 427.

A certified check is a check certified to be good, by the bank on which it is drawn. Such a certification is equivalent to an acceptance. "It implies that the check is drawn upon sufficient funds in the hands of the drawee, that they have been set apart for its satisfaction, and that they shall be so applied whenever the check is presented for payment. It is an undertaking that the check is good then, and shall continue good, and this agreement is as binding on the bank as its notes of circulation, a certificate of deposit payable to the order of the depositor, or any other obligation it can assume." *Merchants' Bank v. State Nat. Bank*, 77 U. S. (10 Wall.) 604, 645, 19 L. Ed. 1008.

A certified check is a check drawn on a bank by a depositor, which is recognized and accepted by the proper officer of the bank as an appropriation of the amount specified therein to the payee named. *Security Bank v. National Bank of the Republic*, 67 N. Y. 458, 462, 23 Am. Rep. 129; *Clews v. Bank of New York Nat. Banking Ass'n*, 89 N. Y. 418, 421, 42 Am. Rep. 808; *Bank of British North America v. Merchants' Nat. Bank*, 91 N. Y. 106, 111.

"The object of the certification is to indicate the assent of the bank, at the request of the drawer, that the drawee will pay the sum mentioned in the check." *Security Bank v. National Bank of the Republic*, 67 N. Y. 458, 462, 23 Am. Rep. 129.

The usual method of certification is for the cashier or teller to write his name across the face of the check. A certification binds the drawee bank to have and to hold sufficient funds to pay the check; in other respects it still remains merely a depositary, liable to pay only on demand. A certified check cannot be sued on without demand. *Bank of British North America v. Merchants' Nat. Bank*, 91 N. Y. 106, 111.

"By the certification is guaranteed the genuineness of the drawer's signature, and there is a representation that the bank has funds of the drawer sufficient to meet the check, and that the funds shall not be withdrawn from it by the drawer. The certification does not import that the body of the check is genuine; and hence, where a check has been raised by some one without authority before certification, the certifying bank cannot be called on, in consequence of its certification, to pay the amount of the

raised check." *Clews v. Bank of New York Nat. Banking Ass'n*, 89 N. Y. 418, 421, 42 Am. Rep. 303.

The word "certify," as commonly understood, implies that the check upon which the words of certification have been written has passed from the custody of the bank and into the hands of some other party, and when the charge is that the defendant did unlawfully, knowingly, and willfully certify a certain check, the import of that accusation is not simply that he wrote certain words on the face of the check, but that he did it in such a manner as to create an obligation of the bank in such a way as to make an instrument which can properly be called a "certified check." *Potter v. United States*, 15 Sup. Ct. 144, 146, 155 U. S. 438, 89 L. Ed. 214.

### CERTIFIED COPY.

A certified copy of a deed imports that it is an office copy taken from the record of deeds and certified by the proper officer. *Doremus v. Smith*, 4 N. J. Law (1 Southard) 142, 143.

"Certify" is defined by the Standard Dictionary as: "To give certain knowledge or information of; make evidence; to vouch for the truth of; attest to; to make statement to as matter of fact; to testify in writing; give a certificate of, or make a declaration about, in writing under hand or under a seal." So that a statement of a vote of the town on the question of local option over the signature of the town clerk is a certified copy of the statement of the result of the vote in compliance with the law. *People v. Foster*, 58 N. Y. Supp. 574, 579, 27 Misc. Rep. 576.

The term "certified copy," is not synonymous with "duplicate." A duplicate must be executed by the same parties with the same formalities as the original. Where the law requires a duplicate of a certificate of incorporation to be filed, it is not complied with by filing a certified copy. *Nelson v. Blakey*, 54 Ind. 29, 36.

### CERTIORARI.

Certiorari, at common law, was a prerogative writ; a mandate issued by a court vested with a plenitude of power over all inferior courts of the realm, which had a right to command them to return authenticated records and proceedings in a particular case for trial or correction of errors. The courts of the United States derive authority to issue such a writ from the Constitution and from acts of Congress. *State of North Carolina v. Sullivan* (U. S.) 50 Fed. 593.

Certiorari at common law was an original writ issuing out of chancery or the  
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king's bench, directed in the king's name to the judges or officers of inferior courts, commanding them to return the record of a case pending before them, to the end that the party may have the same sure and speedy justice before him or such other justices as he shall assign to determine the case. *Dean v. State*, 63 Ala. 153, 154 (citing 2 Bac. Abr. 165); *In re Saline County Subscription*, 45 Mo. 52, 53, 100 Am. Dec. 337; *State v. Valliant*, 27 S. W. 879, 123 Mo. 524.

The writ of certiorari does not owe its existence to constitutional provision or statutory enactment. It is a common-law writ, of ancient origin, and one of the most valuable and efficient remedies which comes to us with that admirable system of jurisprudence. The Supreme Court, the highest tribunal in the state, with appellate and supervisory jurisdiction over proceedings and judgments of all inferior courts, has the inherent power to grant it whenever necessary in the exercise and enforcement of its jurisdiction. *Tennessee Cent. R. Co. v. Campbell*, 75 S. W. 1012, 109 Tenn. 640.

At common law the writ of certiorari is used for two purposes: First, as a valid proceeding for the re-examination of some action of an inferior tribunal; second, as an auxiliary process to enable the court to obtain further information in respect to some matter already before him for adjudication. It is for the latter purpose that the writ of certiorari is usually fastened upon, employed by the Supreme Court. The removal of a proceeding by a writ of certiorari at common law might have been both before and after final judgment. *Louisville, N. A. & C. R. Co. v. Louisville Trust Co.* (U. S.) 78 Fed. 659, 661.

Certiorari is a writ issuing from a superior court to an inferior court, tribunal, or officer exercising judicial powers, whose proceedings are summary, or in a course different from the common law, commanding the return of the records of a cause to the superior court. *California & O. Land Co. v. Gowen* (U. S.) 48 Fed. 770, 771.

Certiorari is a writ issued by a superior court directing the removal of a cause from an inferior to a superior court. "A certiorari, however, can only issue as original process to remove a cause and change the venue when the superior court is satisfied that a fair and impartial trial will not otherwise be obtained. It is sometimes used as auxiliary process, where, for instance, diminution of the record is alleged on a writ of error; but in such cases the superior court must have jurisdiction of the controversy." *Fowler v. Lindsey*, 8 U. S. (3 Dall.) 411, 418, 1 L. Ed. 658.

A proceeding by a writ of certiorari is a judicial proceeding in the technical

sense, as distinguished from a quasi judicial one, and, apart from its ancillary use, its main performance and commonest use is to supervise, control, review, and correct the proceedings of quasi judicial tribunals, or where such proceedings are different from the court of common law. *State v. South Penn Oil Co.*, 24 S. E. 688, 692, 42 W. Va. 80.

Certiorari is a writ issued by a superior court directing an inferior court to send up to the former some pending proceeding or the record and proceeding in a cause, before verdict, for review or trial. A certiorari is appellate in the sense that it involves a limited review of the proceedings of an inferior jurisdiction. It is original in the sense that the subject-matter of the suit or proceeding which it brings before the court is not reinvestigated, tried, and determined on the merits generally, as upon appeal at law or writ of error. A common-law writ of certiorari is not ancillary or auxiliary to appellate jurisdiction, as it is when used to supply a deficiency in the transcript or a record of a judgment from which an appeal is taken or to which a writ of error is sued out, nor is it used to remove a case for trial, but upon such writ the appellate court neither affirms or reverses a judgment nor tries the case upon its merits, but must quash the proceeding of the lower court or quash the certiorari. *Basnet v. City of Jacksonville*, 18 Fla. 523, 526.

Certiorari is in the nature of an appeal from the judgment and judicial determination of inferior tribunals and officers acting under statutory authority, or when the proceeding is not according to the common law. The writ lies only to inferior courts and officers exercising judicial powers affecting the property or right of a citizen, and is directed to the court, magistrate, or board exercising such powers, requiring them to send into the Supreme Court from which the writ issued the proceedings in a cause or matter already terminated. *People v. Walter*, 68 N. Y. 403, 408 (citing *Stone v. City of New York* [N. Y.] 25 Wend. 157; *People v. Same* [N. Y.] 2 Hill, 9; *Lynde v. Noble* (N. Y.) 20 Johns. 80; *Lawton v. Commissioners of Highways* [N. Y.] 2 Caines, 179, 182; *Starr v. Trustees of Village of Rochester* [N. Y.] 6 Wend. 564; *Ex parte City of Albany* [N. Y.] 23 Wend. 277); *Hamilton v. Splers*, 2 Utah, 225, 228.

The writ of certiorari, under the constitutional provisions of Missouri, is strictly the common-law writ of that name. *Hannibal & St. J. R. Co. v. State Board of Equalization*, 64 Mo. 294, 308; *State ex rel. Teasdale v. Smith*, 14 S. W. 108, 101 Mo. 174; *State ex rel. Kansas & T. Coal Ry. v. Shelton*, 55 S. W. 1008, 1012, 154 Mo. 670, 50 L. R. A. 798; *State ex rel. Ballew v. Woodson*, 61 S. W. 252, 255, 161 Mo. 444.

Certiorari is a writ adopted in Ohio to correct such proceedings in inferior courts as are not in conformity with the common law. *Walpole's Lessee v. Ink*, 9 Ohio, 142, 144.

#### **Appeal distinguished.**

See "Appeal."

#### **As judicial proceeding.**

See "Judicial Proceeding."

#### **As commencement of new suit.**

A certiorari sued out to reverse a judgment of a justice of the peace, like a writ of error, is the commencement of a new suit, and not the continuation of an old one. Hence the covenant of the surety for a non-resident plaintiff, on suing out a summons, to pay any sum that may be adjudged against plaintiff in that suit, does not extend to the costs of a reversal on certiorari of the judgment recovered by plaintiff before the justice in the suit commenced by the summons. *Fenno v. Dickinson* (N. Y.) 4 Denio, 84, 85.

#### **As discretionary writ.**

The writ of certiorari was not a writ at common law, but was known as a discretionary writ; not an arbitrary discretion, but a sound discretion. *Bouv. Law Dict.* As a general rule the writ will not be granted to review a proceeding where the right of appeal exists. *Gifford v. Board of Com'rs of Jasper County*, 67 N. E. 509, 510, 160 Ind. 654 (citing *McCrary v. Griswold*, 7 Iowa [7 Clarke] 248, 249).

The writ of certiorari, as known to the common law, is not a writ of right. It is not issued as of course. Whether it shall issue rests in the sound judicial discretion of the judge or court to whom the application for the writ may be made. *Guscott v. Roden*, 21 South. 313, 314, 112 Ala. 632.

Certiorari is an extraordinary remedy for the review of a cause by a proceeding instituted in the appellate court, directing the record to be certified to the latter court for review. "It is not a writ of right, but dependent on the sound discretion of the court or judge granting the writ." *O'Brien v. Dunn*, 5 Tex. 570, 574.

At common law, certiorari is not a writ of right, but may be granted or refused at the discretion of the court. Before allowing or acting upon the writ the court should be satisfied that it is essential to prevent some substantial injury to the applicant, and that the object aimed at by him would not, if accomplished, be productive of great inconvenience or injustice. It should seldom, if ever, be allowed to enable a party to take advantage of mere technical objections. *People v. City of New York* (N. Y.) 5 Barb. 43, 45.

The writ of certiorari is not granted as a matter of right. The application for it is addressed to the discretionary powers of the court, and it must be made to appear that the applicant has rights or a valid defense of which he has been deprived by the erroneous action of the justice of the peace, or that he has been unable to present them from no want of diligence or fault on his part. The errors complained of should be distinctly stated, and not consist of mere irregularities in the proceedings. A statement of all the facts proved should be embraced in the application, and, if he have rights that he has not been able to present, they should be averred, with the excuse for not presenting them, so that the court can determine for itself whether the applicant has any merits in his case and has been unjustly deprived of them and injured. *Clark v. Hutton*, 29 Tex. 123, 125.

To grant a certiorari for the purpose of reviewing the acts of the special jurisdiction created by statute, which do not proceed according to the course of the common law, rests in the discretion of the court. *Dixon v. City of Cincinnati*, 14 Ohio, 240, 244.

#### **Injunction distinguished.**

The office of the writ of certiorari is in no sense that of a restraining order. It is not the purpose of the writ to restrain or prohibit, but to annul. *Gauld v. City and County of San Francisco*, 54 Pac. 272, 273, 122 Cal. 18.

#### **Limited to judicial action.**

At common law or under the Code of Civil Procedure a writ of certiorari is only allowed where the object sought is to review a judgment or a judicial determination of the inferior tribunal or an officer acting under statutory authority, exercising judicial power. The writ lies only to inferior courts and officers exercising judicial power affecting the property or rights of the citizen. *People v. Walter*, 68 N. Y. 403. In *People v. Queens County Sup'rs*, 30 N. E. 488, 131 N. Y. 468, the court says: "The writ of certiorari is appropriate only to review the judicial action of inferior courts or of public officers, or bodies exercising under the laws judicial functions, and there is no authority to be found in the reports of this state sanctioning its use for any other purpose. When the action of a public officer or of a public body is merely legislative, executive, or administrative, although it may involve the exercise of discretion, it cannot be reviewed by certiorari." Certiorari will not lie to review the action of the city or state civil service commission in making a classification under Laws 1899, c. 370, § 10, requiring the mayor of each city of the state to appoint and employ suitable per-

sons to prescribe rules for the classification of the offices and employments in the classified service in such city, as the statute only confers administrative powers, and not judicial. *People v. Burt*, 72 N. Y. Supp. 567, 568, 65 App. Div. 157. Following such rule it was held that the action of the Albany board of control and apportionment, in investigating and rescinding a contract for street improvements, is therefore not subject to review by certiorari. *People v. Van Alstyne*, 65 N. Y. Supp. 451, 454, 53 App. Div. 1. So, too, the action of the board of commissioners of the department of public works of the city of New York in consenting to the construction by the Suburban Rapid Transit Company of an elevated railroad bridge across the Harlem river, and entering into a contract with that company for the building of the bridge at its own expense, was not judicial in its character, and not subject to review by certiorari. *People v. Commissioners of Department of Public Parks of City of New York*, 97 N. Y. 37, 43. Thus, also, the action of the board of estimate and assessment in the allowing of claims is not judicial, and therefore not reviewable on certiorari. *People v. Gilroy*, 25 N. Y. Supp. 878, 879, 72 Hun, 637. The creation of a fire district by the board of supervisors is a legislative act, and not reviewable by certiorari. *People v. Queens County Sup'rs*, 43 N. Y. Supp. 1121, 1122, 14 App. Div. 608.

At common law a certiorari was an original writ issued out of chancery or the king's bench, directed in the king's name to the judges or officers of the inferior courts, commanding them to return the records of the cause pending before them, to the end that the party might have the more sure and speedy justice. In the absence of statute, the writ issues only to inferior courts and to review only judicial action. The action of a county court in subscribing to a railroad stock and issuing bonds for payment thereof is a discretionary, and not a judicial, proceeding, and therefore not the subject of review by writ of certiorari. In *re Saline County Subscription*, 45 Mo. 52, 53, 100 Am. Dec. 337.

Certiorari is a judicial process directed to an inferior court or tribunal, and brings up simply the record of the proceedings of such inferior tribunal. The office of the writ of certiorari is to bring up for review in a superior court the record of an inferior court or of a tribunal exercising judicial functions, and it is not the office of the writ to bring up the proceedings of any other bodies or classes of public officers. *People v. Livingston County Sup'rs* (N. Y.) 43 Barb. 232, 234.

The writ issues only to inferior courts and to review only judicial actions. In *re Saline County Subscription*, 45 Mo. 52, 53, 100 Am. Dec. 337.



Primarily the province of the writ of certiorari is to pronounce on the validity of a judicial proceeding. Code Prac. art. 228, cl. 3, and article 855. This writ is granted only in case the suit is to be decided in the last resort, and where there lies no appeal, by means of which proceedings absolutely void may be set aside. *Id.* art. 857. The writ issued under the supervisory jurisdiction of the Supreme Court cannot be employed for the purposes of inquiring into the correctness of a judgment rendered when the forms of law have been followed, but only to pronounce upon the validity of a judicial proceeding. *State ex rel. Wells-Fargo Exp. Co. v. Martin*, 20 South. 729, 731, 48 La. Ann. 1249.

#### Limited to jurisdictional questions.

At common law the function of a writ of certiorari is simply to bring up for review questions affecting the jurisdiction of the inferior tribunal, there being no other adequate remedy. *State ex rel. Ballew v. Woodson*, 61 S. W. 252, 255, 161 Mo. 444.

Certiorari goes only to the jurisdiction. It does not go to any errors of judgment that may have been committed by the justice in the progress of the exercise of that jurisdiction. *Harris v. Barber*, 9 Sup. Ct. 314, 316, 129 U. S. 366, 32 L. Ed. 697.

The writ of certiorari may be granted only when there has been an excess of jurisdiction, and the review upon the writ cannot extend further than to determine whether the tribunal, board, or officer exercising judicial functions has regularly pursued its or his authority, and has acted with or without jurisdiction. *State v. Second Judicial District Court*, 62 Pac. 820, 821, 24 Mont. 494.

In *City of Nashville v. Pearl*, 30 Tenn. (11 Humph.) 249, it is said that "the writ of certiorari *ex debito justitiae* has been adopted as the almost universal method by which the circuit courts of general jurisdiction, both civil and criminal, exercising control over all inferior jurisdiction, however constituted and whatever their course of proceeding, as well where they have attempted to exercise a jurisdiction not confirmed as where there has been an irregular or erroneous exercise of jurisdiction, and in criminal proceedings as well as in civil. Instead of restricting the use of certiorari to the proceedings of inferior courts which are not according to the course of common law, and where for that reason a writ of error will not lie, it is held that it lies to remove the proceeding of a tribunal exercising jurisdiction under statutory regulation, whether in a summary way or by a mode of proceeding not according to the common law." *Hayden v. City Council of Memphis*, 47 S. W. 182, 100 Tenn. 582.

The writ of certiorari is never used to correct a mere error, but to test the jurisdiction of the tribunal or the legality of its

action. By suing out the writ a party does not affirm that the rulings made by the trial court during the progress of the trial were correct. *Porter v. Butterfield*, 89 N. W. 199, 200, 116 Iowa, 725.

In California the writ of certiorari brings up for review but one question, and that is whether the inferior tribunal or court exceeded its jurisdiction. It cannot be used to correct error of law or fact committed by the inferior tribunal within the limits of its jurisdiction. *Sherer v. Superior Court*, 96 Cal. 653, 31 Pac. 565.

The writ of certiorari will not lie to review any discretion in an action of any tribunal, nor is it within the proper scope of a writ to review the decisions of inferior tribunals upon the merits. The court awarding it, therefore, will not look into the evidence on which the inferior tribunal may have acted, except as may be necessary to the determination of jurisdiction of any question that may depend upon it. *Tomlinson v. Board of Equalization*, 12 S. W. 414, 415, 88 Tenn. 1, 6 L. R. A. 207.

A writ of certiorari, when addressed to an inferior tribunal, can only bring up for review on the record questions of jurisdiction, power, and authority of such inferior tribunal, and the appellate court is confined to the question whether the inferior court had jurisdiction and acted within its limits. *Jacksonville, T. & K. W. Ry. Co. v. Boy*, 16 South. 290, 291, 84 Fla. 389.

#### Prohibition distinguished.

The writ of certiorari can be issued only to a tribunal or person exercising judicial functions, whereas the writ of prohibition can be issued against one exercising either judicial or ministerial functions. The certiorari can be issued only when there is no appeal, nor, in the judgment of the court, any plain, speedy, and adequate remedy; whereas the statute says that prohibition may be resorted to where there is not a plain, speedy, and adequate remedy in the ordinary course of law. *People v. House*, 10 Pac. 838, 841, 4 Utah, 369.

#### Removes record only.

A writ of certiorari brings up the record only. *Appeal of Long*, 19 Atl. 806, 807, 134 Pa. 641, 26 Wkly. Notes Cas. 81, 82.

The writ of certiorari only brings up the record, and only such matters as appear from the face thereof, and which go to the jurisdiction of the tribunal to which the writ is sued out, can be reviewed by such writ. *Hannibal & St. J. R. Co. v. State*, 64 Mo. 294, 308; *Ward v. Board of Equalization of Gentry County*, 36 S. W. 648, 650, 135 Mo. 309; *State ex rel. Teasdale v. Smith*, 14 S. W. 108, 101 Mo. 174; *State ex rel. Kansas & T. Coal Ry. v. Shelton*, 55 S. W. 1008, 1012, 154 Mo.

670, 50 L. R. A. 798; *State ex rel. Ballew v. Woodson*, 61 S. W. 252, 255, 161 Mo. 444.

The writ of certiorari removes nothing but the record or entries in the nature of a record, and if it contains anything more it cannot be regarded. *People v. Metropolitan Board of Police of New York*, 39 N. Y. 506, 509.

A writ of certiorari, when used as a substantial remedy, is issued for the purpose of removing into court a record of some proceeding had before an inferior court or tribunal, in order that upon inspection of such record an action taken by the inferior court or tribunal may be judicially reviewed. The court acts upon the records brought before it, and either reverses or affirms the action below, and the only way to obtain such record is by way of return. Logically it cannot pass judgment upon the record until the record is brought before it by means of the return. *State v. Lien*, 87 N. W. 1113, 1114, 112 Wis. 282.

The writ of certiorari, when issued for the purpose of enabling a court to exercise its supervisory power over inferior tribunals, removes nothing but the record or other entry in the nature of a record of the proceedings in the court below, and, if the return contains the evidence, such evidence cannot be considered. *Gilbert v. Salt Lake City Police & Fire Com'rs*, 40 Pac. 264, 266, 11 Utah, 378.

At common law the writ of certiorari was issued to remove a record from an inferior court into the Supreme Court, to be there examined and affirmed or reversed according to law, and, when so removed, it remained in the Supreme Court until remitted by order of that court, though the writ be quashed. *Cougill v. Farmers' & Merchants' Ins. Co.*, 35 Pac. 975, 25 Or. 360.

#### **As special proceeding or suit.**

See "Special Proceeding"; "Suit."

#### **As stay of proceedings.**

A common-law certiorari carried with it a stay as a matter of course, or rather it was unnecessary to secure a separate stay, as that was involved in the writ itself, which literally removed the record out of the inferior tribunal, and thus rendered all proceedings on it there impossible in theory of law and erroneous in practice. *People v. Sturgis*, 80 N. Y. Supp. 194, 197, 39 Misc. Rep. 448.

#### **As substitute for appeal.**

Certiorari is a revisory writ, and may be issued by a superior to correct the erroneous action of an inferior court where the law has provided no remedy by appeal. "Certiorari at common law is an extraordinary legal remedy. It can be invoked only when

there is a legal right, and no other adequate legal remedy. When an appeal lies, certiorari is not the proper remedy." *Alabama G. S. R. Co. v. Christian*, 1 South. 121, 82 Ala. 307; *Memphis & C. R. Co. v. Brannum*, 11 South. 468, 469, 96 Ala. 461.

Certiorari is a writ employed for review in cases where an appeal is improperly denied, or the party is deprived of it by fraud, accident, or mistake, in which case he may have his whole case reviewed by certiorari, both as to matters of law and fact, or it granted where the right of appeal is not allowed or does not exist. *Saunders v. Sioux City Nursery Co.*, 24 Pac. 532, 534, 6 Utah, 481.

In its nature certiorari is a revisory remedy, intended only for the correction of errors of law apparent on the record. *Lamar v. Commissioners' Court of Marshall County*, 21 Ala. 772; *Glaze v. Blake*, 56 Ala. 379. It was not a substitute for an appeal, nor intended for a correction of errors of fact. *State v. Steuart* (S. C.) 5 Strob. 29. Indeed, it would not lie where an appeal was given, if the objection be not to the want of jurisdiction but to the merits, for that is more properly the subject of an appeal. *Dean v. State*, 63 Ala. 153, 154 (citing 2 Bac. Abr. 165); *Farmington River Water Power Co. v. County Com'rs*, 112 Mass. 206, 217.

The writ of certiorari to remove the record from an inferior jurisdiction is designed to correct errors in law and not of fact, and it is not a substitute for appeal. *State v. Steuart* (S. C.) 5 Strob. 29, 32.

In *Burgett v. Apperson*, 52 Ark. 213, 12 S. W. 559, the court said the writ of certiorari "is granted in two classes of cases: First, when it is shown that the inferior tribunal has exceeded its jurisdiction; and, second, when it appears that it had proceeded illegally, and no appeal will lie, or that the right has been unavoidably lost. Mere errors are never reviewable on certiorari, at the instance of one who has lost the right of appeal by his own fault, or who neglects to apply for the writ as soon as possible after it becomes necessary to resort to it. It cannot be used as a substitute for appeal to correct errors, where an appeal is provided, except by a party who could have appealed." Thus, certiorari will not lie, at the instance of creditors of a decedent's estate, to review the action of the probate court in classifying claims against the probate estate. *Merchants' & Planters' Bank v. Fitzgerald*, 33 S. W. 1064, 1065, 61 Ark. 605.

The writ was issued at common law, not only for the purpose of reviewing the proceedings of the lower court, as a writ of review after final judgment, but as a means of removing the entire cause for hearing and determination in another court. The writ was not one of right, but was always al-

lowed or refused in the discretion of the judge or chancellor. The writ of certiorari is not used so much in this country, and is not available to review an interlocutory order of the circuit court in a proceeding in which it has jurisdiction, before the final determination of such proceeding, on the alleged ground that the circuit court had no jurisdiction to make the order. *State ex rel. Walbridge v. Valliant*, 27 S. W. 379, 123 Mo. 524.

"Certiorari" is only a mode of redress where the remedy by appeal is not provided. *Thompson v. Reed*, 29 Iowa, 117, 118.

#### Writ of error distinguished.

Certiorari is a remedy for the review of the decision of a lower tribunal by a writ issued from an appellate court, requiring the record of the lower court to be certified up for review. "In some respects there is a difference between a writ of error and a writ of certiorari, and in some respects there is a strong resemblance. The former lies where the proceedings are according to the course of the common law; in other cases a writ of certiorari is the proper writ. A writ of error is a writ of right; a writ of certiorari is not. It is a matter of sound discretion to grant or refuse it. There are several other points of difference. They are like in this: that no one but a party to the record, or one who has a direct and immediate interest in it or is privy thereto, can maintain either of the writs." *Bath Bridge & Turnpike Co. v. Magoun*, 8 Me. (8 Greenl.) 292, 293; *Inhabitants of Levant v. Penobscot County Com'rs*, 67 Me. 429, 433.

The difference between writs of error and certiorari is not well defined in our practice, but, so far as there is any general rule on the subject, the former is the appropriate remedy where the proceedings are according to the course of the common law; the latter where the proceedings are of a different character. In either case there must have been, however, what is equivalent to a final order or judgment of the inferior tribunal, before the writ can be issued. *Ewing v. Hollister*, 7 Ohio (7 Ham.) 138, 140, pt. 2.

A writ of certiorari is in the nature of a writ of error. The court is bound to determine, upon an inspection of the whole record, whether the proceedings are legal or erroneous. The right will not be granted for the correction of merely harmless, technical, or formal errors, which are not shown to have resulted prejudicially or to have caused substantial injustice to relator. The matter to be determined is substance, and not form. *McAloon v. License Com'rs of Pawtucket*, 46 Atl. 1047, 1048, 22 R. I. 191.

A writ of certiorari, when sued out to review the decision of a lower judicial tri-

bunal, is in the nature of a writ of error, and therefore the proper practice is to confine the review to errors of law, and not to determine disputed questions of fact. *McAdam v. Block*, 44 Atl. 208, 209, 63 N. J. Law, 508.

While the writ of certiorari is not a writ of error, it is nevertheless a means by which the power of the court in the premises can be inquired into. *McClatchy v. Superior Court of Sacramento County*, 119 Cal. 413, 419, 51 Pac. 696, 39 L. R. A. 691.

The writ of certiorari, except in cases otherwise specifically provided by statute, is in the nature of a writ of error, with this difference: that defendant brings up only the record of the inferior tribunal for inspection, and the trial upon it is a trial of questions jurisdictional in their nature, and not a trial *de novo*, except of matters affecting the jurisdiction of the court. The writ can only issue on final judgment, and accordingly a proceeding to obtain a dram-shop license cannot be removed from a county court by certiorari until it has been finally disposed of by that court. *State v. Schneider*, 47 Mo. App. 669, 675.

A writ of error is the appropriate remedy to obtain a review where the proceedings are according to the course of the common law; certiorari where the proceedings are of a different character. In either case, however, there must have been what is equivalent to a final order or judgment of the inferior tribunal, before the writ can be issued. *Ewing v. Hollister*, 7 Ohio (7 Ham.) 138, 140, pt. 2.

A writ of certiorari, when its object is not to remove a case before trial or to supply defects in a record, but to bring up after judgment the proceedings of an inferior court or tribunal whose procedure is not according to the course of common law, is in the nature of a writ of error. *Staffords v. King* (U. S.) 90 Fed. 136, 141, 32 C. C. A. 536 (citing *Harris v. Barber*, 9 Sup. Ct. 314, 129 U. S. 366, 369, 32 L. Ed. 697).

The writ of certiorari is the appropriate writ for the removal of a cause before judgment, and the writ of error is the writ which removes it afterwards. *Commonwealth v. Simpson* (Pa.) 2 Grant, Cas. 438, 439.

#### Writ of review or inquiry.

See "Writ of Review."

A writ of certiorari to inquire into the cause of detention, and the writ of certiorari to review the determination of an inferior tribunal, are two separate and distinct writs. The latter writ can be issued only by the court in general or special term, and is directed to the inferior tribunal. The return is made to the clerk, and the argument upon the return must be heard at general term.

It is, as its name indicates, a writ of review under which the determination arrived at may be reviewed at the general term, and the evidence before the tribunal may be examined, to see if it authorizes the conclusion reached. The writ of certiorari to inquire into the cause of detention, however, is not in its nature essentially a writ of review. The writ is directed to the sheriff or person having the prisoner in custody. He is required to return to the judge issuing the writ by what right he holds the custody of the person detained. Under this requirement he returns simply the commitment. He has not possession of the evidence upon which the commitment was granted. He cannot certify any such evidence, nor is he required to. Upon such writ the same questions arise, the same facts appear for determination, and the same limitation rests upon the power of the court as upon the writ of habeas corpus. *People v. Seaman*, 29 N. Y. Supp. 329, 330, 8 Misc. Rep. 152.

## CESSAVIT.

Cessavit was an ancient process of the common law, in use in the law of landlord and tenant, for the collection of rent from a tenant. "By such process the landlord could seize the land itself for the rent in arrear, and hold it until payment was made. It has been obsolete for ages, and exists only in the memory of legal antiquaries." *Emig v. Cunningham*, 62 Md. 458, 460.

## CESTUI QUE TRUST.

A cestui que trust is a person for whose benefit the trust is created. *Dillenbeck v. Pinnell* (Iowa) 96 N. W. 860, 861.

## CHAFER.

A chafer is the name applied to a covering of old material over the hatchway of a vessel. *The Hyades* (U. S.) 124 Fed. 58, 59, 59 C. C. A. 424.

## CHAIN OF CIRCUMSTANCES.

The expression "chain of circumstances," in an instruction in a criminal case, conveys substantially the same idea as would that of "inculpatory facts." Where a chain of circumstances is the means by which the guilt of a defendant is to be established, each necessary link in that chain must be established beyond a reasonable doubt, for the reason that the chain without the necessary links would be incomplete and ineffectual. *State v. Myers*, 40 Pac. 626, 627, 12 Wash. 77.

To constitute a chain of circumstances sufficient to establish guilt, each independent fact in the chain relied on must be estab-

lished to a moral certainty or beyond a reasonable doubt. *People v. Phipps*, 39 Cal 326, 333.

It is incorrect to speak of a body of circumstantial evidence as a "chain," and allude to the different circumstances as the "links" constituting such chain, for a chain cannot be stronger than its weakest link, and if one link fails the chain is broken, and it is not true that each and every of the minor circumstances introduced to sustain ultimate facts must be proven with the same degree of certainty. *Clare v. People*, 9 Colo. 122, 123, 10 Pac. 790.

## CHAIN OF TITLE.

Where a grantor of land agreed to show and present to the grantee a perfect "chain of title from the U. S. government," the words "chain of title from the U. S. government" mean the successive links, each perfect in itself, to communicate to the grantee, and invest in him, the title of the government, and not merely a colorable title, with possession and payment of taxes, sufficient to bar a recovery by an adverse claimant under the statute of limitations. *Payne v. Markle*, 89 Ill. 66, 69.

## CHAIN OF TRANSFER.

The phrase "chain of transfer," as used in Rev. St. art. 3192, providing that the term "title," as used in the preceding article, means a regular chain of transfer, means consecutive written transfers. *Finch v. Trent*, 22 S. W. 132, 134, 3 Tex. Civ. App. 568.

## CHAIR.

The term "chair," within the meaning of a statute exempting chairs, includes a barber's chair. *Terry v. McDaniel*, 53 S. W. 732, 733, 103 Tenn. 415, 46 L. R. A. 559.

## CHAIRMAN.

6 & 7 Wm. IV, c. 79, providing that proceedings of all meetings should be entered in a book and signed by the chairman of such respective meetings, authorizes the signing of the minutes of the meeting by the chairman of the next succeeding meeting, where he was also the chairman at the first meeting. *West London R. Co. v. Bernard*, 3 Q. B. 873.

## CHALLENGE.

A challenge to fight a duel is a writing which, when connected with the circumstances of the quarrel and conduct of the parties, shows an intention to write or solicit a meeting or intervention in order to fight with deadly weapons, and it is not neces-

sary that the writing should expressly state that a meeting is requested with a view to fight, and to describe the weapon which the parties are to use. *Commonwealth v. Hart*, 29 Ky. (6 J. J. Marsh.) 119, 121.

A challenge to fight a duel is a requisition, demand, or request to fight with deadly weapons. Expressing a willingness or readiness to fight, should the other party desire such an encounter, is not a challenge. *Commonwealth v. Tibbs*, 31 Ky. (1 Dana) 524.

"Challenge to fight," as used in St. 1796, providing that if any person shall challenge another to fight a duel with a dangerous weapon he shall be punished, is an offense composed of the forming, sending, and offering on the one side of the offer to fight such duel, and the receiving or knowing the contents, and then rejecting, on the other side. *State v. Gibbons*, 4 N. J. Law (1 Southard) 40, 56.

Any word spoken or written, or any sign uttered or made, to any person, expressing or implying, or intended to express or imply, a desire, bequest, invitation, or demand to fight a duel, or to meet for the purpose of fighting a duel, is deemed a challenge. *Gen. St. Minn.* 1894, § 6490.

"Challenging," as used in section 21, Act March 4, 1797, declaring that if any person shall in any manner disturb the peace by threatening, quarreling, challenging, etc., he shall be liable, etc., means some verbal abuse, and does not embrace the giving of a written challenge. *State v. S. S.*, 1 Tyler, 180, 181.

#### CHALLENGE (In Practice).

See "Peremptory Challenge"; "Principal Challenge."

A challenge is an objection made to the swearing in and impaneling of the grand jury, and not an objection made after they are sworn in and impaneled. *People v. Fitzpatrick*, 1 N. Y. Cr. R. 425, 426, 432.

A challenge of a grand juror is a preliminary objection to the qualification of the juror, and its purpose is to prohibit the juror from sitting and inquiring into the charges against the party interposing the challenge, and, if the challenge be allowed, the juror cannot be present at or take part in the considerations of the charge against the defendant who interposed the challenge. Therefore, after the grand jury had completed its work and been discharged, the conditions which make a challenge possible no longer exist. *People v. Travers*, 26 Pac. 88, 89, 88 Cal. 233.

A challenge is an objection made to the trial jurors, and is of two kinds: (1) To the panel; (2) to an individual juror. *Pen. Code*

Cal. 1903, § 1055; *Pen. Code Idaho* 1901, § 5414; *Rev. St. Utah* 1898, § 4816; *Rev. Codes N. D.* 1899, § 8142; *Code Cr. Proc. S. D.* 1903, § 317.

A challenge is an objection to a particular juror, and may be either (1) peremptory or (2) for cause. *Ann. Codes & St. Or.* 1901, § 117.

#### CHALLENGE FOR CAUSE.

Under the common-law practice challenges for cause of jurors were divided into two classes: Principal challenges, or challenges for principal cause; and challenges to the favor. The principal challenge showed a cause which positively, or by necessary legal implication, disqualified the juror from sitting in the case. The challenge to the favor was grounded on circumstances raising a suspicion of the existence of actual bias in the mind of a juror for or against a party. *Turner v. State*, 40 S. E. 308, 114 Ga. 421.

A challenge for cause is an objection to a particular juror, and is either (1) general, that the juror is disqualified from serving in any case; or (2) particular, that he is disqualified from serving in the case on trial. *Cr. Code N. Y.* 1903, § 374.

A challenge for cause is an objection to a juror, and may be either (1) general, that the juror is disqualified from serving in any action, or (2) particular, that he is disqualified from serving in the action on trial. *Ann. Codes & St. Or.* 1901, § 119.

#### CHALLENGE PROPTER AFFECTUM.

Challenges propter affectum are for suspicion of bias or partiality, and may be either a principal challenge, or to the favor. *Harrisburg Bank v. Forster* (Pa.) 8 Watts, 304, 306. See, also, *State v. Baldwin* (S. O.) 1 Tread. Const. 289, 296.

Challenges propter affectum were of two kinds: (1) For principal cause; and (2) to the favor. A challenge is called principal "because, if it be found true, it standeth sufficient of itself, without leaving anything to the conscience or discretion of the triors." *Co. Litt.* 156b. It is "the naming of some exception, which, being found true, the law presently allows." *Term de la L.* "Challenge"; *Temple v. Sumner*, Smith, 226, 228; *State v. Howard*, 17 N. H. 171, 191. It admits of no answer, counterplea, or qualification. If it be for kindred, it is immaterial that the juror is also of kin, though in a nearer degree, to the other party, or that, notwithstanding the kinship, the triors find him to be in fact indifferent. *St. 7 Edw. IV*, p. 4, pl. 12; *Brooke*, Abr. "Challenge," 167; *Co. Litt.* 157a; *Hunsdon v. Baker*, Cro. Eliz. 663; 21 Vin. Abr. 237, 238. No evidence is heard or considered except such as tends to

show the existence or nonexistence of the particular fact alleged as the ground of the challenge. The triors are sworn to well and truly try whether the juror is a cousin, servant, or tenant, etc., as the case may be, of the party. *Barrett v. Long*, 3 H. L. Cas. 395, 400; *Rex v. Dolby*, 1 Car. & K. 238. A fact which, if established, was not, in judgment of law, inconsistent with indifference—which admitted of qualification, and might be explained away by other evidence—was never a ground of principal challenge. *State v. Sawtelle*, 32 Atl. 831, 836, 66 N. H. 488.

In his classification of challenge to the police, Lord Coke says, of the challenge propter affectum, that the right exists "if the juror be of blood to either party, and this is a principal challenge that the law presumeth that one kinsman doth favor another before a stranger, and how far remote soever he is of kindred yet the challenge is good, and if the plaintiff challenge a juror for kindred to the defendant it is not counterplea to say that he is of kindred also to the plaintiff, though he be in nearer degree; for the words of the venire facias forbiddeth a juror to be of kindred to either party." *Jewell v. Jewell*, 24 Atl. 858, 859, 84 Me. 304, 18 L. R. A. 473.

Challenge propter affectum is a challenge on account of the relationship of the juror to one of the parties to the case. "By the common law any one related by blood or marriage, as remotely as the ninth degree even, is subject to challenge propter affectum, and no evidence to the contrary will be heard. The fact constitutes disqualification." *State v. Williams* (Del.) 18 Atl. 949, 950, 9 Houst. 508; *State v. Williams* (Del.) 18 Atl. 949, 950, 9 Houst. 508.

#### CHALLENGE TO THE ARRAY.

A challenge to the array is a challenge to the entire panel summoned and returned to the sheriff as jurors, and, if allowed, the entire jury or panel is discharged. If not allowed when it should have been, it vitiates and renders void the trial by a jury selected from this improper array. This objection to the panel or challenge to the array can only be taken when there is partiality or misconduct of the sheriff, or some irregularity in making out the lists. *Moore v. Navassa Guano Co.*, 41 S. E. 293, 294, 130 N. C. 229 (citing *State v. Speaks*, 94 N. C. 865).

A challenge to the array is an objection to all of the jurors collectively, because of some defect in the panel as a whole. If for any reason the impartiality of any one or more of the jurors whose names appear on the panel is suspected, the proper method of determining the state of feeling of such juror or jurors is by challenge to the polls. *Thompson v. State*, 34 S. E. 579, 580, 109 Ga. 272.

"A challenge to the array is an irregular form of pleading by which exception is made to all the jurors upon the venire for some original defect in making the return thereto. 1 Chit. Cr. Law, 537. It must relate to some defect or partiality in arraying the panel." *Durrah v. State*, 44 Miss. 780, 796 (quoting Coke, Litt. "A").

Challenges to the array are exceptions to the whole panel, and are generally founded on a charge of partiality, or some default of the sheriff or other officer who summoned the jury. *Boyer v. Teague*, 11 S. E. 665, 678, 106 N. C. 576, 19 Am. St. Rep. 547.

#### CHALLENGE TO THE FAVOR.

A challenge to the favor is one grounded upon facts giving rise rather to a suspicion of partiality than to a positive presumption or belief. *Thompson v. State*, 34 S. E. 579, 580, 109 Ga. 272.

Challenge for favor is where the person challenged is so situated because of connection by marriage that a suspicion is raised against his impartiality, which continues until removed. *Waterhouse v. Martin*, 7 Tenn. (Peck) 374, 377.

Challenge to the favor is when the party alleges any such exception against one or more of the jurors, which is not forthwith sufficient upon acknowledgment of the truth thereof, but rather arbitrable and considerable by the rest of the jurors, as if the son of the juror had married the daughter of the adverse party. Term. de la L. "Challenge." It sheweth causes of favor which must be left to the conscience and discretion of the triors, upon hearing their evidence, to find him favorable or not favorable. It raises no question of law, but the question of fact whether the juror stands indifferent between the parties. *State v. Sawtelle*, 32 Atl. 831, 836, 66 N. H. 488.

"Challenges to the favor are where the party hath no principal challenge, but objects only to some probable circumstance of suspicion, as acquaintance and the like, the validity of which must be left to the determination of the triors whose office is to decide whether the juror be favorable or unfavorable." *State v. Baldwin* (S. C.) 1 Tread. Const. 289, 292.

#### CHALLENGE TO THE PANEL.

A challenge to the panel is an objection made to all the jurors returned, and may be taken by either party. Pen. Code Cal. 1903, § 1058; Pen. Code Idaho 1901, § 5417; Rev. St. Utah 1898, § 4819.

A challenge to the panel is an objection made to all the trial jurors returned, and may be taken by either party. Rev. Codes N. D. 1899, § 8145; Code Crim. Proc. S. D. 1903, § 320; Rev. St. Okl. 1903, § 5455.

A challenge to the panel is an objection made to all the jurors returned. Rev. St. Utah 1898, § 3139.

A challenge to the panel is an objection made to all the trial jurors returned, and may be taken as well to the panel returned for the term, as to an additional panel ordered to complete the jury. Cr. Code N. Y. 1903, § 361.

#### CHALLENGE TO THE POLLS.

Challenges to the polls in capita are exceptions to particular jurors, and reducible to four heads: Propter honoris respectum; propter defectum; propter affectum; and propter delictum. Harrisburg Bank v. Forster (Pa.) 8 Watts, 304, 306.

#### CHAMBER.

See "At Chambers."

A room or apartment in a house; a private repository; a treasury. Sometimes used to designate a court, a commission or an association of persons habitually meeting together in an apartment, e. g., the "Star Chamber," "Chamber of Deputies," "Chamber of Commerce." Black, Law Dict.

#### CHAMBER BUSINESS.

All business done out of court by the judge is called "chamber business." But it is not necessary to be done in what is usually called "chambers." Chamber business may be done, and often is done, on the street, in the judge's own house, at the hotel where he stops, when absent from home, or it may be done in transitu, on the cars, in going from one place to another within the proper jurisdiction to hold court. For the purposes of jurisdiction, the chambers of the judge are wherever he happens to be in his circuit or district, when the exigencies of the case call for the transaction of chamber business, and a judge is as clearly engaged in the discharge of the duties of his office, when going from one place of holding court to another, for the purpose of holding court, and just as much entitled to protection from his own government against murderous or other assaults from desperate suitors, on account of his judicial action, as when actually engaged in business at chambers, or in holding court. In re Neagle (U. S.) 39 Fed. 833, 855, 5 L. R. A. 78.

#### CHAMBER SURVEY.

At an early date in Pennsylvania surveyors often made drafts on paper of pretended surveys, and returned them to the land office as duly surveyed, instead of going into the fields and establishing the lines and marking corners upon the ground, and

these false and fraudulent pretenses of surveys never made were called "chamber surveys." Schraeder Min. & Mfg. Co. v. Pack-er, 9 Sup. Ct. 885, 388, 129 U. S. 688, 32 L. Ed. 760.

#### CHAMBERS.

Formerly in England there were four terms of court in each year, and their duration was so fixed that there were only 91 days in each year during which courts could be in session, and there consequently grew up a practice of hearing many matters out of court, with the same effect as if held while the court was in session. At a later day the practice arose of disposing of such matters at certain hours during term time when the court was not in formal session, and subsequently certain hours of each day were fixed in which one of the judges would hear these matters while the court was actually in session. The motions and orders thus made were said to be held and disposed of at his "chambers" rather than in the courtroom, but the term "chambers" finally became extended so as to include any place, either in or out of the courtroom, at which a judge might hear allegations or make orders, while the court is not in session, in matters pending in that court. Von Schmidt v. Widner, 34 Pac. 109, 110, 99 Cal. 511.

As used in Const. art. 6, § 15, and Gen. St. 1894, § 824, relating to the power and jurisdiction of a judge at chambers, the word "chambers" means the private room or office of a judge, where for the convenience of parties he hears matters and transacts business which do not require a hearing by the judge as a court. Hoskins v. Baxter, 66 N. W. 969, 970, 64 Minn. 226.

Chambers "are places in which the work of the judges out of court is performed, and do not have any local habitation. All business done out of court by the judge is called 'chamber business,' but it is not necessary to be done in what is usually called 'chambers.' The chambers of the judge, where chambers are provided, are not an element of jurisdiction, but are a convenience to the judge and to suitors—places where the judge at proper times can be readily found and business conveniently transacted; but the chambers of the judge, as a legal entity, are something of a myth. For the purposes of jurisdiction, the chambers of the judge are wherever he happens to be in his circuit or district when the exigencies of the case call for the transaction of chamber business. The Justices of the Supreme Court at Washington have in fact no chambers, as they study and do their work out of court, at a room in their own residences. In some courthouses there are rooms that are called 'chambers,' in which the work of the judges out of court is in part performed." In re Neagle (U. S.) 39 Fed. 833, 855, 5 L. R. A. 78.

## CHAMBRES.

A will reserving two of the "chambres" of the house, given to another to the use of and during the life of a certain other person, should not be construed as meaning sleeping rooms or rooms in the upper story, but as equivalent to the English word "room," meaning rooms as well in the lower story as the apartment above, whether sleeping rooms or otherwise. *Wusthoff v. Dracourt* (Pa.) 8 Watts, 240, 242.

## CHAMFER.

A chamfer is a small gutter or furrow; a groove; the slope or bevel produced by cutting off the edge of anything which was originally right angled. *Syracuse Chilled Plow Co. v. Robinson* (U. S.) 85 Fed. 502, 503 (citing Webster).

## CHAMPERTY.

See "Maintenance (Of Suits)."

"The word 'champerty' is derived from an old French law term, 'champart,' which was used to denote a customary field rent, consisting of a certain part of the crops in kind, or what is customarily known in this country as 'share rent.' 'Champerty,' therefore, was probably first used in England as a law term by the followers of William of Normandy and their successors to denote a legal agreement by a stranger to assist in the prosecution of suit in consideration of the subsequent receipt of a part of the produce or fruits of the litigation." *Small v. Mott* (N. Y.) 22 Wend. 403, 405.

"Champerty is the unlawful maintenance of a suit, in consideration of some bargain to have part of the thing in dispute, or some profit out of it." *Brown v. Beauchamp*, 21 Ky. (5 T. B. Mon.) 413, 416, 17 Am. Dec. 81; *Roberts v. Cooper*, 61 U. S. (20 How.) 467, 484, 15 L. Ed. 969; *Waller's Adm'x v. Marks* (Ky.) 38 S. W. 894, 897; *Barnes v. Strong*, 54 N. C. 100, 103; *Rust v. Larue*, 14 Ky. (4 Litt.) 411, 413, 418, 14 Am. Dec. 172; *Holloway v. Lowe* (Ala.) 7 Port. 488, 490; *Ware's Adm'r v. Russell*, 70 Ala. 174, 179, 45 Am. Rep. 82; *Price v. Carney*, 75 Ala. 548, 553; *Richardson v. Rowland*, 40 Conn. 565, 570; *Haskins v. Newcomb* (N. Y.) 2 Johns. 405, 409; *Johnson v. Van Wyck*, 4 App. D. C. 294, 315, 41 L. R. A. 520. Champerty, by the common law, consisted in a person's upholding a controversy, he having no interest in it, under a contract to have a part of the property or subject in dispute. *Preston v. Breckinridge*, 86 Ky. 619, 632, 10 Ky. Law Rep. 2, 6 S. W. 341, 644; *Waller's Adm'x v. Marks*, 100 Ky. 541, 552, 9 Ky. Law Rep. 121, 38 S. W. 894; *Scott v. Harmon*, 109 Mass. 237, 238, 12 Am. Rep. 685. It covers all transactions and contracts, whether by counsel or others, to have

the whole or some part of the thing or damages recovered. A contract between parties to two litigated attachment suits and their attorneys is not champertous, which, settling and adjusting the matters of controversy between the parties to the suits, provides that judgments should be rendered for one-half of the proceeds of property which had been levied on and sold under the attachments, and then in the hands of the sheriff; that designated parts of the fund, when collected, should be paid to the plaintiffs, and the balance divided in stated proportions between the attorneys of the parties plaintiff and defendant as compensation to them for services rendered in the suits, and in other controversies between the parties, and to be rendered in the prosecution of suits for the recovery of the funds from the sheriff or his sureties; and that one of the attorneys should have the control of the judgments, and of the fund to be realized from the sheriff or his sureties, until the agreement has been fully executed. *Price v. Carney*, 75 Ala. 548, 553. A contract by which a defendant in attachment transfers and assigns to his attorney the personal property attached, in consideration of professional services rendered and to be rendered in defense of the suit, and in the prosecution of a contemplated action to recover damages for the wrongful suing out of the attachment, stipulating for his own diligence in defense of the suit and the recovery of the attachment lien, and giving the attorney the entire control and management of the suit, is not champerty. *Ware's Adm'r v. Russell*, 70 Ala. 174, 179, 45 Am. Rep. 82. A contract between an heir at law of a testatrix and certain devisees and legatees under the will, by which the first party agreed to abandon a proposed contest of the will in consideration of which he was to be paid the amount of a bequest intended to be given to him, but omitted from the will by mistake of the draftsman, is not in violation of the law against champerty. *Waller's Adm'x v. Marks*, 100 Ky. 541, 552, 88 S. W. 894, 19 Ky. Law Rep. 121.

Champerty is an agreement on the part of the champertor to carry on the party's suit at his own expense, and for remuneration by sharing the money or thing to be recovered. *Jewel v. Neldy*, 16 N. W. 141, 61 Iowa, 299. It is an agreement to prosecute at one's own risk and expense, and take part of the thing received in compensation. *Weakly v. Hall*, 13 Ohio, 167, 175, 42 Am. Dec. 194. As the term is used in American law, it "is the unlawful maintenance of a suit in consideration of some bargain to have a part of the thing in dispute, or some profit out of it, and covers all transactions and contracts whereby counsel or others have the whole or part of the thing or damages recovered." *Poe v. Davis*, 29 Ala. 676, 683. It is an aggravated species of maintenance, and was "punishable at the common law as well as



forbidden by various statutes." *Barnes v. Strong*, 54 N. C. 100, 103; *Thurston v. Percival*, 18 Mass. (1 Pick.) 415, 416. "The gist of the offense is the maintenance and unlawful meddling with another suit, which was supposed to suppress justice and truth, or at least to work a delay." *Bayard v. McLane* (Del.) 3 Har. 139, 208; *Davis v. Settle*, 26 S. E. 557, 560, 43 W. Va. 17.

In defining "maintenance," Mr. Greenleaf says: "This crime is said to consist in the unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hindrance of common right. It is of two kinds, namely, 'ruralis,' or in the country, and 'curialis,' or in the courts. The former is usually termed 'champerty,' and is committed where one upholds a controversy under a contract to have part of the property or subject in dispute. The latter alone is usually termed 'maintenance,' and is committed where one officiously, and without just cause, intermeddles in and promotes the prosecution or defense of a suit, in which he has no interest, by assisting either party with money or otherwise." *Wheeler v. Harrison*, 50 Atl. 523, 526, 94 Md. 147.

As defined by Blackstone, "champerty" is the officious interference in a suit, not in any way belonging to any one, by maintaining or assisting either party with money or otherwise to prosecute or defend. The ground upon which contracts were held, as against the policy of the law, voidable for champerty or maintenance, were that there might be combinations of powerful individuals to oppress others, which might influence or even overawe the court; that they tended to the promotion of unfounded claims, and to disturb the public repose, to promote litigation, and to bring strife and quarrel among neighbors. With the progress of society these reasons have everywhere lost much of their force, and the whole doctrine has been rejected in several states of the Union as antiquated and incongruous with the present state of society. *Manning v. Sprague*, 18 N. E. 673, 148 Mass. 18, 1 L. R. A. 516, 12 Am. St. Rep. 508.

Champerty is a species of maintenance, which is defined as the "officious intermingling in a lawsuit by a mere stranger, without profit. Champerty involves the element of compensation for such unlawful interference by bargain for part of the matter in suit or some profit growing out of it, or, according to some of the authors, as well also for the whole of the thing in dispute." Maintenance was an indictable offense at common law, but has fallen into disuse. *Gilman v. Jones*, 5 South. 785, 786, 87 Ala. 691, 4 L. R. A. 113.

Champerty is a species of maintenance, which is defined as the "officious intermeddling with a suit which in no way belongs to one, or maintaining or assisting either party

with money or otherwise." It is of the essence of the offense that there shall be a suit or any antagonistic proceeding between the parties, in which assistance is to be rendered in litigation. Hence a contract by which one of two heirs, who are having a controversy over the appointment of an administrator, agrees to pay a third person half of what he can save by buying out the interest of the other, is not champertous. *Joy v. Metcalf*, 37 N. E. 671, 161 Mass. 514.

There are two essential elements in a champertous agreement: First, there must be an undertaking by one person to defray the expenses, in whole or in part, of another's suit; and, second, an engagement or promise on the part of the latter to divide with the former the proceeds of the litigation in the event it proves successful. In the case of an absolute sale and transfer of an undivided interest which the grantor has or may afterwards acquire in land in the adverse possession of others, the grantor having no suits pending to recover his interests until an agreement that the grantee should institute legal proceedings in his own name and at his own expense for the purpose of recovering and establishing the title of the grantor so conveyed, no part of which is to be divided between them, but by which agreement the grantor is to be paid a given price per acre for the land recovered, and nothing if the litigation prove unsuccessful, both the essential elements to a champertous agreement are wanting, and the transaction, therefore, is not void for champerty. *Torrence v. Shedd*, 112 Ill. 466, 475.

An obliging advance made by attorneys upon an order upon them, given by their client under his misapprehension that their debt had been paid, is not champerty. The essential ingredient of champerty is the intent to promote litigation. *The J. Carl Jackson* (U. S.) 29 Fed. 396, 397.

A contract may be champertous and void although there be no stipulation as to the expenses of the suit, and an agreement by which an attorney is to receive, for his services in recovering a claim, a part of the thing or claim to be recovered, is void. *Scobey v. Ross*, 13 Ind. 117, 119.

Champerty is a species of maintenance, being a bargain with a party to divide the land or other matter sued for between them if they prevail in the suit, though if a man have any interest, however slight, in the subject-matter, it is not maintenance. *Reece v. Kyle*, 49 Ohio St. 475, 481, 31 N. E. 747, 16 L. R. A. 723.

To maintain the suit of another is unlawful, unless the person maintaining it has some interest in the subject thereof, distinct from what he may acquire by agreement to maintain, or his connection with the suitor in some social relation; but where one has

such an interest, whether it be great or small, vested or contingent, certain or uncertain, he may maintain the suit. So, also, where there is consanguinity or affinity between the suitor and him who gives aid to the suit, the latter may maintain. *Thalhimer v. Brinckerhoff* (N. Y.) 3 Cow. 623, 648, 15 Am. Dec. 308.

According to the usual definition of "champerty," it is that species of maintenance which consists of a bargain with the plaintiff or defendant for a part of the thing recovered in a suit in law or chancery, whether land or something else, which suit the champertor undertakes to carry on or prosecute at his own expense, and at common law champerty was a public offense. *Casserleigh v. Wood* (U. S.) 119 Fed. 308, 312, 56 C. C. A. 212.

Under the statute of that state, it is held in Colorado that no such offense as "champerty" exists, except as defined by implication of statute. *O'Driscoll v. Doyle*, 73 Pac. 27, 28, 31 Colo. 193.

#### Contingent fee.

A contract of an attorney to procure defendant's release from a corporate subscription contract, in consideration of receiving a certain sum if he procures the release, and an additional sum for costs and compensation of the attorney, does not constitute either champerty or maintenance. *Wheeler v. Harrison*, 50 Atl. 523, 526, 94 Md. 147.

Where the owner of land has suits pending between him and others claiming the same lands, and employs counsel to prosecute his suit to recover the same, under a contract to pay him certain fees for his services, the amount of which are wholly or in part contingent upon the recovery of the amount in controversy, the contract is not champertous. *Anderson v. Caraway*, 27 W. Va. 385, 396.

#### At expense of champertor.

Champerty is a species of maintenance, "being a bargain with the plaintiff or defendant to divide land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry the party suit at his own expense." *Lewis v. Broun*, 14 S. E. 444, 445, 36 W. Va. 1 (citing 4 Bl. Comm. 125); *Key v. Vattier*, 1 Ohio (Ham.) 132, 143; *McIntyre v. Thompson* (U. S.) 10 Fed. 531, 532; *Spicer v. Jarrett*, 61 Tenn. 454, 457; *Duke v. Harper*, 2 Mo. App. 1, 4; *Duke v. Harper*, 66 Mo. 51, 56, 37 Am. Rep. 314; *Thalhimer v. Brinckerhoff* (N. Y.) 3 Cow. 623, 625, 15 Am. Dec. 308; *Sedgwick v. Stanton*, 14 N. Y. (4 Kern.) 289, 294; *Ogden v. Des Arts*, 11 N. Y. Super. Ct. (4 Duer) 275, 283 (citing 2 Bl. Comm.; 1 Bouv. Law Dict. 218); *Thompson v. Reynolds*, 73 Ill. 11, 13; *Scott v. Harmon*, 109 Mass. 237, 238, 12 Am. Rep. 685; *Burnham*

*v. Heselton*, 24 Atl. 955, 956, 84 Me. 578; *Reece v. Kyle*, 31 N. E. 747, 748, 49 Ohio St. 475, 16 L. R. A. 723; *Bayard v. McLane*, 3 Har. (Del.) 139, 208; *Nickels v. Kane's Adm'r*, 82 Va. 309, 312; *Wheeler v. Pounds*, 24 Ala. 472, 473; *Hamilton v. Gray*, 31 Atl. 315, 67 Vt. 233, 48 Am. St. Rep. 811; *Meeks v. Dewberry*, 57 Ga. 263, 264; *Allard v. Lamirande*, 29 Wis. 502, 508; *Johnson v. Van Wyck*, 4 App. Cas. (D. C.) 294, 315, 41 L. R. A. 520; *Backus v. Byron*, 4 Mich. 535, 538.

The text-writers are not entirely agreed in their definitions of the term "champerty." Lord Coke defines it thus: "To maintain and have part of the land, or anything out of the land, or part of the debt, or anything in plea of suit." Mr. Chitty defines it thus: "Champerty is the purchasing a suit or right of action of another person, or, ordinarily, it is a bargain with the plaintiff or defendant to divide the land or other matter between them if they prevail at law, whereupon the champertee is to carry on the party's suit at his own expense." Mr. Blackstone defines it thus: "A bargain with the plaintiff or defendant to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense." *Omaha & R. V. Ry. Co. v. Brady*, 57 N. W. 767, 772, 39 Neb. 27 (citing 4 Bl. Comm. 135); *Aultman v. Waddle*, 19 Pac. 730, 734, 40 Kan. 195.

Champerty is not a criminal offense, nor is a champertous contract illegal under our statutes; and, if a contract is champertous and voidable, it is because it is contrary to public policy to enforce it. An agreement whereby attorneys are to prosecute an action for personal injuries, and that the attorneys are to receive an amount equal to one-half of the amount recovered as compensation, is not champertous, for in order to constitute champerty the contract between the attorney and his client must not only provide that the attorney shall have a part of the money or thing recovered in the action, but it must also provide that the attorney shall at his own expense support the suit, be responsible for the costs, and take all the risks of the litigation. *Omaha & R. V. Ry. Co. v. Brady*, 57 N. W. 767, 772, 39 Neb. 27.

Where an attorney at law agreed with judgment creditors that he would proceed to collect the judgments in his own name, and when collected pay the several judgment creditors 50 per cent. of the amount collected on each judgment, the judgment creditors advancing to him a certain amount as indemnity against costs, the agreement is not void for champerty; for the mere agreement for a contingent fee does not fall within any of the rules of champerty, nor is it generally regarded to be unlawful

for an attorney to carry on a suit for another for a percentage or share of the thing to be recovered, unless he assumes the risk of the litigation by relieving or indemnifying his client from all costs and expenses of the same. *Aultman v. Waddle*, 19 Pac. 730, 734, 40 Kan. 195.

A mere implied agreement or understanding that an attorney conducting a case shall save his client harmless from all costs and expenses of the litigation, and have the judgment for costs recovered, if any, the action being in behalf of all taxpayers, of which such attorney is one, comes far short of being champerty, since such implied understanding is entirely consistent with the theory that such attorney representing the taxpayers will see that all interested parties contribute a sufficient amount to relieve the plaintiff from any pecuniary burden of litigation. *Gilbert-Arnold Land Co. v. O'Hare*, 67 N. W. 38, 40, 93 Wis. 194.

It has been said that, where an attorney contracts in advance for a part of the property sued for as compensation for his services, he does, in a certain sense, by the act of rendering the service, carry on the suit at his own expense, in part at least, although he has not contracted in terms to pay any part of the expenses of the litigation. It has therefore been adjudged that a written agreement between an attorney and his client to the effect that the attorney will conduct the action as attorney, and perform all reasonable services therein until a final judgment, for which services the client agrees to convey to the attorney a portion of the property recovered, is champertous; but, on the other hand, there are cases of equal authority which hold that an attorney may lawfully contract with his client for part of the property sued for as compensation for his services, providing he does not also agree to pay the expenses, or any portion thereof, and this court holds that such contract is not champertous. *Allard v. Lamirande*, 29 Wis. 502, 508.

#### **Maintenance distinguished.**

Champerty is the intermeddling in a suit by a stranger having no interest therein, under an agreement with one of the parties by which the intermeddler is to receive a part of the thing in dispute. It is distinguished from "maintenance," which is the offense of intermeddling where there is no agreement to share the proceeds. *Stotsenburg v. Marks*, 79 Ind. 193, 196.

Champerty is the act of a stranger intermeddling to aid a litigant in a suit in which he has no interest, under an agreement by which he is to receive part of the thing in suit. It is distinguished from "maintenance," in that the latter is the intermeddling by a stranger without an agree-

ment to divide the thing in suit. *Quigley v. Thompson*, 53 Ind. 317, 320.

The distinction between "maintenance" and "champerty" seems to be this: That, where there is no agreement to divide the thing in suit, the party intermeddling is guilty of "maintenance" only; but where he stipulates to receive a part of the thing in suit, he is guilty of "champerty." *Lytle v. State*, 17 Ark. 608, 624. *Arden v. Patterson* (N. Y.) 5 Johns. Ch. 44; *Bouv. Law Dict. tit. "Champerty."* "So odious in the eyes of the law are these contracts, that they confer no rights on the parties making them, and if one pay out money under them he cannot recover it." *Wheeler v. Pounds*, 24 Ala. 472, 478 (citing *Burt v. Place* [N. Y.] 6 Cow. 431).

#### **Maintenance by personal services.**

Maintenance and champerty are deemed illegal, not from the consideration that all the expenses of the litigation are to be borne by a stranger, but in reference to the evils resulting from officious meddling and upholding another's litigation by personal services as well as money; hence an agreement that A. should prosecute and manage a suit at law as B.'s agent and receive a certain per cent. of the amount recovered for his services, and only his actual expenses if he did not recover, amounted to "champerty." *Lathrop v. Amherst Bank*, 50 Mass. (9 Metc.) 489, 492.

Hawkins defines "champerty" to be "an unlawful maintenance of a suit in consideration of an agreement to have part of the thing in dispute, or some part out of it." Lord Coke says it is "to maintain; to have part of the land or part of the debt, or other thing in plea or suit." Chitty defines it to be a "bargaining for the land or other subject of dispute, on condition of his carrying it on at his own expense." Sir William Grant says "champerty is the unlawful maintenance of a suit, in consideration of a bargain for a part of the thing sued for, or some profit out of it." *Bouvier* in his *Institutes of American Law* says, "By champerty is meant a bargain with the plaintiff or defendant to divide the land or other things sued for between them, if they prevail at law, the champertor agreeing to carry on the suit at his own expense." It differs from "maintenance" in this: That in the latter the person assisting the suitor receives no part of the benefit, while in the former he receives one-half, or other proportion, of the thing sued for. *Mr. Taylor* in his *Law Glossary* defines it to be "the purchasing of a right or pretended right, under a condition that a part, when obtained by suit, shall belong to the purchaser." When it is considered that champerty is a species of maintenance, it is clear that all these definitions import that the party bargaining for an interest in the thing in dispute under-

takes to aid in the prosecution of the suit for its recovery, and whether such aid is furnished in money by a layman who pays the expenses of the suit, or by an attorney or solicitor in services rendered in its prosecution, it is the same, and each alike in effect and in contemplation of law, is a maintainer of the suit, and prosecutes it, in whole or in part, at his own expense. *Bacus v. Byron*, 4 Mich. 535, 538.

**Maintenance by stranger without interest.**

Champerty is an agreement by a stranger, having otherwise no interest with the plaintiff or defendant in a suit, to supply money, services, information, or evidence by which to aid in maintaining and carrying on a suit, in consideration that he shall receive a part of the matter in suit, as commission or otherwise, if the party with whom the agreement is made prevails; the purchasing a suit, or a right of suing; "maintenance, with the addition of an agreement to divide the thing in suit." *Burnham v. Heselton*, 24 Atl. 955, 956, 84 Me. 578 (citing *Webst. Dict.*).

Champerty is an agreement between an attorney and client by which the attorney is to prosecute an action for a sum of money in which he has himself no previous interest, and to receive in case of success a certain amount of the sum recovered, and such a contract is void as contrary to public policy. *Ackert v. Barker*, 131 Mass. 486, 487; *Williams v. Fowle*, 132 Mass. 385, 388.

Champerty is a bargain by a stranger to carry on the suit of another for a portion of the proceeds thereof. "The doctrines of champerty and maintenance were designed to prevent any mere officious intermeddling by strangers in lawsuits in which they had no pecuniary interest. Where one has such an interest, there is no principle of public policy or law which would forbid his furnishing funds with which to aid the prosecution of the suit, or which would prohibit his participation in the division of the subject-matter of litigation when recovered." *Johnston v. Smith's Adm'r*, 70 Ala. 108, 118.

If a man has an interest, however slight, in the subject of the matter about which the suit is to be brought or is depending, the aid given is not champertous. *Reece v. Kyle*, 31 N. E. 747, 49 Ohio St. 475, 16 L. R. A. 723.

The general purpose of the law against champerty and maintenance was to prevent officious intermeddlers from stirring up strife and contention by vexatious and speculative litigation which would disturb the peace of society, lead to corrupt practice, and work to prevent the remedial progress of the law. A contract which necessarily and manifestly tended to produce these results ought still

to be held void on the ground of public policy. It is doubtless the more modern doctrine that the mere taking of a case on a contingent fee does not constitute champerty, and that it is not unlawful for an attorney to carry on a suit for another for a share of what may be recovered, at least unless he assumes the risks of litigation by indemnifying his client against all costs and expenses of the same. But where it appears that the plaintiff and another who were strangers to the party and to the claim which were the subject of such contract, and who had no object in intermeddling with the matter except a speculative one, enter into a systematic scheme to hunt up claims or supposed claims to which the original holder would probably never have asserted any right or brought any action, and start up wholesale litigation, and induce the landowners to allow him to bring action by agreeing to prosecute the suit at their own expense, indemnifying these clients against costs and expenses of litigation, accept for their compensation a share of what might be recovered, and not to charge anything for their services unless they succeed in collecting the claims, the vice in the conduct of these parties lies deeper and much farther back than merely entering into a champertous contract for their compensation for lawful service performed in the prosecution of the suit legitimately instituted. According to the facts it consists of unlawful, barratrous, and systematic scheming to work up and instigate wholesale and vexatious litigation in the names of parties and concerning subjects to whom and which they were entire strangers. Such contracts will be held champertous and void. *Gammons v. Johnson*, 78 N. W. 1035, 1037, 76 Minn. 76.

**Payment by share only.**

Where an attorney did not agree to pay any of the costs, nor to take any part of the land which was the subject of the suit, for his compensation, and did not agree to take anything but money, the mere fact that he agreed to wait for his money until complainant could sell the land, and to receive a fixed sum out of the purchase money, does not make the contract void for "champerty." *McPherson v. Cox*, 96 U. S. 404, 416, 24 L. Ed. 748.

Champerty "is an agreement by an attorney to prosecute a suit for a part of the amount recovered, and cases where the right to compensation is not confined to an interest in the thing recovered, but gives a right of action against the party, though pledging the avails of the suit or a part of them as security for payment, are not champertous." *Blaisdell v. Ahern*, 11 N. E. 681, 685, 144 Mass. 393, 59 Am. Rep. 99.

Champerty "is an agreement to prosecute the litigation at the expense of the attorney for a share of the proceeds of the suit, but if the payment be by any other means than a share of the proceeds, or if the expenses of

the suit be not borne by the attorney, the agreement is not champertous." Phillips v. South Park Com'rs, 10 N. E. 230, 233, 119 Ill. 626.

The employment of an attorney under an agreement that he shall receive a part of the recovery does not constitute champerty, unless it also contains a further element that the attorney's services shall not constitute a debt due from the client either before or after the recovery, but that the attorney must look solely to the recovery for his compensation. Hadlock v. Brooks, 59 N. E. 1009, 1011, 178 Mass. 425.

#### Purchase of Litigation.

Purchase distinguished, see "Purchase."

The purchase of a lawsuit by an attorney is champerty in its most odious form. Appeal of Maires, 189 Pa. 99, 106, 41 Atl. 388, 989.

Champerty "is an agreement to maintain another in a suit, furnishing all or a part of the means of prosecuting the same, for a part of the subject-matter recovered by the suit. A purchase or gift of land with reference to which a suit is pending, if not the consummation of a previous bargain nor founded on the ties of blood, is champertous. Even a bona fide purchase pending in a suit has been held to be champerty by intentment of law, since a purchaser must and would aid the suit to save himself from loss." Jackson v. Ketchum (N. Y.) 8 Johns. 479, 483.

Blackstone says "champerty" signifies the purchasing of a suit or right of suing, and he adds: "These pests of civil society that are perpetually endeavoring to disturb the repose of their neighbors, and officiously interfering in other men's quarrels, even at the hazard of their own fortunes, were severely animadverted on by the Roman Law, and they were punished by a forfeiture of a third part of their goods, and perpetual infamy." Lytle v. State, 17 Ark. 608, 624 (citing 4 Bl. Comm. 135).

Champerty is a bargain to divide the thing sued for, whereupon the champertor is to carry on the suit at his own expense, purchasing a suit or right to sue. Thus where a stranger to the suit, having no interest, direct or remote, as far as evidence discloses, in the controversy, secures by assignment, without paying a nominal consideration, an agreement to pay expenses and divide what he recovers, and claims which the holders are not willing to prosecute, a distinction is drawn between lawyers and laymen generally, on the ground that the former are authorized to prosecute and render professional service in this behalf, in themselves valuable. The Clara A. McIntyre (U. S.) 94 Fed. 552, 556.

Where an action to determine the title to land had been carried on for a number of years, and in order to carry it on the defendant has been compelled to transfer one-half of it to his attorney, such purchase does not constitute champerty. Davis v. Settle, 23 S. E. 557, 560, 43 W. Va. 17.

## CHANCE.

See "Game of Chance"; "Last Clear Chance."

Accident distinguished, see "Accident—Accidental."

"Chance" implies possibility. An instruction that the jury, in a criminal prosecution, must be satisfied of defendant's guilt beyond a reasonable chance of mistake, is equivalent to an instruction that they must be satisfied beyond the possibility of mistake, "chance" being equivalent to "possibility"; and, since a reasonable possibility means no more than possibility, such an instruction requires too high a degree of proof. Bonner v. State, 18 South. 226, 228, 107 Ala. 97.

The word "chance," in the definition of a lottery as "a scheme for the distribution of prizes by lot or chance," may be defined as "an accident; fortuity; casualty; an event without an assigned cause." Holt v. Wood, 14 Pa. Co. Ct. R. 499, 501.

## CHANCE VERDICT.

The word "chance," as used in a statute prohibiting juries from arriving at a verdict by chance or lot, must be deemed to have been used by the Legislature in its popular sense; and, according to the generally accepted and ordinary use of the word, anything is said to have happened by "chance" to any one when it was neither understandingly brought about by his act, nor pre-estimated by his understanding. Goodman v. Cody, 1 Wash. T. 829, 335, 34 Am. Rep. 808.

"Chance" may be defined to be hazard, risk, or the result or issue of uncertain and unknown conditions or forces. Where a jury agreed that each member thereof should write out the sum which he thought plaintiff was entitled to recover, and then divide the aggregate of such sums by twelve, pursuant to an agreement that the quotient should be their verdict, the verdict was obtained by a resort to the determination of chance. Dixon v. Plums, 33 Pac. 268, 269, 98 Cal. 384, 20 L. R. A. 698, 35 Am. St. Rep. 190; Gordon v. Trevarthan, 34 Pac. 185, 186, 13 Mont. 387, 40 Am. St. Rep. 452; Flood v. McClure (Idaho) 32 Pac. 254, 255; Hunt v. Elliott, 20 Pac. 132, 133, 77 Cal. 588; Pawnee Ditch & Improvement Co. v. Adams, 28 Pac. 662, 1 Colo. App. 250. Contra, see Boyce v. California Stage Co., 25 Cal. 460, 473 (citing Turner v. Tuolumne County Water Co., 25

Cal. 897); *Ulrich v. Dakota Loan & Trust Co.*, 49 N. W. 1054, 1056, 2 S. D. 285.

Such verdicts are condemned because they are the result of chance and of lottery, rather than of the deliberation of the jurors. As well put in one case: "It substitutes the fluctuating and uncertain hazards of the lottery for the deliberate conclusions of their reflections and interchange of views." *Pawnee Ditch & Improvement Co. v. Adams*, 28 Pac. 662, 1 Colo. App. 250.

#### CHANCING BARGAIN.

Where stock running at large upon a range was sold as an entirety, the number being merely estimated, it was what is termed by the court a "chancing bargain," without warranty, and which, in the absence of fraud or misrepresentation, would not entitle the vendor to additional compensation for excess, nor the vendee to any abatement for deficiency. *Cockrell v. Warner*, 14 Ark. 845, 352.

#### CHANCELLOR.

A chancellor was originally an ecclesiastic, and the keeper of the King's conscience, and was the guardian of all infants. *Butterick v. Richardson*, 64 Pac. 890, 891, 89 Or. 246.

#### CHANCERY.

Const. art. 4, § 4, declaring the jurisdiction of the Supreme Court to extend over cases of chancery, means such cases as were cognizable by the courts of equity of the state existing at the time of the adoption of the Constitution. *Sullivan v. Thomas*, 3 S. C. (3 Rich.) 531.

"Chancery jurisdiction" may be defined to be a judicial power to hear and determine all cases wherein the law, for its universality, cannot afford relief. Early in the history of jurisprudence the administration of justice in the ordinary courts was found to be incomplete, and hence arose the necessity of separate courts of equity, which were organized about the reign of Edward III, for the purpose of correcting that wherein the law was defective; and matters of fraud were among the objects to which the jurisdiction of chancery was originally confined. Soon after these courts were established in England, a fierce struggle arose between the law and equity courts in relation to the jurisdiction and powers of each; but, as we trace the history of English jurisprudence, we find the prejudice which at first existed on the part of the common-law courts yielding to the necessity and utility of a distinctive equity jurisprudence. *Kenyon v. Kenyon*, 24 Pac. 829, 830, 3 Utah, 431.

#### CHANCERY COURT.

See "Court of Chancery."

#### CHANGE.

"Change" means to put one thing in the place of another; to exchange; to alter, or make different; to cause to pass from one place to another. *Territory v. Scott*, 20 N. W. 401, 422, 3 Dak. 357 (dissenting opinion of Edgerton, C. J.).

The word "changed," when used in a statute, is but a repetition of the idea expressed by the word "altered." *Wallace v. Blair* (Pa.) 1 Grant, Cas. 75, 79.

"In commercial language, 'change' means a fixed place where merchants meet at certain hours for the transaction of business with each other, subject to such general rules or understanding as they think proper to be governed by. There may be property belonging to this body derived from the payment of dues or fines, or consisting of the furniture of the room where the board meets, but the possession of it is a mere incident, and not the main purpose or object of the association." *White v. Brownell* (N. Y.) 4 Abb. Prac. (N. S.) 162, 192.

#### In building contract.

A building contract, providing that "changes, additions and alterations" in the work may be ordered and paid for as extra work, means only such changes, additions, and alterations as may be incidental to the complete execution of the work as described in the plans and specifications, and therefore of only minor and trifling importance. Any material departure from such plans and specifications resulting in a new and substantially different undertaking is not within the meaning of the phrase. *Cook County v. Harms*, 108 Ill. 151.

A building contract requiring additional payments for "changes, additions, alterations," will be construed to mean such changes as are incidental to the complete execution of the work as described in the plans and specifications, and therefore of only minor or trifling importance; if otherwise, some different mode of determining what prices should be paid for them would also have been prescribed by the writer. We think any material departure from the plans and specifications with reference to which the contract was made, which resulted in a new and substantially different undertaking, cannot be regarded as within the meaning of this language. *Cook County v. Harms*, 108 Ill. 151, 159.

#### In interest.

The expression "change in the interest," as used in a fire insurance policy providing that it should be void if there was any

change in the interest, title, or possession of the subject of insurance, is substantially synonymous with the words "change in the title," and neither event occurs until the sale of property on an execution. The delivery of the execution to an officer, followed by a levy thereof on a stock of goods, does not effect a change in the interest. The interest which a person may have in property is affected in many ways without producing a change in such interest as that term is generally understood. When he contracts a debt or incurs an obligation, this, in a broad sense, may affect such interest, as the property constitutes the means of payment, and his pecuniary condition, in a general sense, depends on what he has left after discharging all his debts and obligations, but it does not effect a change in the interest, within the meaning of an insurance policy. *Walradt v. Phoenix Ins. Co.*, 32 N. E. 1063, 1064, 136 N. Y. 375, 32 Am. St. Rep. 752.

"Interest," as used in a policy of fire insurance, providing that if the interest of the insured in the property is not truly stated in the policy, or if any change takes place in the interest, whether by sale, transfer, or conveyance, in whole or in part, or by legal process, or by judicial decree, the policy should be void, means, as defined in *Abbot's Law Dictionary*, "any right in the nature of property, but less than title." Its chief use seems to designate some right attached to property which either cannot or need not be defined with precision. *East Texas Fire Ins. Co. v. Clarke*, 15 S. W. 166, 79 Tex. 23, 11 L. R. A. 293.

A policy of fire insurance providing that if the property should be sold or conveyed, or the interest of the parties therein "changed," the policy should be null and void, contemplates an actual change of interest, and not a merely nominal one; and an assignment of a title bond of the property by the insured as collateral security, which did not increase the pledgee's right nor decrease the right of the insured, did not change his interest so as to defeat the policy. *Ayres v. Home Ins. Co.*, 21 Iowa, 185, 188.

A fire insurance policy providing that the policy should be void if any "change in the interest" takes place, whether by sale, transfer, or conveyance, should be construed to include the execution of a mortgage on the insured property, for a mortgage conveys an interest in the property mortgaged to the mortgagee. *East Texas Fire Ins. Co. v. Clarke*, 15 S. W. 166, 79 Tex. 23, 11 L. R. A. 293.

A contract under seal to sell property, accompanied by a receipt of a part of the purchase price, is a "change of interest" in such property, within the meaning of the clause of an insurance policy which provided that if the property insured should be sold or conveyed, or the interest of the parties there-

in changed, the policy should be null and void. *Germond v. Home Ins. Co. (N. Y.)* 2 Hun, 540, 541.

The execution of a chattel mortgage on partnership property by one of the partners to secure his individual debt works a change of interest in the property within the meaning of an insurance policy, placed thereon by the partnership, which provides that the policy shall become void if any change other than by death of the insured takes place in the "interest, title, or possession" of the property insured. *Olney v. German Ins. Co.*, 50 N. W. 100, 101, 88 Mich. 94, 13 L. R. A. 684, 26 Am. St. Rep. 281.

Where what purports to be an absolute conveyance and reconveyance is shown to be in fact a mortgage only, there is no violation of an insurance policy providing that it shall be void if any change takes place in the "interest" of the property insured. *Bemis v. Harborcreek Mut. Fire Ins. Co.*, 14 Pa. Super. Ct. 528, 534.

The word "interest," as used in a fire policy to the effect that the policy should be void if any change should take place in the interest in the property insured, whether by legal judgment or process, or by voluntary act of the insured, or otherwise, means a change in the insurable interest of the owner of the property, which is not affected by the execution of a mortgage on the property. *Wolf v. Theresa Village Mut. Fire Ins. Co.*, 91 N. W. 1014, 1016, 115 Wis. 402.

A fire policy contained a provision that if any change should take place in the title, interest, or possession of the property, without consent of the insurer, the policy should become void. Held, that the word "interest" meant a change in insurable interest of the owner, and a mortgage given by him, inasmuch as it did not affect such interest, did not avoid the policy. *Sun Fire Office of London v. Clark*, 42 N. E. 248, 250, 53 Ohio St. 414, 38 L. R. A. 562.

#### **In location of highway.**

"Change in the location of a highway," according to the ordinary meaning of the term, is a removal of the highway from one place to another. After the removal the highway does not exist in its former place. *Leighton v. Concord & M. R. R.*, 55 Atl. 938, 939, 72 N. H. 224.

#### **In property insured.**

In the law of insurance, "change" means a permanent or habitual change in the property insured, or its use or occupation, and does not mean the temporary absence of the watchman, of which the insured has no knowledge. *King Brick Mfg. Co. v. Phoenix Ins. Co.*, 41 N. E. 277, 279, 164 Mass. 291.

As used in Rev. St. § 3643, providing that in the absence of any change increasing the

risk without the consent of the insurers, etc., the whole amount mentioned in the policy etc., shall be void, "change" refers to some physical change in the insured property, its use, or its surroundings, and does not relate to a change respecting incumbrances. *Webster v. Dwelling House Ins. Co.*, 42 N. E. 546, 549, 53 Ohio St. 558, 80 L. R. A. 719, 53 Am. St. Rep. 658.

"Change by which the degree of risk is increased," as used in an insurance policy providing that it shall be void if any change occurs in the buildings by which the degree of risk is increased without the written consent of the company, refers only to a change produced by the act of the insured, such a change as the company could consent to upon the application of the insured, and not to one occasioned by accident, or a cause over which the insured had no control. *Breuner v. Liverpool & L. & G. Ins. Co.*, 51 Cal. 101, 107, 21 Am. Rep. 703.

#### In warehouse stamps.

"Change," as used in Rev. St. U. S. § 3326 [U. S. Comp. St. 1901, p. 2169], making it an offense to "change or alter distillery warehouse stamps," means to obliterate or render illegible a portion of it, or to erase part of it and substitute something else in lieu of the part erased. *United States v. Bardenheier* (U. S.) 49 Fed. 846, 847.

#### Of beneficiaries.

"Changing," as used in the by-laws of a beneficial association authorizing the changing of beneficiaries, means and refers to the express act of naming and specifying some other person or persons in place of those previously designated, who shall be entitled to receive the benefits of the certificate. *Hanson v. Minnesota Scandinavian Relief Ass'n*, 60 N. W. 1091, 1093, 59 Minn. 123.

#### Of citizenship.

"Change of citizenship" means an actual removal from one state to another; an actual change of domicile, with a bona fide intention of abandoning the former place of residence and establishing a new one. *Kemna v. Brockhaus* (U. S.) 5 Fed. 762, 764.

#### Of districts.

To "change the districts," as used in the judicial article of the Constitution, § 15, authorizing the General Assembly to change the districts of the court of common pleas, "has reference to altering the territorial limits of the districts." In re District Court Case, 34 Ohio St. 431, 437.

#### Of domicile.

To state it in its briefest form, a change of domicile is accomplished by a change of residence to a new place, combined with the animus manendi. *Marks v. Germania Sav. Bank* (La.) 34 South. 725, 728.

To constitute a new domicile, two things are essential: First, residence in a new locality; second, the intention to remain there. The change cannot be made except *facto et animo*. Both are alike necessary. Mere absence from a fixed home, however long continued, cannot work the change. There must be the animus to change the prior domicile for another. *Tuttle v. Wood*, 88 N. W. 1056, 115 Iowa, 507 (citing *Mitchell v. United States*, 88 U. S. [21 Wall.] 350, 22 L. Ed. 584); In re *Williams* (U. S.) 99 Fed. 544, 545.

A change of domicile is not effected until the intention to change is consummated by the actual removal. *Bangs v. Inhabitants of Brewster*, 111 Mass. 382, 385.

Where a domicile has once been fixed, it continues there until a determination to reside elsewhere has been carried into effect. *Inhabitants of Wayne v. Inhabitants of Greene*, 21 Me. (8 Shep.) 357, 361.

Change of domicile does not depend so much on the intention to remain in the new place for a definite or indefinite period, as on its being without an intention to return. An intention to return, however, at a remote or indefinite period, to the former place of actual residence, will not control, if the other facts which constitute domicile all give the new residence the character of a permanent home and place of abode. The intention and actual fact of residence must concur, when such residence is not in its nature temporary. There is a right of election by expressed intention, only where the facts of residence are to some extent ambiguous. *Hallet v. Bassett*, 100 Mass. 167, 171 (citing notes to *Guier v. O'Daniel*, 1 Am. Lead. Cas. [4th Ed.] 747, 750; *Shaw v. Shaw*, 98 Mass. 158; *Inhabitants of Wilbraham v. Inhabitants of Ludlow*, 99 Mass. 587).

A change of domicile means a moving from one place to another with intention to remain absent from the place removed from, and by selecting and occupying a home in the new locality. *McLean v. Janin*, 12 South. 747, 749, 45 La. Ann. 664.

"Change of domicile consists of an act done with an intent. The act is an actual change of residence. The intent to effect the change must be to acquire a new domicile, either permanent in purpose or of indefinite duration. A temporary habitation, without intent to make it a permanent home or one of indefinite duration, is not a change of domicile." *Young v. Pollak*, 5 South. 279, 280, 282, 85 Ala. 439.

Where there has been an actual removal with intent to make a permanent residence, and the acts of the party correspond with the purpose, the change of domicile is complete, and the law forces upon him the character of a citizen of the state wherein he has chosen his domicile, although he may have formally declared that he considered himself a



citizen of the state he has left. *Pacific Mut. Life Ins. Co. v. Tompkins* (U. S.) 101 Fed. 539, 543, 41 O. C. A. 488.

"It has long been settled law that every person has a domicile somewhere. If he has not acquired one elsewhere, he retains his domicile of origin, and to effect a change of domicile the fact and intent must concur; that is, there must be not only a change of residence, but an intention to abandon the former domicile, and where one has the sole domicile." *In re Town of Hector*, 24 N. Y. Supp. 475, 481.

A person can have but one domicile, or legal residence, at one time. A domicile, once acquired, continues until another is acquired elsewhere. The fact that a person leaves his domicile with an intention never to return does not change it, but it remains the same until it is changed by the party acquiring the intention of permanently residing in some other place. *Ayer v. Weeks*, 18 Atl. 1108, 1109, 65 N. H. 248, 6 L. R. A. 716, 23 Am. St. Rep. 87.

"Domicile" means the place of a person's residence, when he has no intention of removal. Mere absence, however long, effects no change of domicile. *Lindsay v. Murphy*, 76 Va. 428, 430.

Personal absence for a while does not necessarily change one's domicile, and personal presence in a place for a somewhat prolonged period does not necessarily establish domicile there. *Olivieri v. Atkinson*, 46 N. E. 422, 168 Mass. 28 (citing *Viles v. City of Waltham*, 82 N. E. 901, 157 Mass. 542, 34 Am. St. Rep. 311; *Borland v. City of Boston*, 132 Mass. 89, 42 Am. Rep. 424; *Inhabitants of Chicopee v. Inhabitants of Whately*, 88 Mass. [6 Allen] 508; *Harvard College v. Gore*, 22 Mass. [5 Pick.] 370, 374).

Domicile is the true, fixed, permanent home of a person, to which, whenever he is absent, he has the intention of returning. Residence and intention to make it a home must concur to constitute a "domicile," and when a person has actually removed to another place with the intention of remaining there for an indefinite time, and as a place of present domicile, it becomes his place of domicile, notwithstanding he may have a following intention to return at some future period. *State v. Casinova*, 1 Tex. 401, 407.

The place where a person lives is held to be his domicile until the contrary appears, and this is made to appear when it is shown by positive or presumptive proof that at the time of the apparent change of domicile he had no intention of remaining for an unlimited time at the place to which he removed. *Dow v. Gould & Curry Silver Min. Co.*, 31 Cal. 629, 630, 651.

Domicile is in no way affected by a temporary residence elsewhere, and to effect a

change there must be not only a change of residence, but an intention to abandon the former domicile, accompanied by an actual abandonment with the intention not to return, and the taking up of a residence in another place with the intention of staying there permanently. *In re Dimock*, 32 N. Y. Supp. 927, 929, 11 Misc. Rep. 610.

If a seaman without family or property sails from the place of his nativity, which may be considered his domicile of origin, although he may return only at long intervals, or even be absent many years, yet if he does not, by some actual residence or other means, acquire a domicile elsewhere, he retains his domicile of origin. The actual change of one's residence with his family, and the taking up of a residence elsewhere, without any intention of returning, is one of the strong indications of change of domicile, and, unless controlled by other circumstances, is decisive. *Thorndike v. City of Boston*, 42 Mass. (1 Metc.) 242, 245.

#### Of duties.

A written contract was entered into at San Francisco for the sale of goods to arrive from Calcutta, B. I. The contract provided that any "change in duties" should be for or against purchasers. The rate of duty on the bags constituting the subject-matter of the contract was not changed since the contract was made. The amount of duty actually paid was, however, considerably less than the amount which it would have been necessary to pay on the same goods if they had been entered at the time when the contract was made, owing to a change meanwhile in the estimated value of the rupee, on the basis of which the ad valorem duty was computed. Held, that the phrase "change of duty" meant a change in the rate of duty by authority of Congress, and not a difference in the amount of duty merely. *Detrick v. Balfour* (U. S.) 8 Fed. 468.

#### Of employment.

Within the provisions of an insurance policy providing that, in case of an injury received in any occupation classed as more hazardous than that for which the party was insured, he shall receive a less amount, it was held that individual acts outside the statute occupations do not constitute a change of employment within the meaning of such provision. The provision may well be construed to permit the actual doing of various acts of recreation, exercise, and accommodation, and duties which are recognized as proper incidents in the lives of men of all occupations. The merchant spends a day in hunting; the teacher looks after the men who are building his barn; the manufacturer visiting his relative assists in loading hay; but where one insured as proprietor of a gristmill goes to his father's farm to assist temporarily, during the absence or disability of his father,

in overseeing the work of haying, and who is injured while riding on a horse rake, he receives his injury in an occupation other than that for which he is insured. *Estabrooks' Adm'rs v. Union Casualty & Surety Co.*, 52 Atl. 1048, 74 Vt. 473, 93 Am. St. Rep. 916.

"Changing his occupation," as used in an insurance policy providing that the insured shall give immediate notice to the company in the event of changing his occupation, means engaging in another employment as a usual business, and a teacher out of employment who built one or two houses by contract did not thereby become a builder by profession. *Stone's Adm'rs v. United States Casualty Co.*, 34 N. J. Law (5 Vroom) 371, 373.

#### Of grade.

"Change of grade," as used in a city charter providing that to authorize a change of grade it must be asked for on petition of the owners of two-thirds in value of the property on both sides of the street where the change is desired, means a change of the surface of the street at the proper grade line. The elevation of the surface of the street by the addition of the material used for macadamizing it is not a change of grade, the surface of the street being left at its proper grade line to receive the material. *Warren v. Henly*, 31 Iowa, 31, 35.

The change of grade of a street includes a change from the natural grade, as well as a change previously made by the authorities; so that, where a party sustains damage by reason of a change from the natural grade of the street, he may recover therefor the same as though it was changed from a grade previously fixed by the authorities. *Appeal of Hendrick*, 103 Pa. 358, 361, 13 Wkly. Notes Cas. 553, 554 (citing *Borough of New Brighton v. United Presbyterian Church*, 96 Pa. 331, 339).

"Change of grade," as used in a statute providing that a grade once established may be changed, but only upon certain conditions, one of which is that the damages occasioned thereby, after being established as therein directed by tender to the property owners or their agents before any such change of grade shall be made, has no direct reference to actual work upon the street, which may not take place for months, or even years, after the change is made, but merely to the ideal rise and fall or elevation of the surface between given points as re-established, considered in comparison with the old grade, and shown by proper profile, and to which it may thereafter be lawfully brought, either by cutting down or falling in, or both. *Goodrich v. City of Omaha*, 4 N. W. 424, 425, 10 Neb. 98.

"Changes of grade are of two different classes, one where a grade other than that which has before existed is prescribed by

boards or officers who have jurisdiction to order alteration or specific repair, the other where the change occurs, without adjudication, in so repairing the way as to make or keep it safe or convenient, and to better adapt it for uses for which it had before been intended. The former is not in a strict sense a repair, but a permanent change or alteration—as when a road is lowered or raised to pass under or over a railroad—and is really a substitution of one way for another, although both are within the same location." In either case an adjacent owner damaged by such a change is entitled to compensation therefor. *Proctor v. Stone*, 33 N. E. 704, 705, 158 Mass. 564.

A change in the grade of a highway is a lawful act, and does not necessarily cause a legal damage to the property of adjoining owners; and, even when legal damage may result, such damage is not compensation for property taken. *Nicholson v. New York & N. H. R. Co.*, 22 Conn. 74, 56 Am. Dec. 390; *Fellowes v. City of New Haven*, 44 Conn. 240, 26 Am. Rep. 447; *Callender v. Marsh*, 18 Mass. (1 Pick.) 418. A mere change of grade in a highway is clearly distinguishable from the appropriation of the highway to another use from the imposition of an additional servitude. *Gilpin v. City of Ansonia*, 35 Atl. 777, 778, 68 Conn. 72.

The phrase "change of grade," as used in a city charter, *Laws 1870, c. 519, § 17*, providing that, when a city shall change the recorded grade of any street, the owner of a lot fronting thereon may within one year claim damages therefor, means change by the common council by a formal determination. It does not mean every change in a street, or any portion of the soil, even if made under some resolution of the council, nor changes which are incidental to the performance of some other public work. The actual surface of a street often remains for a long time unconformed to the established grade. Erecting an embankment in a street does not itself alter the legal grade. A bridge, a trestle, or an embankment constructed by a railroad company on the street of a city, under a permit from the city council to occupy such street, is not a "change of grade" where no change of grade has been officially determined. *Reining v. New York, L. & W. R. Co.*, 13 N. Y. Supp. 238, 243.

Merely extending the level of a street by filling in the sides thereof as far as the front line of an abutting lot, without raising the level of the street above the established grade, is not a "change of grade" within the meaning of *Laws 1897, c. 414, § 159*, providing that a change of grade, to the extent of damages resulting therefrom, shall be a taking of adjacent property for public use. In *Whitmore v. Village of Tarrytown*, 33 N. E. 489, 490, 137 N. Y. 409, the court say: "The grade of the street having been established

in 1882, it was not altered or changed by the cutting down of the embankment on either side of the street for the purpose of making the whole street conform to the grade thus established. Such an improvement of a street is not, within the fair meaning of the statute, a change or alteration of the grade thereof." *Bissell v. Village of Larchmont*, 67 N. Y. Supp. 962, 965, 57 App. Div. 61.

Any elevation or depression of the surface of a highway as it in fact exists, resulting from an attempt to establish a grade, is a change of grade. *McGar v. Borough of Bristol*, 42 Atl. 1000, 1002, 71 Conn. 652.

#### **Of ground of action.**

A statute authorizing amendments which do not "change the ground of the action" justifies the court in authorizing an amendment of an action for breach of a covenant against incumbrance on land, by permitting the plaintiff to add a new and distinct count setting forth another incumbrance on the land conveyed to him, which existed at the time of his deed, since the ground of action may be fairly considered as for breach of the covenant against incumbrances, and, so long as the amendments are confined to mere specifications of this breach, the court is justified in allowing them. *Spencer v. Howe*, 26 Conn. 200, 201.

#### **Of liability**

"Change," as used in Laws 1867, p. 165, § 1, providing that a railroad company shall not change or limit its common-law liability as a common carrier except by written contract, etc., is used as synonymous with "lessen" or "abridge." *Feige v. Michigan Cent. R. Co.*, 28 N. W. 685, 687, 62 Mich. 1.

#### **Of money.**

Where a person is given money to "change," the idea conveyed is to procure bills or silver coins, or some of each, of lesser denominations, in an amount of equal value, without any intent that the party to whom the money is given should become the owner. *Murphy v. People*, 104 Ill. 528, 535.

#### **Of moorings.**

A vessel bound on a voyage to London with a cargo of fruit and wine, the former to be delivered at Cox's Quay, which was higher up the river Thames than the London Docks, where the wine was to be delivered, put into the London Docks, and while there application was made to the consignees of the fruit to allow the same to be landed there, but, they refusing, the vessel proceeded from the London Docks toward Cox's Quay under the charge of a pilot, and ran aground of a brig and sunk it. Held that, the vessel not having reached the place at which she was to commence the delivery of her cargo, her

removal from the London Docks to that place was not a "change of mooring" within *St. George IV*, c. 125, § 63, and the master was therefore bound to have a pilot on board, and the owners were not liable for the collision. *McIntosh v. Slade*, 6 Barn. & C. 657.

#### **Of occupants.**

"Change of occupants," as used in a policy of fire insurance on a stock of goods providing that any change of possession, except change of occupants, without increase of hazard, should avoid the policy, is not inapplicable because the subject of insurance is personality only, though the term is not the most natural and appropriate, since the change of possession stated must refer to the place where the goods are kept. *Walradt v. Phoenix Ins. Co.*, 32 N. E. 1063, 1065, 136 N. Y. 375, 32 Am. St. Rep. 752 (affirming 19 N. Y. Supp. 293, 296, 64 Hun, 129).

#### **Of ownership.**

Under an insurance policy providing that if the insured property should be alienated by sale or otherwise, or if it should be transferred by any contract or "change of ownership," the policy should be void, it was held that a contract for the sale of the property, under which no deed was made and only a part of the purchase money paid, was not an alienation or change of ownership within the meaning of the policy. *Hill v. Cumberland Valley Mut. Protection Co.*, 59 Pa. (9 P. F. Smith) 474.

#### **Of possession.**

See "Actual and Continued Change of Possession"; "Continued Change of Possession."

"Change in possession," as used in a policy of fire insurance providing that any change in possession of the subject of insurance, except change of occupants, should avoid the policy, does not mean every change of possession that may take place in the property. A change in the possession of a stock of goods must refer to the place where the goods are situated. A levy of an execution on a stock of goods does not necessarily, and of itself, effect a change of possession within the meaning of the statute. *Walradt v. Phoenix Ins. Co.*, 32 N. E. 1063, 1064, 136 N. Y. 375, 32 Am. St. Rep. 752.

A policy of insurance, containing the condition that if any "change of possession" of the property take place the policy shall be void, refers to the insured's possessory right, and not to his occupancy. The leasing of premises is not such a change of possession as will avoid the policy. *Rumsey v. Phoenix Ins. Co. (U. S.)* 1 Fed. 396, 398; *Ramsey v. Phoenix Ins. Co. (U. S.)* 2 Fed. 429, 431.

Where the effect of the appointment of a receiver for a firm, in an action brought by one of the partners for a dissolution thereof

as well as the effect of a final judgment, was to divest all the partners, as such, of all control of the property, there was, in legal contemplation, a "change of possession," within the meaning of a fire insurance policy providing that if any change should take place in the title or possession of the property insured, whether by legal process, judicial decree, or voluntary transfer or conveyance, without written permission, the policy should be void. *Keeney v. Home Ins. Co. of Columbus (N. Y.)* 3 *Thomp. & C.* 478, 480.

The word "possession," as used in a fire policy to the effect that the policy should be void if any change should take place in the possession of the property insured, whether by legal judgment or by process, or by voluntary act of the insured or otherwise, means an actual change of the possession in law and equity, which is not affected by a mortgage on the property. *Wolf v. Theresa Village Mut. Fire Ins. Co.*, 91 N. W. 1014, 1016, 115 *Wis.* 402.

"Change of possession," within the meaning of a fire policy containing a provision that it shall be void in case of a change of possession, cannot be predicated of a mere temporary absence of the insured, the property being left in possession of a care-taker. *Shearman v. Niagara Fire Ins. Co.*, 46 N. Y. 526, 532, 7 *Am. Rep.* 380.

Gen. St. 1878, c. 41, § 15, declares that the sale of chattels without actual and continued change of possession is presumptively fraudulent as to creditors, etc., of the seller. Held, that the statute required an actual change of possession, and not a mere constructive change. Thus, where the debtor remained in possession of the property which once belonged to him, the mere manual or constructive taking of possession by the buyer from such vendor, by stating that he took possession and put the original owner in charge of the business for him, was insufficient. *Murch v. Swensen*, 42 N. W. 290, 291, 40 *Minn.* 421.

As to what is a sufficient change of possession of chattels sold, as against the seller's creditors, see *Valley Distilling Co. v. Atkins*, 7 S. W. 137, and note, 50 *Ark.* 289; *Peters Saddlery & Harness Co. v. Schoelkopf*, 9 S. W. 336, and note, 71 *Tex.* 418; *Hopkins v. Partridge*, 10 S. W. 214, and note, 71 *Tex.* 606; *Wolcott v. Hamilton*, 17 *Atl.* 39, and note, 61 *Vt.* 79; *Fitzgerald v. Meyer*, 41 N. W. 123, 25 *Neb.* 77.

"Change of possession means any delivery of a chattel with intent to give it to another. The term is a mere paraphrase of the word 'deliver,' and every delivery with intent to give operates a 'change of possession,' and transfers dominion over the subject of the gift to the donee." *Sims v. Sims' Adm'r (Ala.)* 8 *Port.* 449, 33 *Am. Dec.* 293.

A "change of possession," within the meaning of a statute relative to sales, means an actual and continued change of possession, and not subject to some secret trust between the seller and buyer, and requires that the sale shall be open and public, that the world may be apprised of the change of ownership. *Swartsburg v. Dickerson*, 73 *Pac.* 282, 12 *Okl.* 566.

Where what purports to be an absolute conveyance and reconveyance is shown to be in fact a mortgage only, there is no violation of an insurance policy providing that it shall be void if any change takes place in the possession of the property insured. *Bemis v. Insurance Co.*, 14 *Pa. Super. Ct.* 528, 534.

#### Of road.

As used in Rev. Code, c. 60, § 4, providing that the Court of General Sessions shall have jurisdiction to change public roads, "change" should be construed to mean "alter," but is restricted by section 5, providing a procedure on a petition for changing the course of a public road, to mean "change the course of," and does not include widening a road. *In re Alston*, 40 *Atl.* 938, 1 *Pennewill*, 359.

#### Of title.

Under a fire policy void in case of any "change of title" in the property, unknown to the company, a change of title by the natural death of the insured was not a change contemplated, as the words refer only to voluntary acts on the part of the assured himself. *Forest City Ins. Co. v. Hardesty*, 55 N. E. 139, 140, 182 *Ill.* 39, 74 *Am. St. Rep.* 161.

"Change of title," as used in a policy of fire insurance, providing that, in case of any sale, transfer, or change of title in the property insured, the insurance should be void, means more than a nominal change or transfer of title. "The object of the insurance company is that the interest shall not change so that the assured shall have a greater temptation or motive to burn the property, or less interest and watchfulness in guarding and preserving it from destruction by fire. Any change in or transfer of the interest of the assured in the property of a nature calculated to have this effect is in violation of the policy. But if the real ownership remains the same, if there is no change in the fact of title, but only in the evidence of it, and if this latter change is merely nominal, and not of a nature calculated to increase the motive to burn, or diminish the motive to guard the property from loss by fire, the policy is not violated." Hence an assignment of the title bond of the property insured as collateral security is not such a change or transfer of the title as to violate the policy. *Ayres v. Hartford Fire Ins. Co.*, 17 *Iowa*, 176, 181, 85 *Am. Dec.* 553.

"Changed or transferred," as used in an insurance policy providing that the title to the property insured shall not be changed or transferred, means an act whereby the policy is made another's, or whereby the ownership of the policy is made from one person to another, but does not include a transfer, under the bankrupt law, to an assignee. *Starkweather v. Cleveland Ins. Co.* (U. S.) 22 Fed. Cas. 1091, 1092.

A dissolution of partnership before loss and division of the goods, so that each partner owns a distinct portion, is a "change of title" within the conditions of an insurance policy. *Card v. Phoenix Ins. Co.*, 4 Mo. App. 424.

"Change of title," as used in a fire policy declaring that it shall be void if the property insured shall undergo any change of title, means a change in actual legal ownership, so that a void sale which does not operate to change the legal ownership is not a change of title. *Pearman v. Gould*, 5 Atl. 811, 814, 42 N. J. Eq. (15 Stew.) 4.

"Change of title," as used in a fire policy providing that the policy shall be void if any change takes place in the title or possession thereof, should be construed to include an agreement between the owner and lessee by which the latter leased the property for a term of years with option to buy the property at any time during the term, and which absolutely bound him to buy and pay the purchase money at the end of that time, since such contract gave the lessees an equitable title in the land. *Smith v. Phenix Ins. Co.* (Cal.) 23 Pac. 383, 384.

Putting a lessee in possession of insured property under a contract that he shall buy the property on the expiration of the lease, or at his option at any time during his continuance, does not violate the condition of the policy that it shall become void if any change takes place in the title or possession, when on application for insurance the building was in process of erection and untenanted, and the company had knowledge of the contemplated lease and change of possession, though not of the agreement to convey contained in the lease. *Smith v. Phoenix Ins. Co.*, 27 Pac. 738, 739, 91 Cal. 823, 18 L. R. A. 475, 25 Am. St. Rep. 181.

"Change in the title," as used in a policy of fire insurance providing that any change in the title of the subject of insurance should avoid the policy, is substantially synonymous with the words "change of interest" and is not brought about by the delivery of an execution to an officer, followed by a levy thereof on a stock of goods. There is no change of title until the sale on the execution. *Walradt v. Phoenix Ins. Co.*, 32 N. E. 1063, 1064, 136 N. Y. 375, 32 Am. St. Rep. 752.

"Change in the title," as used in a policy providing that it should become void if

a change occur in the title or possession of the property, means such a sale, transfer, or alienation as passes the title and carries with it the right to possession, and does not include a sale on execution, since such sale confers a mere right which may or may not ripen into a change of title. *German-American Ins. Co. of New York v. Barwick*, 54 N. W. 519, 521, 36 Neb. 223.

An insurance policy provided for an immediate termination of the risk if the property be sold or transferred, or any alienation or change take place in the title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance. It was held that the words "sold, transferred, alienated," do not ordinarily include a sale upon execution, and the words "change in the title or possession" do not extend the meaning, and this would be the meaning were it not for the words "by legal process or judicial decree," but where under a sale on execution the owner of the land has full rights of possession and occupancy for 15 months after the sale, and for 12 months of that time he has an absolute right to redeem, so that neither possession nor title passes before the end of 15 months, such sale on execution does not violate the provisions of the policy. *Hammel v. Queen's Ins. Co.*, 11 N. W. 349, 355, 54 Wis. 72, 41 Am. Rep. 1.

As used in a policy forbidding change of title in whole or in part, the words "change of title" apply to a termination of the assured's interest, and a mortgage is not a sale, transfer, or change of title, since the mortgagor is still interested to the full value of the property, and there is no such change in title or interest as would be effected by a sale. The effect of a mortgage is to appropriate a certain portion of the property to the payment of some one creditor, and does not change the title previous to foreclosure, being a mere incumbrance, which might or might not afterwards have that effect. *Judge v. New York Bowery Fire Ins. Co.*, 132 Mass. 521, 523; *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115.

Foreclosure on insured premises of an existing mortgage, and a sale by the purchaser at the foreclosure sale, constitute a change of title in the property within the meaning of a provision in the policy declaring it void in case "any change takes place in the title, whether by legal process or judicial decree or voluntary transfer or conveyance." *Commercial Union Assur. Co. v. Scammon*, 102 Ill. 46, 49.

Within the meaning of an insurance policy providing that if the property be sold or transferred, or any change takes place in title or possession, the policy should be void, the term "change in title" means a change in ownership which carries the legal right of possession and property. Such a change does not take place on the foreclosure of a mort-

gage, until the period for redemption has expired. *Loy v. Home Ins. Co.*, 24 Minn. 315, 318, 31 Am. Rep. 346.

A "change of title," within the meaning of a fire policy providing that when property insured by the policy shall be alienated or incumbered, or in case of any transfer or change of title to the property insured, without the consent of the insurer, the policy shall cease, does not arise where the assured, before the loss, contracted to sell the house insured for a consideration of \$850, \$100 of which was paid down, the balance to be paid in 15 equal installments, the purchaser going into possession, but none of the installments being due when the house was destroyed by fire. *Grable v. German Ins. Co.*, 49 N. W. 713, 714, 32 Neb. 645.

A fire policy provided that if any change should take place in the title, interest, or possession of the property insured, by sale, transfer, or conveyance, without the consent of the insurer, the policy should become void. Held, that the words "title or possession" meant an actual change in law and equity, and a mortgage of the property by the insured did not avoid the policy. *Sun Fire Office of London v. Clark*, 42 N. E. 248, 250, 53 Ohio St. 414, 38 L. R. A. 562.

The word "title," as used in a fire policy to the effect that the policy should be void if any change should take place in the title of the property insured, whether by legal judgment or process, or by voluntary act of the insured or otherwise, means an actual change in the title in law and equity, which is not effected by the execution of a mortgage on the property. *Wolf v. Theresa Village Mut. Fire Ins. Co.*, 91 N. W. 1014, 1016, 115 Wis. 402.

A title to property is not changed by the execution of a mortgage, within the meaning of the charter of an insurance company providing that, "when the title of any property insured shall be changed by \* \* \* mortgage or otherwise, the policy shall thereupon be void." *Shepherd v. Union Mut. Fire Ins. Co.*, 88 N. H. 232, 240.

Where what purports to be an absolute conveyance and reconveyance is shown to be in fact a mortgage only, there is no violation of an insurance policy providing that it shall be void if any change takes place in the title of the property insured. *Bemis v. Harborcreek Mut. Fire Ins. Co.*, 14 Pa. Super. Ct. 528, 534.

#### Of use and occupation.

A change from occupancy to disuse of a building insured is a change in its use and occupation within the meaning of St. 1861, c. 34, § 4, providing that no insurance company shall avoid payment of a loss by reason of any change in the use and occupation unless it materially increased the risk. *Cannell v. Phoenix Ins. Co.*, 59 Me. 582, 586.

The conversion of ordinary sleeping apartments into a house of assignation and prostitution kept in a disorderly manner was a "change in the nature and character of occupation," within the meaning of a stipulation in a policy of insurance declaring that such change would render it void. *Indiana Ins. Co. v. Brehm*, 88 Ind. 578, 582.

#### CHANGE BILL.

The ordinary dray ticket used in commercial cities as a mode of keeping accounts of drayage between merchants and draymen is not a "change bill" within the sense of the law forbidding the issuance and circulation of change bills. *State v. Fisk*, 35 Tenn. (3 Sneed) 695, 696.

#### CHANGE OF VENUE.

Application for, as special proceeding, see "Special Proceeding."

As an action, see "Action."

"Change of venue" and "removal of causes," in statutes authorizing the transfer of causes, are interchangeable and of the same significance. "Change of venue," strictly speaking, means a change of the place of trial to another county, but is sometimes used to denote the transfer of the cause to another court or judge within the county or district in which it is pending. Thus "the removal of a cause," within the meaning of Act April 14, 1834, authorizing either party, in a suit brought by or against canal companies and railroad companies, to remove the same to the court of another adjacent county, and the phrase "change of venue," in Act March 30, 1875, entitled "An act relating to and authorizing change of venue in civil cases," are of the same meaning. *Felts v. Delaware, L. & W. R. Co.*, 45 Atl. 493, 494, 195 Pa. 21.

A change of venue is not a constitutional right. It is entirely competent for the Legislature to provide the terms upon which a change, if any, shall be granted. The Legislature has used the words "change of venue" and "the removal of a cause" as interchangeable and of the same significance, so that, whatever technical signification the word "venue" had at one time, the words "change of venue" will not be held to mean a change from a circuit or county, but will include as well a removal from one place in a county to another. *State v. Wofford*, 24 S. W. 764, 765, 119 Mo. 375.

#### CHANNEL.

See "Main Channel"; "Natural Channel"; "Regular Channel"; "Ship Channel"; "Steamboat Channel"; "Usual Channel."

A "channel" is the bed of a stream of water. The thread of a stream is the middle

line of the channel, and, where a running stream which is a boundary changes its channel by a gradual and progressive washing away of one of its banks, the boundary follows the thread of the stream, though the change is caused by instantaneous and obvious dropping into the river of quite large portions of the bank, when such portions are not carried down the stream or lodged on the opposite shore in solid masses, but disintegrate and separate into particles of earth, borne onward by the flowing water. *Willey v. Lewis*, 11 Ohio Dec. 607, 611, 28 Wkly. Law Bul. 104.

A channel is defined by the Century Dictionary to be the deeper part of the river or bay where the current flows, or which is most convenient for the track of ships. *The North-ern Queen* (U. S.) 117 Fed. 906, 915.

The channel of a river is the bed of the stream over which its waters run; a passage-way between banks through which flow the waters of the stream. *Benjamin v. Manistee River Imp. Co.*, 4 N. W. 483, 484, 42 Mich. 628.

The channel is that portion of a body of a river or canal which furnishes uninterruptedly, through its course, the deepest water. *The Sarah* (U. S.) 52 Fed. 233, 235, 3 C. C. A. 56.

#### As boundary.

The "channel" of a river forming a boundary line between states means the space within which ships can and usually do pass. *State of Iowa v. State of Illinois*, 13 Sup. Ct. 239, 243, 147 U. S. 1, 37 L. Ed. 55.

By the word "channel" is meant the place where the river flows. *State of Alabama v. State of Georgia*, 64 U. S. (23 How.) 505, 513, 16 L. Ed. 556.

"The 'channel' of a river, bay, or sound, in boatmen's parlance, means the course over its bed along which the water is deepest and the navigation safest. This must be irrespective of the current or distance from the shore. In questions of geography or boundaries, however, it is more generally used to designate the depression of a bed below permanent banks, forming a conduit along which waters flow, and which may be at some times full, and at others nearly, if not quite, dry. In this sense it is of common use in law. It is the more obvious signification in connection with boundaries, inasmuch as it presents something of a permanent nature, and at least at all times visible, and, when changed, leaving traces of old landmarks. They have permanent features independent of water, whereas channels, in the sense of the river pilots, are ever shifting, invisible, discoverable only by patient sounding and then imperfect." *Cessill v. State*, 40 Ark. 501, 504.

#### In navigation of rivers.

The word, when applied to rivers generally, without the purpose of describing their

currents or navigable characters, means the bed in which the stream of the river flows; but it is, like many other words in our language, controlled in its signification by the subject under discussion. As used when treating all subjects connected with the navigation of rivers, it indicates the line of the deep water which vessels follow. In this sense it is familiarly used by the boatmen of the Mississippi river. *Dunlieth & D. Bridge Co. v. Dubuque County*, 8 N. W. 443, 446, 55 Iowa, 558.

The definition of "channel" given in the most recent edition of Webster's Dictionary is "the bed of a stream of water, especially the deeper part of a river or bay where the main channel flows." The word "channel," when employed in treating subjects connected with the navigation of rivers, indicates the line of the deep water which vessels follow. *Buttenueth v. St. Louis Bridge Co.*, 17 N. E. 439, 444, 123 Ill. 535, 5 Am. St. Rep. 545.

#### In navigation of tide waters.

"The term 'channel' sometimes refers to the current of a running stream, and means that part of the stream in which the current flows. But in tide waters the term refers to the movement of vessels, and means that part of the water on which vessels move. Buoys do not mark the limits of channels to vessels of lighter draft. They are usually placed at the edge of that part of the channel in which the water is deep enough for vessels of large size, called the 'ship channel.'" *The Oliver* (U. S.) 22 Fed. 848, 849.

#### CHANNEL OF COMMERCE.

The channel of commerce of a navigable stream is the channel upon which commerce by steamboats or other vessels is usually conducted. *State of Iowa v. State of Illinois*, 13 Sup. Ct. 239, 243, 147 U. S. 1, 37 L. Ed. 55.

#### CHAPEL.

7 & 8 Geo. IV, c. 29, § 10, relating to the breaking and entering a church or chapel, does not refer to or include a Wesleyan chapel, but only chapels of the Church of England. *Rex v. Nixon*, 7 Car. & P. 442.

#### CHAPTER.

The words "title," "chapter" and "section," when used by way of reference, mean a title, chapter, or section of the Vermont statutes. *V. S. 1894*, 16.

#### CHAR.

"The definition of 'char' is to reduce wood to a coal by burning." It constitutes a sufficient burning to render a person, knowingly and willfully setting fire to a building, guilty of the crime of arson. *State v. Sandy*, 25 N. C. 570, 574.

Wood is said to be charred when it is reduced to coal and its identity changed. *State v. Hall*, 98 N. C. 571, 573.

## CHARACTER.

See "Bad Character"; "Chaste Character"; "Fiduciary Capacity or Character"; "General Bad Character"; "General Character"; "Good Moral Character"; "Maritime Character"; "Moral Character"; "Notorious Character"; "Public Character"; "Suspicious Character."

Like character, see "Like."

Character is the actual qualities which belong to an individual. *Boak v. State*, 5 Iowa (5 Clarke) 430.

"Character" is defined to be peculiar qualities impressed by nature or habit on a person which distinguish him from others. *Webst. Dict.* A libeler seeks to deprive a man of these and give him a fictitious character. *Cox v. Strickland*, 28 S. E. 655, 661, 101 Ga. 482.

Character is the estimation in the community in which a witness is held. *Smith v. State*, 7 South. 52, 53, 88 Ala. 73; *State v. Turner*, 15 S. E. 602, 604, 36 S. C. 534; *Fahnestock v. State*, 23 Ind. 231, 238.

The opinion and estimation of a person's neighbors, in order to establish his character, must be in regard to the traits of his moral character; as, for instance, that he was regarded by his neighbors generally as a thief, or regarded as an honest man, etc. *State v. Parker*, 9 S. W. 723, 732, 96 Mo. 382.

Character is the result of personal observation and intercourse and the information derived from others. The opinion must be the result of a knowledge of the general reputation of the party, not of particular facts nor of an estimate of the character of the party founded on personal knowledge of many facts. *Ford v. Ford*, 26 Tenn. (7 Humph.) 92, 100.

### As conduct or habits.

Conduct synonymous, see "Conduct."

"Character and conduct," as used by Mr. Justice Story in the case of *Jencks v. Coleman*, 13 Fed. Cas. 442, when he speaks of the character and conduct of passengers who are guilty of gross and vulgar habits of conduct, or who make disturbance on board, or whose characters are doubtful or dissolute or suspicious, and whose characters are unequivocally bad, mean habits and conduct that are injurious to the other passengers in the sense that they subject them to loss at the hands of the thief or gambler, to discomfort by reason of personal trespass and insult, or to annoyance by the exhibition

of coarse and vulgar habits. *Brown v. Memphis & C. R. Co.* (U. S.) 7 Fed. 51, 56.

"Character," as used in an instruction that the presumption of law is that the life and previous character of the prosecuting witness were chaste, means manner of living, habits of life, conduct. *Bradshaw v. People*, 88 N. E. 652, 653, 153 Ill. 156.

### As general character.

Character which would discredit a witness is general character. It may happen that a man may have knowledge of a particular fact which would induce him to disbelieve another on oath, but such disbelief would not be evidence as to his character. *Wike v. Lightner* (Pa.) 11 Serg. & R. 198, 199.

"Where a witness is sought to be impeached on the ground of his bad character, persons called for that purpose may testify that they are acquainted with his general character, and may give evidence as to whether, from such general character, they would believe the witness on oath, although they expressly disclaim all knowledge of the witness' character for truth and veracity. In this sense, therefore, character is used as meaning general character, and not character with respect to certain particular characteristics." *Johnson v. People* (N. Y.) 3 Hill, 178, 38 Am. Dec. 624.

### As reputation.

The word "character," in provisions that the character of a witness may be proved for the purpose of testing his credibility, means reputation. *State v. Egan*, 13 N. W. 730, 59 Iowa, 636; *Bucklin v. State*, 20 Ohio, 18, 24; *Rudsill v. Slingerland*, 18 Minn. 380, 382 (Gil. 342, 343); *Powers v. Leach*, 26 Vt. 270, 278; *Knobe v. Williamson*, 84 U. S. (17 Wall.) 586, 588, 21 L. Ed. 670.

Character is the estimation in which one is held in the community; reputation, the estimate put upon it. This estimate may be just or unjust, true or false; still it is character. It is judged by many things, some of which it would be difficult, if not impossible, to define. What the public generally say of a person, and the manner in which he is received and treated in society, are among the tests by which his character is determined. *Sullivan v. State*, 6 Ala. 48, 50; *Haley v. State*, 63 Ala. 83, 86.

When a witness knows another's character, though he may have no personal knowledge of any act of his life, he is competent to testify in regard to it. But these are not the only sources of the witness' information. He may know his character although he never heard it canvassed, and does not even know a majority of his neighbors. *Haley v. State*, 63 Ala. 83, 86.



"The term 'character' in law is not synonymous with 'disposition,' but simply means reputation, or the general credit which a man has obtained in public opinion." Taylor, Ev. 350. Where character evidence is admissible, it has generally been found that that which is least talked about is generally the best character, and it has therefore been necessary to permit witnesses to give negative evidence on the subject, and to state that they never heard anything against the character of the person on whose behalf they are called; and "some of the judges," says Mr. Taylor, "have gone so far as to assert that the evidence in this negative form is the most positive proof of a man's good reputation"—citing Reg. v. Rowton, 10 Cox, Cr. Cas. 25, where Cockburn, C. J., observes: "I am ready to admit that negative evidence, such as 'I never heard anything against the character of the person of whose character I come to speak,' should not be excluded. I think, though it is given in a negative form, it is the most positive evidence of a man's good character and reputation, because a man's character does not get talked about until there is some fault to be found with him. It is the best evidence of his character that he is not talked about at all." Hussey v. State, 6 South. 420, 423, 87 Ala. 121.

Generally speaking, "character" is a word of broader significance than "reputation." However, the character which affected the question of guilt or of the credibility of witnesses is almost a synonym of reputation—the estimate placed upon the party by the public. Sullivan v. State, 66 Ala. 48, 50.

The word "character" has an objective and subjective import which are quite distinct. As to the objective, character is its quality; as to man, it is the quality of his mind and his affections, his capacity and temperament; but, as a subjective term in the minds of others, one's character is the aggregate or abstract of other men's opinions of one, and in this sense, when a witness speaks of the character of another witness for truth, he draws not upon his memory alone, but his judgment. It is the conclusion of the mind of the witness in summing up the amount of all the reports he has heard of the man, and declaring his character for truth as held in the mind of his neighbors and acquaintances, and, in this sense, character, general character, and general report or reputation are the same. Powers v. Leach, 26 Vt. 270, 278.

"Character," in the sense in which the term is used in jurisprudence, means the estimate attached to the individual by the community, not the real qualities of the individual as conceived by the witness. In other words, it is not what the individual in question really is, but what he is held to be in the society in which he moves. Whart. Cr. Ev. c. 2, § 53. Character is a fact which

is proved by another fact—general reputation. It cannot be shown by evidence of particular and specific facts, but may be proved by negative testimony. It must therefore be proved by witnesses who are acquainted with the general reputation of the person whose character is in issue, which must be shown before the evidence is admissible. Berneker v. State, 59 N. W. 372, 374, 40 Neb. 810.

Where witnesses in their depositions, when testifying of the reputation of other witnesses for truth and veracity, used the terms "character for truth" and "general character for truth," it was held that character, general character, report, or reputation, so used, were synonymous. Powers v. Leach, 26 Vt. 270, 275.

"The character for truth of a witness is a report concerning such witness. Character and reputation are the same. The reputation which a man has in society is his character. General report is general reputation, and general reputation is general character. The knowledge of a witness' character is not a personal, individual knowledge of facts, but a knowledge by reputation or general report." Kimmel v. Kimmel (Pa.) 3 Serg. & R. 336, 337, 8 Am. Dec. 655.

Evidence of defendant's character means evidence of his general reputation. State v. Pearce, 15 Nev. 188, 190.

The word "character" has been variously used in legal proceedings, sometimes denoting personal, official, or special character in which a party sues or is sued; but it more frequently refers to reputation or common report, and is seldom used as synonymous with mere inclination or propensity or even secret habit, nor as descriptive of the mere qualities of individuals, only so far as others have formed opinions from their conduct. In a prosecution for seduction, reputation of incontinency alone will constitute a defense. Safford v. People, 1 Parker, Cr. R. 474, 478.

The character of a person for peace and quiet is the estimate which the public places on the person—his reputation. When a witness is called to testify in regard to it, he must not speak from his individual knowledge of the acts or conduct of the person inquired about. His reputation or standing, whether good or bad, is the matter to be deposed to. Character is the estimation in which one is held by the public who know his standing. His character manifests itself by the manner in which one is estimated, spoken of, or received in society. It is always permissible on cross-examination to ascertain the extent of the witness' information and the data from which he draws his conclusion. A man may have a bad character for peacefulness without being bloodthirsty, quarrelsome, turbulent, re-

vengeful, and disorderly. *De Arman v. State*, 71 Ala. 351, 360.

"Character" is used in two senses. In the one it is used to refer to one's actual life, and in the other it is the reputation which one bears in the community. In a libel case, reputation may be shown as indicating character. *Edwards v. Kansas City Times Co.* (U. S.) 32 Fed. 818, 816.

"Character" as used in Acts 23d Gen. Assm. c. 35, § 12, providing that on the trial of any proceeding against any person for selling, giving away, or keeping intoxicating liquors in violation of law, evidence of "the character and habits of sobriety or otherwise" may be given, includes reputation. *State v. Fleming*, 53 N. W. 234, 235, 86 Iowa, 294.

"Character" is a synonymous term with "reputation," as used in Act 1864, c. 38, providing that evidence of facts, or reputation proving that a person is habitually and by practice a thief shall be sufficient for his conviction, as satisfactorily establishing the fact that he is a common thief. *World v. State*, 50 Md. 49, 56.

"Character," as used in Pub. St. c. 80, § 3, providing that the notorious character of any premises on which liquors are sold shall be evidence that such premises are nuisances, is synonymous with the word "reputation," meaning merely what is reported or understood from report. *State v. Wilson*, 1 Atl. 415, 416, 15 R. I. 180.

#### Reputation distinguished.

The term "character," as used in a statute, signifies that which the person really is, in distinction to that which she may be reported to be. *Andre v. State*, 5 Iowa (5 Clarke) 389, 394, 68 Am. Dec. 708; *State v. Lapage*, 57 N. H. 245, 296, 24 Am. Rep. 69.

"Character consists of the qualities which constitute the individual; reputation, the sum of opinions entertained concerning him. The former is interior; the latter external. One is the substance; the other the shadow." In re *Spenser*, 7 Cent. Law J. 84, 85.

"'Character' and 'reputation' are not synonymous terms. Character is what the man is morally, while reputation is what he or she is reputed to be. Reputation is the estimate which the community has of the person's character, and it is the belief that moral character is wanting in the individual that renders him unworthy of belief; that is to say, that reputation is evidence of character, and if the reputation is bad for truth, or reputation is bad in other respects affecting the moral character, then the jury may infer that the character is bad and the witness not reliable." *Leverich v. Frank*, 6 Or. 212, 213.

Doubtless there is a distinction observed by careful writers between character and reputation; character, where the distinction is observed, signifying the reality, and reputation merely what is reported or understood from report to be the reality about a person or thing. The word "character," however, is often used as synonymous with and in the sense of "reputation." *State v. Wilson*, 1 Atl. 415, 416, 15 R. I. 180.

"Character," as used in Code, § 2586, providing a punishment for the seduction of an unmarried woman of previously chaste character, is not synonymous with "reputation," and is used in its accurate sense as signifying that which the person really is, in distinction from that which she may be reported to be. "According to Webster, 'character' signifies the peculiar qualities impressed by nature or habit upon a person, which distinguish him from others. These constitute real character, and the qualities which he is supposed to possess constitute his estimated character or reputation. And then he defines 'reputation' to be good name, the credit, honor, or character which is derived from a favorable public opinion or esteem, and character by report. It is very true that the word 'character' is often used colloquially in the same sense as 'reputation,' but such is not its true signification." *Andre v. State*, 5 Iowa (5 Clarke) 389, 394, 68 Am. Dec. 708.

"Character," as used in Code, § 3867, providing punishment for the seduction of any unmarried woman of previously chaste character, does not mean her reputation, but her real moral qualities. "To determine whether the crime has been committed, the true character of the woman must be ascertained. The reputation of a man or woman does not always accord with the true character of the individual." *State v. Prizer*, 49 Iowa, 531, 532, 31 Am. Rep. 155.

"Character" is defined by Webster to be "the peculiar qualities impressed by nature or habit on a person, which distinguish him from others." These constitute real character, and the qualities he is supposed to possess constitute his estimated character or reputation. *Carpenter v. People*, 8 Barb. 603, 608.

#### CHARBON.

Charbon is a disease caused by the infection upon the body of putrid animal matter containing poisonous bacillus anthrax. *Bacon v. United States Mut. Acc. Ass'n*, 25 N. E. 399, 123 N. Y. 304, 9 L. R. A. 617, 20 Am. St. Rep. 748.

#### CHARCOAL.

"Charcoal," as used in the internal revenue act exempting charcoal from taxation,

does not mean boneblack, but means only that produced from wood. In commercial contracts and in legal phraseology the simple term "charcoal," without the word "animal" before it, would not be held to include bone-black or animal charcoal; and, if we look to the ordinary and popular use of the term "charcoal," it clearly would not include bone-black. *Schriefer v. Wood* (U. S.) 21 Fed. Cas. 737, 738.

## CHARGE.

See "Average Charges"; "Engineer in Charge"; "Free of All Charges"; "Lawful Charges"; "Necessary Charges"; "Port Charges"; "Prison Charges."

A complaint in an action by an attorney for commissions, alleging that the plaintiff charged a certain amount, but which does not allege that the charge was true, or that the services for which he made the charge were worth that or any other sum, is not to be construed as an allegation that the charge was true, or that the services were worth such sum, and hence the allegation is not sufficient to authorize the introduction of evidence of the value of the services. *Farrington v. Wright*, 1 Minn. 241, 245 (Gil. 191, 195).

The word in its legal acceptance has a very broad meaning. It includes payments charged on land by devise, as legacies; those by deed, as rents, annuities, and mortgages; those by operation of law for public purposes, as taxes and assessments; those by effect of law in private suit, as judgments. In the dictionaries and digests of the common law, by no means the best expounders of the reason of the law, but of necessity the best interpreters of its vocabulary, the word "charge" is used in this latitude. *Darling v. Rogers* (N. Y.) 22 Wend. 483, 491.

Charge is the price required or demanded for services rendered, or less frequently for goods supplied. It is a word of very general and varied use. *Fulmer v. Southern Ry. Co.*, 45 S. E. 196, 198, 67 S. C. 262.

The words "charge" and "custody" are frequently used as synonymous. The lexicographers give them as synonyms. *State v. Clark*, 29 Atl. 984, 86 Me. 194.

The use of the words "charging and collecting," in a contract to transport coal through a canal, charging and collecting a certain toll therefor, does not exclude the idea of collecting compensation at a date after the coal has been transported, or limit the canal company to the special remedy of retaining or excluding the boats. *Pennsylvania Coal Co. v. Delaware & H. Canal Co.*, 40 N. Y. 72, 73, 79.

## As appointment as guardian.

The term "take charge of," in a will providing that E. should take charge of the testator's children and receive annually from the testator's estate the sum of \$500 for her services, constituted an appointment of a testamentary guardian of the persons, and should be so construed, and entitled E. to the annual bequest until the youngest child of the testator became of age, but did not entitle E. to the sum of \$500 per annum during her lifetime. The devise was not a bequest of an entire sum for the performance of the trust, nor was it a legacy to an executrix, but merely constituted a direction for the payment of a certain sum annually for services for taking charge of the children of the testatrix. Acceptance and performance were necessary on the part of the devisee, and her right to receive payment ended with the termination of her relation to the children of the testatrix. *Appeal of Hewson*, 102 Pa. 55, 58.

## Assessment for benefits.

"Taxes, charges, and impositions," as used in a charter exempting the property of a corporation, are the taxes, charges, and impositions imposed for public use, and do not include assessments for benefits. *City of Paterson v. Society for Establishing Useful Manufactures*, 24 N. J. Law (4 Zab.) 385, 400.

## As burden or onerous condition.

The term "charge," as used in a statute prohibiting any "charge" on foreigners emigrating to the country, means any onerous condition; it being the evident intention of the act to prevent any such condition from being imposed upon any person emigrating to the country which is not equally imposed upon all other emigrants, at least upon all others of the same class. *In re Ah Fong* (U. S.) 1 Fed. Cas. 218, 218.

## As command or direction.

A will providing that, upon the death of testatrix's husband, she gave, devised, and bequeathed all of her estate in such manner as he might by his last will and testament, or by an instrument in the nature of a last will and testament, devise and bequeath, trusting entirely to his discretion to carry into execution such "charge and instruction" as she might during her life have expressed to him in regard thereto, expresses more than hope or wish, or advice or recommendation. The words "charge and instruction" have an imperative significance, which may not rightfully be resisted. Their inherent force is not impaired by testatrix's expression of entire trust in her husband's discretion to carry out her injunctions. *Condit v. Reynolds*, 49 Atl. 540, 541, 66 N. J. Law, 242.

**As control or regulation.**

Under Rev. St. 1879, art. 2851, providing that during the marriage the husband shall have sole management of the wife's property, the husband is the "person in charge" of sheep belonging to the wife, within the meaning of Act April 4, 1883, making a person in charge of sheep liable for fees for their inspection. *Abbott v. Stanley*, 14 S. W. 62, 77 Tex. 309.

Pilot Act 6 Geo. IV, c. 175, providing that an unlicensed pilot, who shall continue in the charge or conduct of any ship or vessel after any duly licensed pilot shall have offered to take charge of such ship, shall forfeit a certain sum, does not include a person employed to tow or move a vessel, if the bona fide object of the employment by the moving power, as such person is not a pilot, and has not the conduct or charge of the vessel. The words mean the taking the charge and direction of a pilot, whose proper and sole duty is to select the course, and take the management and conduct of the vessel for the purpose of directing her in that course. *Bellby v. Scott*, 7 Mees. & W. 93, 100.

The act to regulate and license the sale of intoxicating liquors, approved March 17, 1875, declares "that no city or incorporated town shall charge any person who may obtain a license under the provisions of this act more than the following sums for license to sell," etc. This section was not intended to, and did not, confer any power or authority upon either cities or incorporated towns to regulate and license the sale of intoxicating liquors within their corporate limits. From the language of the section cited and from the title of the act it is manifest that the Legislature merely intended in and by said section to impose a limit upon the amount to be charged for license by the corporate authorities of cities and incorporated towns, wherever they might be authorized by law to grant such license. By the general law the corporate authorities of cities have been authorized to regulate and license the sale of intoxicating liquors; but this authority has not been given to towns incorporated under the general law, and is not given to them by the act referred to. *Walter v. Town of Columbia City*, 61 Ind. 24, 28.

A section foreman, whose duty it is to keep the track in repair, is "a person in charge or control of any part of the track of a railway," within *Employers' Liability Act*, subd. 5. *Alabama G. S. R. Co. v. Davis*, 24 South. 862, 868, 119 Ala. 572.

**As a debt or liability.**

A charge is defined as an obligation directly bearing on the individual thing or person to be affected, and appointing him or it to the discharge of the duty or claim imposed, so that an act of the Legislature mak-

ing certain warrants a county charge converts prima facie evidence of debt into incontestible obligations of the maker, so that the statute is invalid as an exercise of judicial power. *Felix v. Wallace County Com'rs*, 62 Pac. 667, 669, 62 Kan. 832, 84 Am. St. Rep. 424.

The word "charge," as a technical word of legal use, conveys the idea of obligation. The distinct signification of the term rests in the idea of obligation, directly bearing upon the individual, thing, or person to be affected, and binding him or it to the discharge of the duty or satisfaction of the claim imposed. In this view, a charge will, in general terms, denote a responsibility peculiar to the person or thing affected and authoritatively imposed. It means an exaction or demand which must be met, and, though in common phrase, as applied to a single instance, it may at times imply a demand made on the one hand without power to enforce it, which may or may not be complied with on the other, yet in a complaint charging that a charge of 1 per cent. was made in addition to the lawful rate of interest on certain loans and advances, "it carries with it the fuller meaning of an obligation imposed and taken," and is sufficient to show usury. *Merchants' Exch. Nat. Bank v. Commercial Ware House Co.*, 49 N. Y. 635, 639.

In a bond conditioned to keep a constable harmless from all charges by reason of a levy made under execution, the word "charges" means liability. *Bancroft v. Winspear* (N. Y.) 44 Barb. 209, 214.

In the construction of revenue statutes, it is a general rule that, if a duty is charged on any article, the word "charged" means that the owner shall be personally debited with that sum. *United States v. Lyman* (U. S.) 28 Fed. Cas. 1024, 1030; *Attorney General v. —*, 2 Anst. 559, 560.

"Charged," in a statute providing that gifts charged in writing by an intestate or his order shall be deemed advancements, implies that the donee shall be charged or in a manner made debtor to the testator or intestate's estate, or that the memorandum given shall indicate the nature of the gift as an advancement. *Mewry v. Smith*, 5 R. I. 255, 260.

An officer serving a writ, not being in the employ of the defendant named in the writ, and such defendant not by law becoming liable to the officer for his fees for the service of the writ, either before or after final judgment in the case, cannot properly, within the ordinary meaning of that word, "charge" his fees against such defendant, but can only render his services upon the credit of, and charge his fees for such services against, the person who has employed him, within the meaning of Gen. St.

§ 955, enacting that every officer who demands or receives more than his legal fees shall pay threefold the amount thereof to the one against whom the illegal charge is made, so that a defendant cannot recover excessive fees from a sheriff which he has paid to the plaintiff on the settlement of the case. *Littlefield v. Cowles*, 50 Atl. 737, 739, 74 Conn. 241.

In Public Health Act 1848, 11 & 12 Vict. c. 3, § 89, providing that the local board may make and levy special and general district rates in order to raise money for the payment of future charges and expenses which may have been incurred at any time within six months before the making of the rate, the term "charge" includes a judgment obtained against a local board, and a rate might be made to defray it within six months of that charge. *Queen v. Rotherham Local Board*, 8 El. & Bl. 905, 913.

#### **As demand or require.**

Code, § 1966, imposes a penalty on any railroad which shall charge for the transportation of any freight over its road a greater sum than shall be charged at the same time by it for an equal quantity of the same class of freight transported in the same direction over any portion of the same railroad of equal distance. Held, that the phrase "charge for the transportation of any freight" means to require or demand of the shipper as of right such compensation for the transportation of any freight already transported or delivered to the company to be transported. *Hines v. Wilmington & W. R. Co.*, 95 N. C. 434, 440, 59 Am. Rep. 250.

#### **As duty or obligation.**

In Act 1853, c. 239, § 1, constituting and declaring the county commissioners a corporation and body politic, and enacting that they shall have charge and control over public roads and bridges and the property owned by the county, the phrase "charge and control" should be construed as equivalent to "duty and obligation," since the statute conferred a power upon the corporation to be exercised for the public good, the exercise of which is not discretionary, but imperative, and the commissioners are not at liberty to exercise a discretion as their sense of duty to their constituents dictate, without coercion or liability for its nonuser. The power vested in the county commissioners was a ministerial one, which they were obliged to exercise for the public good, and in default of its proper exercise they are liable to an action for damages at the suit of one injured by a defect in a road or bridge. *Anne Arundel County Com'rs v. Duckett*, 20 Md. 468, 475, 83 Am. Dec. 557.

Laws 1883, c. 321, § 1, giving the board of claims authority to hear and determine all claims against the state for damages

resulting or arising from the negligence or conduct of any "officer of the state having charge of the canals" includes a lock tender, for it should be construed as embracing all those persons in the employ of the state intrusted with the performance of duties relating to the canals, and from the neglect or omission to perform which damages might occur to individuals. It is unreasonable to suppose that the state intended to confine its liability to cases arising from the negligence of those officers having the duty of general supervision only to perform, and deny relief in cases where damages arose from the neglect of others having practical control of its operations. *Sipple v. State*, 1 N. E. 892, 893, 99 N. Y. 284.

"Charged," as used in a statute declaring that a certain official shall be charged with certain duties, means to put upon as a task or duty, to burden, to commission, to intrust, to lay on or impose, to load or burden, as a task or duty or trust. It imposes imperative duties and personal responsibilities. It defines his status. *People v. Angle* (N. Y.) 47 Hun, 183, 189.

#### **As expenses.**

In Rev. St. 1833, p. 57, authorizing a township meeting to vote such sums of money as they should judge necessary for the purpose of supporting and maintaining the poor, and for all proper and necessary charges arising in the township, "charges" means any matters which were supposed likely to require expenditures in amounts, either definite or indefinite. *Marathon Tp. v. Oregon Tp.*, 8 Mich. 372, 381.

In a mercantile contract for the purchase and shipment of tobacco, the term "charges" comprehends only the real expenses paid. *Alexander v. Morris* (Va.) 3 Call, 89, 99.

In an agreement by one who bought certain lands for the benefit of others to sell such lands, and that if, on the sale thereof, he should realize any profit after paying the purchase money, costs, and charges, he might be at by reason of such purchase, he would hold the same for the use and benefit of such other persons, the word "charges" means only expenses paid out by him in attending to the business, and does not include any claim to commissions or other compensation for his services. *Green v. Jones*, 73 N. C. 265, 268.

Charges and expenses allowed to a trustee under a trust deed are moneys paid out in the discharge of the duties of his office. *Whitaker v. Old Dominion Guano Co.*, 31 S. E. 629, 630, 123 N. C. 368.

#### **As lien or incumbrance.**

"Charge," as used in Code 1899, c. 74, § 2, providing that every transfer or charge

by an insolvent with intent to prefer a creditor shall be void, is defined as including every confessed judgment, deed of trust, mortgage, lien, and incumbrance. *Nuzum v. Herron*, 44 S. E. 257, 262, 52 W. Va. 499.

The word "charge" is of very large signification, and in the statute its proper signification is every lien or incumbrance or claim the purchaser may have upon the premises, and for which at common law or in equity he would be entitled to hold the lands as security and to the satisfaction of which a court of equity would condemn them. *Anniston First Nat. Bank v. Elliott*, 125 Ala. 646, 651, 27 South. 7, 9, 47 L. R. A. 742, 82 Am. St. Rep. 268 (citing *Grigg v. Banks*, 59 Ala. 311).

"Charges," as used in the mortgage of a railroad authorizing a sale of the property on default, and an application of the proceeds to pay preferred stock, after providing for and paying all prior or lawful charges thereon, will not be construed in any technical sense, or "as importing legal liens upon the property and franchises of the company, but rather in the general acceptance of equitable claims, which, proper steps being taken therefor, may be charged thereon." *Miller v. Ratterman*, 24 N. E. 496, 499, 47 Ohio St. 141.

#### As make liable.

"Charge," as applied to the power of a married woman as to her separate property, is used in the sense of rendering her estate generally liable for a debt, and, when it is said that a married woman may charge her separate estate in the same manner as if unmarried, it means that, as when unmarried, in contracting a debt she charges all her property, no matter what was her intention, so a married woman in contracting a debt charges all her separate property, no matter what was her intention. *Radford v. Carwile*, 13 W. Va. 572, 658.

The word "charge," when used in connection with a married woman's property and her attempt to affect it by contract, simply means that the property is made liable for her debts under execution, as if she were a feme sole. It does not mean, where she has contracted in a manner to affect her separate estate, that a lien which prevents the free transfer of the property afterwards, and before judgment, is created. *Wachovia Nat. Bank v. Ireland*, 37 S. E. 223, 224, 127 N. C. 238.

#### Of administration.

"Charges of administration," as used in Code Civ. Proc. §§ 1631, 1632, requiring an administrator to itemize the charges or expenses of administration, does not include expenses incurred by carrying on a business with the funds of the decedent, which the

administrator is not authorized to do. In re *Rose's Estate*, 22 Pac. 86, 87, 80 Cal. 166.

#### Of engine or train.

Within the meaning of Code, § 2590, subd. 5, making the master liable for injury to a servant caused by the negligence of one in the master's employ having charge or control of an engine, the engineer, while running the engine, performing the labor himself, has charge and control of it, but not a superintendence of the engine. *Culver v. Alabama Midland Ry. Co.*, 18 South. 827, 831, 108 Ala. 330.

The words "person in charge or control of the train," within the meaning of section 1, cl. 3, of the employers' liability act, no doubt for many purposes applies to the conductor; but, if the statute is to be of any use in the cases of running down or collision, the engineer must be regarded as the person in charge, so far as giving signals or slackening speed at the approach of danger are concerned. *Davis v. New York, N. H. & H. R. Co.*, 34 N. E. 1070, 1071, 159 Mass. 532.

St. 1887, c. 270, § 1, subd. 3, authorizing a recovery for a railroad employé injured by the negligence of any person in the service of the employer in "charge or control" of a train, includes the engineer of the train, but does not include the station agent and the tower man in charge of the track, since they have charge of the switches. *Fairman v. Boston & A. R. Co.*, 47 N. E. 613, 617, 169 Mass. 170.

St. 1887, c. 270, providing that an employé of a railway company may recover for injuries due to the negligence of the person in charge or control of a train, etc., means a person who for the time being, at least, has immediate authority to direct the movements and management of the train as a whole, and of the men engaged upon it, and hence a brakeman on cars which are moving from the impetus imparted by a locomotive shortly detached therefrom has not "charge or control" of the cars within the meaning of the statute. *Caron v. Boston & A. R. Co.*, 42 N. E. 112, 113, 164 Mass. 523.

In construing the statute relative to the liability of a railroad company for personal injuries by reason of the negligence of any person who has charge or control of any train upon a railroad, it was held that it was a question for the jury whether the brakeman, who, in signaling a train to back when he and the engineer were the only persons on the train, was not acting under the orders of any immediate superior, was to be considered a person in charge or control of a train; the court saying that the language of the statute implies that some one is to be regarded as in charge. *Steffe v. Old Colony R. Co.*, 30 N. E. 1137, 1138, 156 Mass. 262.

The term "person in charge of a train," within the meaning of a statute in reference to the liability of a railroad company for injuries resulting from the negligence of a person in charge of a train, applies to a conductor having charge of a train, who, with intent to put two cars belonging thereto in a certain place, carelessly directs how the engine should operate against them, resulting in their being kicked on a siding with too great force, which caused the injury of plaintiff. *Devine v. Boston & A. R. Co.*, 34 N. E. 539, 540, 159 Mass. 348.

The term "person in charge or control of any locomotive or train" in the masters' liability act, in reference to injuries caused by the negligence of persons having charge or control of any railroad locomotive, engine, or train, does not include the conductor of a switch engine having charge of making up freight trains in the yard, in so far as his negligent acts in making up the train relate to and are the cause of an accident occurring after it is started on the road and outside of his control. *Thyng v. Fitchburg R. Co.*, 30 N. E. 169, 170, 156 Mass. 18, 32 Am. St. Rep. 425.

#### Of imprisonment.

Charges of imprisonment, as used in Rev. St. c. 8, section 5 as amended, providing that, when any person committed for the nonpayment of taxes shall be discharged by taking the poor debtor's oath, the collector shall be liable to pay the tax with the charges of imprisonment, cannot be construed to include the support of the prisoner while imprisoned. *Inhabitants of Townsend v. Walcutt*, 44 Mass. (3 Metc.) 152, 153.

#### On cargo or importation.

A receipt given by common carrier by water in full for freight and charges on a certain boat means only such expenses as the master of the boat has paid and for which he has a lien upon the cargo, and does not include demurrage. *Huntley v. Dows* (N. Y.) 55 Barb. 310, 312.

Charges which are to be added to the purchase price to determine the dutiable value of merchandise include the cost of sacks in which salt is imported. *Barnard v. Morton* (U. S.) 2 Fed. Cas. 837.

#### On estate.

A provision in a will, "I charge the estate inherited from my late husband with a life annuity of \$250 to M.," is a charge on all the estate received from the husband, and takes precedence over other bequests, though testatrix gave a large number of legacies, manifestly desired that her husband's home place should remain in his family name, made no other provisions for priorities, made a residuary bequest, and apparently thought

the estate would be sufficient to pay all legacies in full. *Young v. Benton*, 46 Atl. 51, 70 N. H. 268.

The term "charges," as used in a will by which testator provided that all debts and charges should be paid out of his estate, after which he made disposition of the remainder, did not include bequests. *Cairns v. Smith* (Tex.) 49 S. W. 728, 733.

As used in the statute (title 60, c. 1, § 22, p. 269, St. 1808) authorizing the sale of real estate by a decedent to pay debts and charges beyond the personal estate, the word "charges" has the precision of a technical term, and comprises merely the expenses incurred in the settlement of an estate. *Goodwin v. Chaffee*, 4 Conn. 163, 166.

#### On land.

"Charge," as used in a statute requiring a mortgagor, on redeeming real estate, to pay the sum bid, with interest and all other lawful charges, is a word of very large signification, and in the statute its proper signification is any lien or incumbrance or claim the person may have on the premises, and for which at law or in equity he would be entitled to hold the lands as security, or to the satisfaction of which a court of equity would condemn them. *Harris v. Miller*, 71 Ala. 26, 34; *Parmer v. Parmer*, 74 Ala. 285, 289; *Grigg v. Banks*, 59 Ala. 311, 317; *Lehmann, Durr & Co. v. Collins*, 69 Ala. 127, 132; *Holden v. Rison*, 77 Ala. 515, 518.

A "charge" on the lands for the payments of debts in England makes the land liable to debts for which they would not be liable but for the act of the testator. If a testator should think proper to use that word here, there would be nothing ambiguous about it. Every one would at once understand it to mean that the burden of the debts should be thrown on the real estate in exemption of the personalty. It would be a direction to pay the debts out of that estate, and equivalent to a devise for the payment of debts. *Warley v. Warley* (S. O.) Bailey, Eq. 397, 407.

"Charge," as used in Code, c. 74, § 2, providing that "every gift, sale, conveyance, assignment, transfer or charge made by an insolvent debtor to the trustee, or otherwise giving or attempting to give a prior deed or preference to a creditor or creditors of such insolvent debtor," shall be void as to such priority, has a specific technical and also a broad legal meaning, under which it includes any lien on property of any description, and includes a confessed judgment. *Mack v. Prince*, 21 S. E. 1012, 1013, 40 W. Va. 324.

Code 1876, §§ 2881-2887, providing for the redemption of lands sold at execution sale on demand or tender to the purchaser of the purchase price and all other lawful charges

thereon, should be construed to embrace not only costs of conveying, but the value of all permanent improvements made by the purchaser. *Posey v. Pressley*, 60 Ala. 243, 250.

"Charge," as used in 8 Hen. VI, c. 7, providing for the registration as a voter of one having an interest in land to the value of 40s. by the year at the least, above all charges, would include annual interest payable on a mortgage on the land by a parol agreement, though the mortgage on its face called only for the payment of a certain principal, and did not express interest. *Lee v. Hutchinson*, 8 C. B. 16, 24.

"Charges," as used in a statute relating to the conditions entitling one to be a registered voter, and requiring that he be possessed of an interest in land to a certain value beyond all charges, is understood to mean and include interest payable in respect of a mortgage. *Copland v. Bartlett*, 6 C. B. 18, 27.

"Charges," as used in *Gantt's Dig.* § 2697, authorizing an execution debtor to redeem lands sold under execution at any time within 12 months by paying the purchase money with 15 per cent. interest and all lawful charges, "includes taxes paid by the purchaser after the sale and before redemption, and costs of the clerk connected with the act of redemption." *Fuller v. Evatt*, 42 Ark. 230, 232.

"Charges," in the covenants of a lease providing for the payment of charges by the tenant, include assessments for the paving of a street, though the expenditure was for a permanent benefit extending beyond the term. *Bleecker v. Ballou* (N. Y.) 3 Wend. 263, 267.

The term "charges," as used in an express covenant to pay ground rent clear of all charges and assessments whatsoever, includes taxes, so that the grantee cannot deduct them from the ground rent itself. *Peart v. Phipps* (Pa.) 4 Yeates, 386, 387.

A "charge" on land is distinguished from a "trust" of the land, in that in the case of the former the land is devised generally for the beneficial enjoyment of the devisee, subject, however, to the payment by him of a specific sum or sums of money or the performance of a particular duty, while in the case of a trust the devise is limited to some particular purpose, with no beneficial interest in the devisee. Where testator gave his wife all his property for life if she should remain his widow so long, on condition that she should, out of the income, maintain his children during minority, the will expressly stating that the devise was in lieu of dower, a trust estate for testator's children was not created, but a life estate in the widow charged with the children's support was created. *Lang v. Everling*, 23 N. Y. Supp. 329, 331, 3 Misc. Rep. 530.

## CHARGE (In Criminal Law).

See "Criminal Charge"; "Offense Charged."

The expression "charged with," as applied to a crime, is sometimes used in a limited sense, intending the accusation of a crime which preceded a formal trial. In a fuller and more accurate sense the expression includes the responsibility for the crime. *Anderson's Law Dict.* And it is in this latter sense that the expression is used in Const. U. S. art. 4, § 2, requiring to be delivered up a person charged in any state with a crime, who shall flee from justice and be found in another state. *Drinkall v. Spiegel*, 36 Atl. 830, 831, 68 Conn. 441, 36 L. R. A. 486.

"Charged," as used in Const. art. 6, § 4, does not mean only the offense named in the indictment, but also offenses of the same nature, but of a lesser degree, than that distinctly named, and the offense charged in the indictment is to be determined by the offense of which the accused is found guilty; and hence, under the section above quoted, providing that in all criminal cases in which the offense charged amounts to a felony the Supreme Court shall have jurisdiction of an appeal, the court has not such jurisdiction in a case where the indictment was for assault with intent to murder, but the accused was found guilty thereunder of a simple assault. *State v. Quinn*, 16 Nev. 89, 91.

The words "charged with murder and being a fugitive from justice," as used in treaty of March 23, 1868, between the United States and Italy, providing for the extradition of persons charged with murder and being fugitives from justice, do not require that the person shall commit the murder in the future, but includes one who has committed a murder and fled from justice before the making of the treaty, and after the making thereof is charged with the crime; and hence, if one had committed a murder in Italy before the making of the treaty, and after the making of it was charged with the crime and found within the United States, he was a fugitive from justice, within the meaning of the statute. *In re De Giacomo* (U. S.) 7 Fed. Cas. 366, 367.

"Charged with crime," in legal parlance, means charged in the regular course of judicial proceedings. A man cannot be legally charged with crime when there is no jurisdiction to try him. The fact that he is so legally charged means that he is charged by an authority having a right to try. *Ex parte Morgan* (U. S.) 20 Fed. 298, 308.

According to military usage and practice, a charge before a court-martial is in effect divided into two parts, the first technically called a "charge," and the second "specification." The charge proper designates the military offense of which the accused is alleged



to be guilty; the specification sets forth the acts or omissions which form the legal constituents of the offense. *Carter v. McClaughry*, 22 Sup. Ct. 181, 189, 183 U. S. 365, 46 L. Ed. 236.

Both the Constitution of the United States and of Maryland use the terms "indictment," "presentment," and "charge" interchangeably, and as referring to the first step in the prosecution of a crime. *State v. Kiefer*, 44 Atl. 1043, 1044, 90 Md. 165.

#### As any accusation.

One is not charged with a crime authorizing his extradition under the law where the charge is upon suspicion. *Ex parte Smith* (U. S.) 22 Fed. Cas. 373, 379.

"Charge and accuse," as used in an indictment charging that the defendants conspired to seduce and entrap one B., and then "willfully charge and accuse him of the crime of adultery," does not mean a charge actually made before a grand jury or magistrate, but simply imputes to him these offenses falsely as a means of inducing him to pay money to avoid actual prosecution. *Commonwealth v. O'Brien*, 66 Mass. (12 Cush.) 84, 90; *Commonwealth v. Andrews*, 132 Mass. 263, 264.

"Charge," as used in a declaration in an action of slander alleging that the defendant said, "I have made a charge against him," imports an accusation of criminality, and, when made against a party in relation to his oath and evidence in the trial of a cause, imports an accusation of the only species of criminality which could have been incurred by him in the character of a witness. *Thompson v. Lusk* (Pa.) 2 Watts, 17, 22, 26 Am. Dec. 91.

"Charge," as used in a statute as to the form of an indictment, is synonymous with "accusation," which, while it includes a crime in legal contemplation, also includes the circumstances to a reasonable extent. *United States v. Ross* (Iowa) Morris, 164, 166.

#### As formal complaint.

Charge signifies an accusation, made in a legal manner of legal conduct, either of commission or omission, by the person charged. *Tompert v. Lithgow*, 64 Ky. (1 Bush) 176, 180.

"Charged," as used in Pen. Code, § 32, providing that all persons who harbor and protect a person charged with felony are accessories, means a formal complaint, information, or indictment filed against the criminal, or possibly an arrest without warrant. Mere general rumors and common talk that a person has committed a felony are wholly insufficient. *People v. Garnett*, 61 Pac. 1114, 1115, 129 Cal. 364.

"As it is usually used and understood, 'charged with crime' means something more

than suspected or accused of crime by popular opinion or rumor, and implies that the offense has been alleged against the party according to the forms of law." It is used in such sense in Gen. St. c. 117, § 7, giving the selectmen authority to offer a suitable reward to be paid by the town to any one who, in consequence of such offer, secures any person charged with a capable crime or other high crime or misdemeanor committed in such place. *Day v. Inhabitants of Otis*, 90 Mass. (8 Allen) 477, 478.

*Aiken*, Dig. p. 124, § 63, providing that, if the owner or any other person having the charge or government of any slave who shall be charged with any capital crime shall conceal or carry away such slave, the person so offending shall forfeit the sum of \$500, means a charge made in legal form. *State v. Duncan* (Ala.) 9 Port. 260, 263.

A "charge," within a charter authorizing a police board to retire a police officer after a certain number of years when there are no charges pending against him, may as well be an existing accusation made by a citizen against the officer and entertained by the board, as a formal presentment by the board itself, with notice from it to the officer. The words "charge" and "pending" are indeed susceptible of two interpretations—the legal and technical or the popular and liberal. To the lawyer's mind a "charge" would mean an accusation as to which formal notice was brought to the accused, and "pending" would suggest the state of an undetermined proceeding after such notice had been given to the party proceeded against; but in the popular sense "charge" and "accusation" are practically synonymous, and the word "pending," if we have recourse either to the vernacular or to the derivation of the term, means "hanging"; and a complaint filed against a police officer by a citizen is a "charge pending," within the meaning of the act. *People v. Roosevelt*, 34 N. Y. Supp. 228, 229, 12 Misc. Rep. 622.

The term "charges," as used in *Syracuse City Charter*, § 199, providing that the city marshal may be removed for cause on charges duly furnished, implies an accusation of official misconduct. *In re Freeman*, 50 N. Y. Supp. 520, 522, 27 App. Div. 593.

"Charges," as used in Act May 28, 1873, providing that courts of special sessions shall, in addition to the power already possessed by them, have also exclusive jurisdiction in the first instance to hear and determine charges for assault and battery not alleged to have been committed riotously, means an original complaint made in the first instance preliminary to a formal trial for a crime; and hence, where an indictment had been regularly found in a prosecution for assault and battery, and had been sent to the general sessions for trial, the latter court had jurisdiction of the case, for when the act was passed

the case was not in a condition where a charge could be made. An indictment is, in an enlarged sense, a "charge," yet it would not be included in that term as used in ordinary legal language or as used in this act; and hence the special sessions could not deprive the other court of jurisdiction to hear and determine a prosecution for assault and battery pending at the time of the passage of the act conferring jurisdiction on the courts of special sessions. *Ryan v. People*, 79 N. Y. 593, 598.

A statute requiring the judge to order a special term of court on being informed that a person is "charged with crime and confined in jail" does not mean that such person is confined in jail on an indictment, but includes cases in which he is charged with crime before a magistrate, and committed to jail by the latter for safekeeping. *Mary v. State*, 5 Mo. 71, 79.

#### As in hands of jury.

"Charged" means after the prisoner has been placed in the hands of the jury for trial. This, in England, was always done immediately after the jury was sworn, and before the bill of indictment was read or any of the testimony heard. It means, therefore, charged with the fate of the prisoner, and not with the testimony or law of the case. *Ward v. State*, 20 Tenn. (1 Humph.) 253, 260; *State v. Connor*, 45 Tenn. (5 Cold.) 311, 313.

"Charged," as applied to a trial, does not mean after the jury are sworn and have heard the testimony or a part of it, but after the prisoner has been placed in the hands of the jury for trial; and a discharge of the jury after they were sworn and so charged, against the consent of the prisoner, operated his discharge. *Dilworth v. Commonwealth* (Va.) 12 Grat. 689, 702, 65 Am. Dec. 264.

The jury is said to be charged with the prisoner when the 12 jurors are duly impaneled and sworn, and, when they are thus sworn to try the accused on the charge preferred, jeopardy attaches. Formerly, and now in England, the act of submitting the cause to the jury, or charging them with the accusation as contained in the indictment against a defendant, was quite formal. The clerk of the court directed them to look on the prisoner and hearken to the evidence, and read or stated to them the substance of the indictment, the plea, and their duty to find the defendant guilty or not guilty. *Scott v. State*, 20 South. 468, 469, 110 Ala. 48 (citing *Whart. Cr. Pl. & Prac.* § 961).

#### Person convicted.

Code Civ. Proc. § 2060, providing that a person who stands charged upon a criminal accusation with a bailable offense may be bailed upon an appeal, cannot be construed to mean a person who has been convicted. "The word 'charged' implies that the person

is alleged to be guilty, not proved or adjudged to be so." *People v. Bauman* (N. Y.) 3 N. Y. Cr. R. 454, 457.

"Charge," as used in Const. U. S. art. 4, § 2, subd. 2, providing that "a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in another state, shall \* \* \* be delivered up to be removed to the state having jurisdiction of the crime," does not admit of a narrow or strained construction. It is broad enough to include all classes of persons duly accused of crime. A person can be said to be charged with crime as well after his conviction as before. The conviction simply establishes the charge conclusively. An unsatisfied judgment of conviction still constitutes a charge, within the true intent and meaning of the Constitution. In *re Hope*, 10 N. Y. Supp. 28, 29, 7 N. Y. Cr. R. 406.

#### CHARGE (To Jury).

See "General Affirmative Charge."  
See, also, "Instruction."

"A 'charge,' as defined by Bouvier, is the exposition by the court to the jury of those principles of the law which the latter are bound to apply in order to render such a verdict as will, in the state of facts proved at the trial to exist, establish the rights of the parties to the suit." *Equitable Fire Ins. Co. v. Trustees C. P. Church*, 18 S. W. 121, 122, 91 Tenn. (7 Pickle) 185; *Dodd v. Moore*, 91 Ind. 522, 523.

"Bouvier, in defining the word 'charge,' says charging is stating the precise principles of law applicable to the case immediately in question." It is synonymous with "instruction." *Lehman v. Hawks*, 23 N. E. 670, 671, 121 Ind. 541.

The essential idea of a charge is that it is authoritative as an exposition of the law, which the jury are bound by their oath and by moral obligation to obey. *Dodd v. Moore*, 91 Ind. 522, 523.

The charge of a court to a jury is a decision made by the court, during the trial, that the law thus declared must be applied by the jury, through the facts established by the evidence. *Sharp v. Hoffman*, 21 Pac. 846, 847, 79 Cal. 404.

The term "charge," as used in Code, § 244, relating to instructions to juries, embraces any and all instructions addressed by the court to the jury for the purpose of governing their action in making, or aiding to make, a final disposition of the case in favor of one litigant or the other. *Harris v. McArthur*, 15 S. E. 758, 90 Ga. 216.

As used in a statute requiring instructions to be given in writing, the term "charge" does not include any and every question and answer passing between the court

and jury. It refers to the address made by the judge after the case has been closed, when he comments on the evidence or instructs the jury in any matter of law arising upon it. *Millard v. Lyons*, 25 Wis. 516, 517.

"Charge," as used in *Laws 1868*, c. 101, providing that the charge to a jury shall be in writing, cannot be construed to include the direction to the jury to find for one of the parties. *Grant v. Connecticut Mut. Life Ins. Co.*, 29 Wis. 125, 136.

The bare statement to the jury of the penalty authorized by a statute is not a charge, within the meaning of the statute requiring an instruction to be in writing. *Bush v. State* (Tex.) 70 S. W. 550.

### CHARGE AT LAW.

A charge in an attorney's bill for attending at a lockup house and obtaining defendant's release and filling up the bail bond is a "charge at law," within *St. 2 Geo. II*, c. 23, rendering the bill subject to taxation. *Fearne v. Wilson*, 6 Barn. & C. 86.

### CHARGE UPON THE FACTS.

In determining an objection to a charge of a judge in which he recited the uncontradicted testimony in the case, the objection being that he violated a provision of the Constitution forbidding a judge from charging upon the facts, the court quotes the following from the case of *Moore v. Columbia & G. R. Co.*, 16 S. E. 781, 791, 38 S. C. 1: "What is meant by the judge charging upon the facts? It seems to us it may be said to occur when, in the progress of a trial, the circuit judge conveys by word his opinion of the sufficiency or insufficiency of certain testimony necessary to the determination by the jury of some fact at issue between the parties litigant. This court, in construing this section of the Constitution, has held that any expression of the circuit judge in his charge that did not relate to the issues being tried by the jury, that were not pertinent to such issues, did not fall within the interdicted action on the part of the judge. This court has decided that, while he may not charge upon the facts, yet he may state the testimony in its logical order, and as bearing upon certain issues. The stating of the testimony means more than repeating it. It includes the idea of stating it in its logical relations to the propositions it is to support or contradict, as well as to the principles of law by which its bearing and force ought to be controlled, or, as it is expressed by the technical phrase, 'summing up.'" *State v. Ezzard*, 18 S. E. 1025, 1028, 40 S. C. 312.

### CHARGEABLE.

The term "chargeable," as applied to taxes when used in a tax deed declaring that the sum for which the land was sold was the amount of taxes for a certain year, with the

cost chargeable to the tract of land, meant that the taxes were properly a lien on the land; but the word "chargeable" was not synonymous with "delinquent," and therefore the deed did not show sufficiently that the taxes for which the land was sold were delinquent by the expression used. *Gilfillan v. Chatterton*, 37 N. W. 583, 584, 38 Minn. 335.

### As relating to poor persons.

"The word 'chargeable,' in its ordinary acceptation, as applicable to the imposition of a duty or burden, signifies capable of being charged, subject to be charged, or liable to be charged, or legally liable to be charged." It is used in such sense in *Gen. St. c. 20*, § 19, making the kindred of any poor person who shall become chargeable to any town liable for his support, and also in section 20, prescribing a method of enforcing such duty upon the kindred. *Walbridge v. Walbridge*, 46 Vt. 617, 625.

*Rev. St. 1866*, p. 621, § 22, declaring that when any pauper becomes chargeable to a town the selectmen are to send notice of his condition to the town to which he belongs, means "subjecting the town to expense." *Town of Beacon Falls v. Town of Seymour*, 44 Conn. 210, 217.

The expression, "without becoming chargeable to such town," as used in *Gen. St. § 3288*, which provides that no person shall claim a legal settlement in any town unless he shall have continually resided four years therein without becoming chargeable thereon, means without subjecting the town to actual expense for the support of a person during the four years. *Town of Ridgefield v. Town of Fairfield*, 46 Atl. 245, 246, 73 Conn. 47.

### CHARGED IN EXECUTION.

*32 Geo. II*, c. 28, § 13, enacting that any prisoner may, before the end of the first term which shall be next after any such prisoner shall be "charged in execution," petition, etc., means being detained within the walls of the prison. *Vaughan v. Durnell*, 4 Term R. 367.

### CHARGING LIEN.

Attorneys have two kinds of liens in their relations with their clients—one a lien on the papers of the client, which is called a "retaining lien." An attorney also has a lien on the fund or judgment which he has recovered for his compensation as attorney in recovering the fund, and that is denominated a "charging lien." *Goodrich v. McDonald*, 19 N. E. 649, 651, 112 N. Y. 157; *Schreyer v. Deering*, 52 N. Y. Supp. 203, 206, 30 App. Div. 602.

At common law an attorney had a lien upon the fund or judgment which he recovered for payment as attorney in recovering the

fund or judgment called a "charging lien." *Young v. Renshaw*, 76 S. W. 701, 705, 102 Mo. App. 173.

An attorney has a lien on a judgment or decree obtained for a client to the extent of the compensation the client has agreed to pay him, or, if there has been no specific agreement of compensation, to the extent to which he is entitled to recover from the client reasonable compensation for the services rendered. The lien of an attorney rests on the theory that he is to be regarded as the assignee of the judgment or decree, to the extent that is fair, from the date of the rendition of the judgment or decree, and is subject to all set-offs existing against his client at the time. *Ex parte Lehman, Durr & Co.*, 59 Ala. 631, 632.

Liens of attorneys are retaining liens and charging liens; the former existing as against moneys or papers in the hands of the attorney, and the latter being one which gives the creditor the right to collect such debt as a priority out of property in the hands of another. *Whart. Ag. § 623 et seq.* It is not necessary that the attorney should have obtained a judgment for his client in order to enforce his lien in a suit in equity. *Koons v. Beach*, 46 N. E. 587, 147 Ind. 137.

An attorney's charging lien is that which he has upon a judgment recovered by him for moneys payable thereon or upon some fund in court. It entitles the attorney to take active steps to secure payment for what may be expended beyond the services and expenses in the suit itself, or any other proceeding by which the judgment or fund has been recovered, or in the same subject-matter. *In re Wilson* (U. S.) 12 Fed. 235, 239.

A charging lien, as applied to an attorney's lien, is the right of an attorney to recover his taxable costs from a fund recovered by his aid, and also the right to have the court interfere to prevent payment by the judgment debtor to the creditor in fraud of his right to the same, and also to prevent or set aside assignments or settlements made in fraud of his rights. It does not usually attach until the recovery of judgment, and then does not prevent an honest settlement, nor a payment to his client, until the attorney has notified the debtor of his intention to claim a lien. The charging lien has never been extended beyond the charges and fees in the suit in which the judgment was recovered. It does not extend to the general balance due the attorney from the client for professional services. *Weed Sewing Mach. Co. v. Bouteille*, 56 Vt. 570, 576, 48 Am. Rep. 821.

## CHARGÉ D'AFFAIRES.

"Chargé d'affaires" is the title of an office in the diplomatic service. *Hollander v. Balz* (U. S.) 41 Fed. 732, 734.

"Chargés d'affaires" are persons invested with the affairs of their government at the seat of a foreign government. Generally used as synonymous with ministers, diplomatic agents, envoys, etc. *In re Balz*, 10 Sup. Ct. 854, 858, 135 U. S. 403, 34 L. Ed. 222.

## CHARIOT.

Johnson defines a chariot as "a half coach with four wheels, used for convenience and pleasure." *Cincinnati, L. & S. Turnpike Co. v. Nell*, 9 Ohio (9 Ham.) 11, 13.

## CHARITABLE.

See "Charity."

## CHARITABLE BEQUEST.

See "Charity."

## CHARITABLE CORPORATION.

See "Charity."

## CHARITABLE DEVISE.

See "Charity."

## CHARITABLE FUNDS.

See, also, "Charity."

Funds supplied from the gift of the crown, or from the gift of the Legislature, or other private gift, for any legal, public, or general purpose, are charitable funds, to be administered by courts of equity. It is not material that the particular public or general purpose is not expressed in the statute of Elizabeth, other legal, public, or general purposes being within the equity of that statute. Thus, a gift to maintain a preaching minister, a gift to build a session house for a county, a gift by parliament of a duty on coal imported into London for the purpose of rebuilding St. Paul's Church after the fire in London, have all been held to be charitable uses, within the equity of the statute of Elizabeth. It is the source from which the funds are to be derived, and not the mere purpose to which they are to be dedicated, which constitutes the use charitable, and funds derived from the gift of the crown or the gift of the Legislature, or from private gift for paving, lighting, cleaning, and improving a town, are, within the equity of the statute of Elizabeth, charitable funds, to be administered by a court of equity. But where an act of parliament passes an act for paving, lighting, cleaning, and improving a town, to be paid for wholly by rates or assessments to be levied upon the inhabitants of that town, the funds so raised are in no sense derived from bounty or charity, in the most extensive sense of that term, and are not charitable funds to be administered by

a court of equity. *Attorney General v. Heelis*, 2 Sim. & S. 67, 77.

### CHARITABLE GIFT.

See "Charity."

### CHARITABLE INSTITUTION.

See, also, "Charity."

Where a trust deed provided that after the death of the settlor a trust fund should be applied by the trustees to such charitable purposes as should be determined by a board named in the deed, or, in their discretion, transferred to a corporation organized for like charitable purposes to those which such board might wish to carry out, a corporation organized pursuant to the latter provision is a "charitable institution," within Pub. St. c. 11, § 5, cl. 3, exempting charitable institutions from taxation. *Balch v. Shaw*, 54 N. E. 490, 492, 174 Mass. 144.

A "charitable institution," within the meaning of Const. art. 8, §§ 11, 14, and the statutes enacted in pursuance thereof (Laws 1895, c. 71, and Laws 1896, c. 546), creating and conferring on the state board of charities the right of visitation and inspection of all charitable institutions, must be one which in some form or to some extent receives public money raised by taxation, either in the state at large, or in any city, county, or town, for the support and maintenance of indigent persons. *People v. New York Soc. for Prevention of Cruelty to Children*, 56 N. E. 1004, 162 N. Y. 429.

### CHARITABLE SOCIETY.

See "Charity."

### CHARITABLE TRUST.

See, also, "Charity."

Private trusts are for the benefit of certain designated individuals in which the cestui que trust is a known person or class of persons. Public, or, as they are frequently termed, charitable, trusts are those created for the benefit of an unascertained, uncertain, and sometimes fluctuating body of individuals, in which the cestuis que trust may be a portion or class of a public community; as, for example, the poor or the children of a particular town or parish. In private trust the beneficial interest is vested absolutely in some individual or individuals, who are, or within a certain time may be, definitely ascertained, and to whom, therefore, collectively, unless under some disability, it is, or, within the allowed limit, will be, competent to control, modify, or end the trust. Private trusts of this kind cannot be extended beyond the legal limitations of a perpetuity. But a trust created for charitable or public

purposes is not subject to similar limitations, but it may continue for a permanent or indefinite time. *Doyle v. Whalen*, 32 Atl. 1022, 1025, 87 Me. 414, 31 L. R. A. 118.

"Charitable trusts include all gifts for religious or educational purposes, in their ever-varying diversity." *Beckwith v. St. Philip's Parish*, 69 Ga. 564, 569 (quoting 2 Perry, 687).

A charitable trust is simply an indefinite or uncertain trust; that is, a trust without a beneficiary. Such a trust is void by the rules of the common law. *Knox v. Knox's Ex'rs*, 9 W. Va. 124, 148.

### CHARITABLE USE.

See "Mistaken Charitable Use."

See, also, "Charity."

To constitute a "charitable use," there must be a donor, a trustee competent to take, a use restricted to a charitable purpose, and a definite beneficiary. In case of a grant or demise, where there is no party or parties designated who can take the property, or where they are so uncertain that the court cannot direct intelligibly the execution of the trust, the property remains undisposed of, and falls to the heir or next of kin. *Grimes' Ex'rs v. Harmon*, 35 Ind. 198, 252, 9 Am. Rep. 690.

A "charitable use," in legal parlance, means a use for some object within the purview of the statute. *Chittenden v. Chittenden*, 1 Am. Law Reg. 538, 547 (citing 43 Eliz. c. 4).

"Charitable use," in legal contemplation, is a convertible term with "charity," and there can be no charitable use without a trust. *Owens v. Missionary Soc. of Methodist Episcopal Church*, 14 N. Y. (4 Kern.) 380, 385, 67 Am. Dec. 160.

A charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing and well-being of social men. *Ould v. Washington Hospital for Foundlings*, 95 U. S. 303, 311, 24 L. Ed. 450.

### CHARITY.

See "Definite Charity"; "Private Charity"; "Public Charity"; "Pure Charity"; "Purely Charitable Purposes."

Property exclusively used for charitable purposes, see "Exclusively Used."

"Charity," in its widest sense, denotes all the good affections which men ought to bear towards one another, and in that sense embraces what is generally understood by benevolence, philanthropy, and good will. In its more restricted sense it means merely relief or alms to the poor. *Morice v. Bishop of Durham*, 9 Ves. 399, 400, 405; *State v.*

Laramie County Com'rs, 55 Pac. 451, 456, 8 Wyo. 104; Town of Hamden v. Rice, 24 Conn. 350, 355.

Mr. Binney, in his great argument in the case of *Vidal v. Girard's Ex'rs*, 43 U. S. (2 How.) 127, 11 L. Ed. 205, defined a pious or charitable gift to be whatever is given for the love of God, or for the love your neighbor, in the catholic and universal sense, given from these motives and to these ends, free from the stain or taint of every consideration that is personal, private, or selfish. The love of God is the basis of all that is bestowed for His honor, the building of His church, the support of His ministers, the religious instruction of mankind. The love of neighbor is the principle that prompts and consecrates all the rest. This definition was approved by the Supreme Court of Pennsylvania. *Pennoyer v. Wadhams*, 25 Pac. 720, 722, 20 Or. 274, 11 L. R. A. 210 (citing *Price v. Maxwell*, 28 Pa. [4 Casey] 23, 35); *Boyd v. Philadelphia Insurance Patrol*, 6 Atl. 536, 539, 113 Pa. 269; *Jackson v. Phillips*, 96 Mass. (14 Allen) 539, 556; *Ford v. Ford's Ex'r*, 16 S. W. 451, 452, 91 Ky. 572; *Johnson v. De Pauw University*, 76 S. W. 851, 852, 25 Ky. Law Rep. 950; *Harrington v. Pier*, 82 N. W. 845, 357, 105 Wis. 485, 50 L. R. A. 307, 76 Am. St. Rep. 924; *St. Clement v. L'Institut Jacques Cartier*, 50 Atl. 376, 377, 95 Me. 493; *Allen v. Stevens*, 49 N. Y. Supp. 431, 435, 22 Misc. Rep. 158.

A "charity," in a legal sense, may be defined as a gift to be applied, consistently with existing law, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show it is charitable in its nature. *Webster v. Sughrw*, 45 Atl. 139, 140, 69 N. H. 390, 48 L. R. A. 100 (citing *Jackson v. Phillips*, 96 Mass. [14 Allen] 539, 556); *Pennoyer v. Wadhams*, 25 Pac. 720, 722, 20 Or. 274, 11 L. R. A. 210; *State v. Laramie County Com'rs* 55 Pac. 451, 456, 8 Wyo. 104; *Kelly v. Nichols*, 25 Atl. 840, 841, 18 R. I. 62, 19 L. R. A. 413; *Detwiller v. Hartman*, 37 N. J. Eq. (10 Stew.) 347, 353; *De Camp v. Dobbins*, 29 N. J. Eq. (2 Stew.) 36, 44; *Livesey v. Jones*, 35 Atl. 1064, 55 N. J. Eq. 204; *Protestant Episcopal Education Soc. v. Churchman's Representatives*, 80 Va. 718, 762; *In re Hinckley's Estate*, 58 Cal. 457, 497; *People v. Fitch*, 47 N. E. 983, 988, 154 N. Y. 14, 38 L. R. A. 591; *Hoeffler v. Clogon*, 49 N. E. 527, 529, 171 Ill. 462, 40 L. R. A. 730, 68 Am. St. Rep. 241; *Everett v. Carr*, 59 Me. 325, 330; *Harrington v. Pier*, 82 N. W. 345, 357, 105 Wis. 485, 50 L. R. A. 307, 76 Am. St.

Rep. 924; *Stuart v. City of Easton* (U. S.) 74 Fed. 854, 858, 21 C. C. A. 146; *Clayton v. Hallett*, 70 Pac. 429, 438, 30 Colo. 231, 59 L. R. A. 407; *Troutman v. De Boissiere Odd Fellows' Orphans' Home & Industrial Ass'n* (Kan.) 64 Pac. 33, 36 (citing *Jackson v. Phillips*, 96 Mass. [14 Allen] 539); *Doughten v. Vandever*, 5 Del. Ch. 51, 65 (citing *Justice Gray in Jackson v. Phillips*, 96 Mass. [14 Allen] 539, 556); *Haggerty v. St. Louis, K. & N. W. R. Co.*, 74 S. W. 456, 462, 100 Mo. App. 424.

Its signification in the court of chancery in the construction of a will must be chiefly derived from the statute of Elizabeth, and those purposes are considered charitable which that statute enumerates, or which by analogies are deemed within its spirit and intentment. *Morice v. Bishop of Durham*, 9 Ves. 400, 405. "Charitable use," in legal parlance, means a use for some object within the purview of the statutes of Elizabeth respecting charities. *Chittenden v. Chittenden*, 1 Am. Law Reg. (O. S.) 538, 547; *Troutman v. De Boissiere Odd Fellows' Orphans' Home & Industrial School Ass'n*, 71 Pac. 286, 292, 293, 66 Kan. 1.

Charitable purposes for which gifts or devises of property may be made were considered at common law to consist only of those purposes enumerated in St. 43 Eliz., or which by analogy were deemed within its spirit and intentment. The preamble of that statute mentioned three classes of charitable gifts: (1) For the relief and assistance of the poor and needy, specifying only sick and maimed soldiers and mariners; education and preferment of orphans; marriages of poor maids; supportation, aid, and help of young tradesmen, handicraftsmen, and persons decayed; relief or redemption of prisoners and captives, and assistance of poor inhabitants in paying taxes, either for civil or military objects. (2) For the promoting of education, of which the only kind specified in the statute beyond the education and preferment of orphans, which seems more appropriately to fall within the first class, are those for maintenance of schools of learning, free schools, and scholars of universities. (3) For the repair and maintenance of public buildings and works, under which are enumerated repairs of ports, havens, and sea banks, for permitting commerce and navigation, and protecting the land against the encroachments of the sea, of bridges, causeways, and highways, by which the people may pass from one part of the country to another, of churches in which religion may be publicly taught, and of houses of correction. At common law any purpose was construed to be charitable which was within the principle and reason of the statute, though not expressly named in it, and many objects have been held as charities which the statute neither mentions nor distinctly refers to. The term is given a much wider operation at the present

day than during the reign of Elizabeth. *Jackson v. Phillips*, 96 Mass. (14 Allen) 539, 551. See, also, *Town of Hamden v. Rice*, 24 Conn. 350, 355.

In *Missouri Historical Soc. v. Academy of Science*, 94 Mo. 459, 8 S. W. 346, it is said that any gift, not inconsistent with existing laws, which is promotive of science, or tends to the education, enlightenment, benefit, or amelioration of the condition of mankind, or the diffusion of useful knowledge, or is for the public convenience, is a "charity," within the meaning of the authorities, whether so denominated in the instrument which evidences the gift or not. *Harrington v. Pler*, 82 N. W. 345, 347, 105 Wis. 485, 50 L. R. A. 307, 76 Am. St. Rep. 924.

"A charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing and well-being of social man." *Ould v. Washington Hospital for Foundlings*, 95 U. S. 303, 311, 24 L. Ed. 450; *Tilden v. Green*, 28 N. E. 880, 882, 130 N. Y. 29, 14 L. R. A. 33, 27 Am. St. Rep. 487.

Lord Camden defined "charity" to be the gift to a general public use which extends to the poor as well as the rich. *People v. New York Soc. for Prevention of Cruelty to Children*, 58 N. Y. Supp. 953, 955, 42 App. Div. 83.

A charity is a gift to the general public, which extends to the rich as well as the poor. Charity, says Sir William Grant in *Morice v. Bishop of Durham*, 9 Ves. 399, denotes all the good affections men ought to bear to each other; in its most restricted sense, relief of the poor. *State v. Addison*, 2 S. C. (2 Rich.) 499, 505.

"The definition of 'charity' has been steadily broadening. It was once held to be whatever is given for the love of God, or for the love of your neighbor, free from any taint or stain of any consideration that is personal or selfish. But the purity and unselfishness of the motive came to be regarded by the courts as important only in the moral aspects of the act, and was not insisted on in determining whether a gift was to a charitable use. In *Appeal of Donoghugh*, 86 Pa. 306, 312, 'charity' was defined as something done out of good will, benevolence, and a desire to add to the happiness or improvement of our fellow beings." *Trustees of Academy of Protestant Episcopal Church v. Taylor*, 25 Atl. 55, 56, 150 Pa. 565.

The test which determines whether an enterprise is charitable or otherwise is its purpose. If its purpose is to make profit, it is not a charitable enterprise. *Long v. Rosedale Cemetery* (U. S.) 84 Fed. 135, 136 (citing *Union Pac. R. Co. v. Artist* [U. S.] 60 Fed. 365, 9 C. C. A. 14, 23 L. R. A. 581); *Haggerty v. St. Louis, K. & N. W. R. Co.*, 74 S. W. 456, 462, 100 Mo. App. 424.

#### Antislavery cause.

A gift to promote the antislavery cause, and to assist fugitive slaves, is a gift to a charity. *Jackson v. Phillips*, 96 Mass. (14 Allen) 539, 540.

#### Asylums and hospitals.

"Charity," in its widest sense, denotes all the good affections which men ought to bear toward each other, and in this sense embraces all that is usually understood by the words "benevolence," "philanthropy," and "good will." A gift to a home for the friendless is a gift to charity. *Taylor v. Keep*, 2 Ill. App. (2 Bradw.) 363, 377.

The word in legal parlance has a much wider signification than in common speech, and as used in Gen. St. 1878, c. 11, § 5, which provides that all buildings belonging to institutions of purely public charity, including public hospitals, etc., shall be exempt from taxation, includes an institution established, maintained, and operated for the purpose of taking care of the sick without any profit or view to profit, but at a loss which has to be made up by benevolent contribution. *Hennepin County Brotherhood of Gethsemane*, 8 N. W. 595, 596, 27 Minn. 460, 38 Am. Rep. 298.

Const. art. 10, § 6, exempting from taxation lots and buildings used exclusively for "purposes purely charitable," exempts a hospital conducted by a religious community who devote themselves to the gratuitous care of the sick, paid patients being also received, but the whole object of the institution being charity, nobody connected with it deriving any profit from the work carried on there, and any profit derived from paid patients being applied exclusively to the charitable purposes of the institution, and every part of the building used exclusively for a hospital. The object being clearly charitable, and exclusively so, and all idea of private gain, profit, or advantage being excluded, the purpose is "purely charitable," within the meaning of the law. *State ex rel. Alexian Bros. Hospital v. Powers*, 10 Mo. App. 263, 266.

A gift of property in trust to provide a home for orphans or children of deceased Odd Fellows is a "charitable gift." *Troutman v. De Boissiere Odd Fellows Orphans' Home & Industrial School Ass'n* (Kan.) 64 Pac. 33, 36.

The term "charitable bequest" includes a bequest for the establishment of an orphan asylum, and a hospital for sick and infirm persons. *Attorney General v. Moore's Ex'rs*, 19 N. J. Eq. (4 C. E. Green) 503, 506.

A hospital incorporated under special act to furnish medical treatment and care for the sick, without capital stock, and from which it means to derive no profit, is a charitable corporation. *Hearns v. Waterbury*

Hospital, 33 Atl. 595, 596, 66 Conn. 98, 31 L. R. A. 224.

A charitable devise includes a gift to a society incorporated for the relief of distressed widows and the schooling and maintaining of poor children, and a devise of land to use and appropriate the rents and profits for the support of the schools and charities of said institution, without their being at any time liable to debts or contracts of said society. *Jones v. Habersham*, 107 U. S. 174, 185, 2 Sup. Ct. 336, 27 L. Ed. 401.

An institution for the education of the blind, a considerable portion of whose pupils are indigent, is to some extent a charitable institution, and subject to visitation. *People v. Fitch*, 47 N. E. 983, 988, 154 N. Y. 14, 88 L. R. A. 591.

*Swan & S. St.* p. 761, providing that all buildings belonging to "institutions of purely public charity," together with the land actually occupied by such institutions, not leased or otherwise used with a view to profit, and all moneys and credits appropriated solely to sustaining and belonging exclusively to such institutions, shall be exempt from taxation, should be construed to include a corporation created for the sole purpose of affording an asylum for destitute men and women and the incurable sick and blind, irrespective of their nationality or creed. "The right to the exemption depends upon the public nature of the charity, and not upon whether the corporation or institution which administers it is a public or private organization. If the charity which the institution is created to administer and which it does administer is purely public, it comes within the exemption, although it may have a private foundation and be governed by private authority. In one sense such an institution is public. It is public as respects the uses it subserves and the benefits it confers, but it is private as respects its organization and management. By the term 'institution' is to be understood an organization which is permanent in its nature, as contradistinguished from an undertaking which is transient and temporary." *Humphries v. Little Sisters of the Poor*, 29 Ohio St. 201, 206.

"Charity," as used in Const. art. 9, § 1, exempting institutions of purely public charity from taxation, means a gift to promote the welfare of others. A Masonic home for aged and decrepit Masons is a charity. *City of Philadelphia v. Masonic Home of Pennsylvania*, 28 Atl. 954, 955, 160 Pa. 572, 23 L. R. A. 545, 40 Am. St. Rep. 736.

As used in 1 Gav. & H. St. p. 70, providing that every building erected for the use of any benevolent or charitable institution, and the tract of land on which such building is situated, not exceeding 20 acres, shall be exempt from taxation, "charitable institution" should be construed to include

a Masonic hall used for the relief of suffering humanity wherever it may be found, but more immediately and especially for the relief of distressed and worthy Free Masons, their widows and orphans, and the support of the latter without reward, though the order confines its benefaction to those who have become members of the Masonic order, having paid the fees demanded for that purpose, for it is not essential to a charity that it shall be universal. *City of Indianapolis v. Grand Master of Grand Lodge of Indiana*, 25 Ind. 518, 519.

"That an institution limits the disposition of its blessings to one sex, or the inhabitants of a particular city or district, or to the membership of a particular religious or secular organization, does not deprive it, either in a legal or popular comprehension, of the character of a 'charitable institution.' If that only be charity which relieves human want, without discriminating amongst those who need relief, then it is a rarer virtue than has been supposed." *City of Indianapolis v. Grand Master of Grand Lodge of Indiana*, 25 Ind. 518, 519.

A corporation without capital stock, and without any provision for making dividends or profits, and the object of which is to provide a general hospital for sick and insane persons, deriving its funds mainly from public and private charity, and holding them in trust for the object of sustaining the hospital, conducting its affairs for the purpose of administering to the comfort of the sick without expectation or right on the part of those immediately interested in the corporation to receive compensation for their own benefit, is a public, charitable corporation. *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 435, 21 Am. Rep. 529.

The maintenance of a hospital, an institution for the sole purpose of relieving sick and injured employes, without expense to them, and without any intention on the part of the employer to make profit out of the undertaking, is a charitable institution. *Sawdey v. Spokane Falls & N. R. Co.*, 70 Pac. 972, 973, 30 Wash. 349, 94 Am. St. Rep. 880.

A hospital maintained by a railroad company for the free treatment of its employes, supported partly by monthly contributions from its employes and partly by the company, and not maintained for profit, is a charitable institution. *Union Pac. R. Co. v. Artist* (U. S.) 60 Fed. 365, 369, 9 C. C. A. 14, 23 L. R. A. 581.

#### **Beneficial association.**

An act, to be charitable in a legal sense, must be designed for some public benefit open to an indefinite and vague number; that is, the persons to be benefited must be vague, uncertain, and indefinite until they



are selected or appointed to be the particular beneficiaries of the trust for the time being. "Money contributed by the members of a club to a common fund, to be applied to the relief and the assistance of the particular members of the club when in sickness, in want of employment, or other disability, is not a charitable fund. It is not charity to give to your friend because of friendship, nor to your associate in a society because of your duty imposed by the laws of that society. 'Charity,' in the legal sense, has been illustrated by a reference to the customs of the ancient Jews to leave at random a sheaf of corn here and there in a field for the poor gleaners who follow the harvesters, it being unknown who would get it." *Franta v. Bohemian Roman Catholic Cent. Union*, 63 S. W. 1100, 1101, 164 Mo. 304, 54 L. R. A. 723, 86 Am. St. Rep. 611.

A common fund created by voluntary contributions, the benefits being restricted to the members of the association, has not ordinarily been considered a charitable fund. Where the common fund of an unincorporated association organized for the purpose of nursing and caring for sick members, providing for maintenance and medical attention during illness and of burying such as should die, was created by initiation fees and monthly contributions, such fund is not a charitable trust. *Burke v. Roper*, 79 Ala. 138, 142.

A charitable use is one of a public nature, tending to the benefit or relief in some shape or other of the community at large, not restricted to the mutual aid of a few. An association whose objects are stated to be the employment of its funds in purposes of mutual benevolence amongst its members and families does not make it one whose object is a charitable use. *Babb v. Reed* (Pa.) 5 Rawle, 151, 153, 28 Am. Dec. 650; *St. Clement v. L'Institut Jacques Cartier*, 50 Atl. 376, 377, 95 Me. 493.

Payment of sickness and funeral benefits for members only, out of an income chiefly derived from regular compulsory dues paid by such members, is not a use for a benevolent or charitable purpose, within Pub. St. c. 11, § 5, cl. 3, exempting from taxation real estate of societies devoting their entire income to benevolent, charitable, and other purposes. *Young Men's Protestant Temperance & Benevolent Soc. v. City of Fall River*, 36 N. E. 57, 160 Mass. 409.

A statute exempting the moneys and properties of an "institution of purely public charity" from taxation cannot be construed to exempt a charitable or benevolent association which extends relief only to its own sick and needy members and to the widows and orphans of its deceased members. *Morning Star Lodge, No. 26, I. O. O. F. v. Hayslip*, 23 Ohio St. 144, 146.

A fraternal benefit society having a lodge system, with ritualistic work, and paying benefits in case of death of its members, is in the nature of an insurance organization, and is not a society of purely public charity within the exemption laws. *State Council of Catholic Knights v. Board of Review of Effingham Co.*, 64 N. E. 1104, 1105, 193 Ill. 441.

Within the meaning of Const. art. 10, § 3, empowering the Legislature to exempt all property from taxation which is used for charitable purposes, is not limited to public purposes, but applies to the purposes of an association which uses its entire revenues for paying current expenses and assisting indigent members and their families. *City of Petersburg v. Petersburg Benevolent Mechanics' Ass'n*, 78 Va. 431, 436.

#### **Benevolent synonymous.**

The words "charitable and benevolent," as used in a bequest in trust for charitable and benevolent institutions, should be construed as having been employed to indicate that such institutions as would be entitled as beneficiaries under the will must be both charitable and benevolent, and should not be construed as indicating that the words "benevolent" and "charitable" were used synonymously. *People v. Powers*, 41 N. E. 432, 433, 147 N. Y. 104, 35 L. R. A. 502.

"Charitable," when used in a will conveying property for charitable purposes, has had a technical meaning since the enactment of St. 43 Eliz., which specifically mentioned certain trusts which would be upheld and executed by the Lord Chancellor, which were designated as "charitable and Godly uses," and is to be construed to only include purposes which were there designated. The word is not synonymous with "benevolent," for, while it is true that there is no charitable purpose which is not also a benevolent purpose, yet the converse is not quite true, for there may be a benevolent purpose which is not charitable in the legal sense of the term. *Adair v. Smith*, 44 Ky. (5 B. Mon.) 428, 428.

Charity may be benevolence, but all benevolence is not necessarily charity. The word "charitable," as used in the residuary clause of a will giving the property to trustees to be expended for benevolent and charitable purposes, is synonymous with "benevolent." *Fox v. Gibbs*, 29 Atl. 940, 942, 86 Me. 87.

A bequest in trust for such objects of benevolence and liberality as the trustee should most approve should not be supported as a charitable legacy. *Morice v. Bishop of Durham*, 9 Ves. 400, 405; *Id.*, 10 Ves. 522, 538.

"Charity," as used in a will devising property for the furtherance and promotion

of piety and good morals, and for the purposes of benevolence or charity or temperance, or for the education of deserving youths, "is not to be interpreted in its largest technical sense, but is used in its limited and ordinary popular acceptance, and is synonymous with 'benevolence.'" *Saltonstall v. Sanders*, 93 Mass. (11 Allen) 446, 470.

#### Education.

The term "charitable bequest" includes a bequest to a school district for the schooling of its children, and to a county for the support of its poor. The rudiments of the law of charitable bequests were undoubtedly derived from the civil law. "It was a fixed maxim in Roman jurisprudence that legacies to pious uses, which included all legacies destined for works of piety or charity, whether they related to spiritual or temporal concerns, were entitled to peculiar favor, and to be deemed privileged testaments. 2 Story, Eq. Jur. 489, § 1187. A long and uninterrupted course of decisions under the English statute of charitable uses (43 Eliz. c. 4) shows most conclusively that bequests of the nature of those in the will in question have received the use of the unqualified sanction of the English Court of Chancery. They are held to be within the letter and spirit of the statute, for in the preamble thereto are enumerated devises for poor people, for schools of learning, free schools, and scholars of universities." *Heuser v. Harris*, 42 Ill. 425, 430.

"The meaning of the word 'charity,' in its legal sense, is different from the signification which it ordinarily bears. In its legal sense it includes not only gifts for the benefit of the poor, but endowments for the advancement of learning, or institutions for the encouragement of science and art, and, it is said, for any other useful and public purposes. 3 Steph. Comm. 229." A school established by private donation, which is carried on for the benefit of the public, and not with a view to profit, is a charity. *Gerke v. Purcell*, 25 Ohio St. 229, 243.

The word "charitable," as used in the provisions of the Constitution and the statutes, as applied to institutions, should be given its usual and ordinary meaning. It is not necessary that an institution should be wholly charitable to fall within that definition. It is enough if an institution is partly charitable in its character and purpose, even if its purpose is partly educational. *People v. Fitch*, 154 N. Y. 14, 47 N. E. 983, 38 L. R. A. 591. And an institution incorporated to maintain an industrial school for the sustenance of male orphan children is a charitable institution. That such an institution, and similar institutions throughout the state, are benevolent and charitable institu-

tions, has been almost universally recognized by committing magistrates, overseers of the poor, and judges who have committed children guilty of minor offenses to such institutions, as required by Pen. Code, § 713. *Corbett v. St. Vincent's Industrial School*, 79 N. Y. Supp. 369, 375, 79 App. Div. 334.

Gifts for the promotion of education are charitable in the legal sense. "Schools of learning, free schools, and schools and universities are among the charities enumerated in the statute of Elizabeth, and no trusts have been more constantly and uniformly upheld as charity than those for the establishment and support of schools and colleges." *Russell v. Allen*, 2 Sup. Ct. 327, 334, 107 U. S. 163, 27 L. Ed. 397.

All gifts for the promotion of education are "charitable," in a legal sense, where the element of private gain is wanting, and where the scheme is in part supported by public or private contributions. *Alfred University v. Hancock* (N. J.) 46 Atl. 178.

A bequest to the inhabitants of a town for the purpose of founding and establishing a literary institute for the use and benefit of all the inhabitants of such town is clearly a public charity. *Drury v. Inhabitants of Natick*, 92 Mass. (10 Allen) 169, 178.

A gift to the educational society of a church for the education of poor young men for the ministry is a valid charitable gift. *Protestant Episcopal Education Soc. v. Churchman's Representatives*, 80 Va. 718, 762.

A trust for the promotion of education or science, such as the establishment of a school or a chair in a university, is a trust for charity. *Spence v. Widney* (Cal.) 46 Pac. 463, 466 (citing *Jackson v. Phillips*, 96 Mass. [14 Allen] 539); *Yates v. Yates* (N. Y.) 9 Barb. 324, 334.

A bequest to be expended in the purchase of a lot and erection of a college or university, with library rooms, together with testator's library, and \$6,000 additional to be expended in the purchase of useful books for the library, is a gift to charity. *Miller v. Porter*, 53 Pa. (3 P. F. Smith) 292, 297.

"In *Kendall v. Granger* [5 Beav. 300], it was said by Lord Langdale that a 'charitable purpose' 'must be either one of those purposes denominated charitable in the statute of Elizabeth, or one of such purposes as the court construes to be charitable by analogy to those mentioned in that statute.' Among the purposes denominated 'charitable' in that statute were gifts for relief of aged, impotent, and poor people, and for schools of learning, free schools, scholars in universities, education and preferment of orphans, aid and help of young tradesmen, handicraftsmen, etc. So, according to Mr. Berry, charitable trusts include all gifts in trust for

educational purposes in their ever varying diversity, as well as gifts for the relief and comfort of the poor, the sick, and the afflicted. The purpose of establishing a school in O. or some place in a certain county for the education of young persons in the domestic and useful arts was a 'charitable purpose' within the judicial sense." *Webster v. Morris*, 28 N. W. 353, 366, 66 Wis. 366, 57 Am. Rep. 278.

The Constitution and statutes, exempting from taxation all "institutions of learning, benevolence and charity," do not exempt an incorporated college, founded and endowed by the gifts of citizens, managed by a certain board, whose chief object is to furnish education to both sexes at as reasonable a rate as possible, but not granting absolutely free tuition, and into which neither the public, nor any class thereof, have an absolute right of admission. *Thiel College v. Mercer County*, 101 Pa. 530, 533.

A gift to a sectarian college, the expense of the erection and equipment of which is to be borne by the churches of the denomination to which the proposed college belongs, is a devise to a charity. In *re Stewart's Estate*, 66 Pac. 148, 149, 26 Wash. 32.

A gift to Harvard College, to hold as a permanent fund and apply the net income is one to a charitable institution. *Dexter v. Harvard College*, 57 N. E. 371, 374, 176 Mass. 192.

The public educational institutions of the state will be held "charitable institutions," within the provisions of the statute giving the board of control control of charitable institutions. *State v. Board of Control of State Institutions*, 88 N. W. 533, 538, 85 Minn. 165.

"Charitable societies," as used in the act of 1848, entitled "An act for the incorporation of charitable societies," and authorizing any five or more persons possessing the qualifications prescribed by the act to associate themselves for charitable purposes, cannot be construed to include societies for the purpose of carrying on of medical or other colleges, or any institution whatever which is primarily and exclusively educational, and especially one in which a compensation is demanded for the instruction furnished. An institution of the latter kind could hardly be regarded as a "charitable institution" within the ordinary meaning of those terms. *People v. Cothran* (N. Y.) 27 Hun, 344, 345.

Money devoted to the support of a college or academy, which is incorporated wholly for the purpose of general education, and so operated without any capital stock or purpose of profit, and tuition is charged only for its maintenance, is given and used for "charitable uses," within the meaning of the statute exempting from taxation "real and personal estate granted, sequestered, or used for

public, pious or charitable uses." The popular misapprehension as to what constitutes a "charity" is certainly very great if money given for education is not a charitable use of it. *Williard v. Pike*, 9 Atl. 907, 915, 59 Vt. 202.

A religious denominational school which does not limit the admission of pupils to children of members of its own denomination, though it gives a preference to such children, and which is not maintained for pecuniary profit, is exempt under Const. art. 9, § 1, as a charity. *Trustees of Academy of Protestant Episcopal Church v. Taylor*, 25 Atl. 55, 56, 150 Pa. 565.

"In determining whether a bequest is a mere gift or charitable use, it is necessary to ascertain the intention of the testator. Where the purpose of a will is to provide for the endowment of an institution of learning for all time, where the testator's own descendants and those of his brothers and sisters as a class might have a preference, and then, if the fund was sufficient, the poor of a certain county might partake of its benefits, it is a bequest for a charitable use. While the children who were to be educated were the beneficiaries, they were to have no interest or control over the property. In the course of time the descendants of the testator's brothers and sisters might become so numerous that all of them could not be educated, and it would be uncertain who of them would be selected. If all could be received, it would be uncertain who of them would submit to the conditions imposed. There is no difference in the interest conferred on those and on such poor children as might also be received. The beneficiaries are also uncertain by reason of the continued fluctuations of those who are to be its recipients. The fact that a preference is given to the blood of the testator does not take from the bequest the character of a charity, and although the relief of the poor, or a benefit to them in some way, is in its popular sense a necessary ingredient in a charity, this is not so in view of the law, by which it is defined to be a gift to a general public use, which extends, or doubtless may do so, either to the rich or to the poor. An institution of learning for the education of gentlemen's sons has been held a proper devise to charitable uses. Uncertainty of individual objects has often been said to be a characteristic of charity, and, if the beneficiary is certain, it is a gift, and not a charity. This must be understood, however, to some extent as referring to certainty of individuals to whom, as such, the bequest is made, and not to certainty of a class of individuals from whom the beneficiaries shall come." *Paschal v. Acklin*, 27 Tex. 173, 198.

A gift to a school under the auspices and control of a religious denomination, and confined to the youth of its members, both rich

and poor, and in which the particular creed of that church is taught, is a devise to a charitable use. *Price v. Maxwell*, 28 Pa. (4 Casey) 23, 35.

The term "charitable trust" may properly be applied to the bequest of a fund in trust for the education of the poor children of a certain district in the state, although the free education of all poor children in the state is provided for by law. *Green v. Blackwell* (N. J.) 35 Atl. 375.

A charitable trust is one which originates from a gift, and which limits property to any public use to which it is lawful to devote the property. Thus a bequest of property in trust for the payment of additional teachers in the public schools is a charitable trust. *Webster v. Wiggin*, 31 Atl. 824, 828, 19 R. I. 73, 28 L. R. A. 510.

A bequest to a theological seminary to provide for the education of two young men for the ministry is a good charitable bequest. *Field v. Drew Theological Seminary* (U. S.) 41 Fed. 371, 373.

"Charitable institutions," in a strict sense, are not educational institutions, for it may be conceded that in a popular sense the words "charitable" and "educational" are distinguishable. But from a consideration of the title of Gen. Laws 1901, c. 122, reading "An act to create a state board of control, and to provide for the management and control of the charitable, reformatory and penal institutions of the state, and to make an appropriation therefor, and to abolish the state board of corrections and charities," it may be assumed that the phrase "charitable institutions" in the title, under the liberal rules of construction applicable to such cases, is fairly suggestive of the supervision by the state board of control of the finances of the state normal schools, and hence not obnoxious to Const. art. 4, § 27, declaring that no law shall embrace more than one subject, which shall be expressed in its title. *State v. Board of Control*, 85 Minn. 165, 169, 88 N. W. 533, 535.

#### **Eleemosynary synonyms.**

"Charitable" is practically synonymous with "eleemosynary," the latter being technically employed to designate a class of corporations organized for charitable purposes. *People v. Fitch*, 39 N. Y. Supp. 926, 927, 16 Misc. Rep. 464.

#### **Family monument.**

After approving the definition in *Jackson v. Phillips*, 96 Mass. (14 Allen) 539, 556, it was held that, where a testator who had no family of his own provided for repairs of a family monument and burial place, the trust is void as against perpetuities, for the object is not a charity, it not being to a general public use. *Detwiller v. Hartman*, 37 N. J. Eq. (10 Stew.) 347, 353.

Under Gen. St. c. 113, § 2, providing that a person "may by will dispose of any estate, right or interest in real or personal estate that he may be entitled to at his death," and chapter 13, § 1, declaring that devises for any charitable or humane purpose shall be valid, a devise of a life estate to a testator's wife, with directions that at her death the whole estate shall be converted into money and applied to the purchase of a monument to be erected over the graves of himself and wife, is valid. *Ford v. Ford's Ex'r*, 16 S. W. 451, 452, 91 Ky. 572, 13 Ky. Law Rep. 183.

A bequest of money to county commissioners and their successors in office, or to such authority as may control and direct the finances of the county, to be held in perpetuity in trust, and the interest to be expended annually in the repair, preservation, and neat keeping of the graves and monuments of the testatrix and other named relatives, is not a bequest to a charitable use, within the exception to the rule against perpetuities, and is therefore void. *Johnson v. Holifield*, 79 Ala. 423, 58 Am. Rep. 596.

#### **Insurance.**

A Tennessee statute exempting organizations for charitable and benevolent purposes from taxation, etc., does not exempt a co-operative fire insurance company. *Co-operative Fire Ins. Order of Knoxville v. Lewis*, 80 Tenn. (12 Lea) 136.

The term "charity" cannot be construed to include life insurance, which is merely a business transaction. *State v. Taylor*, 27 Atl. 797, 798, 56 N. J. Law (27 Vroom) 49.

#### **Library or museum.**

Const. art. 9, § 1, providing that the General Assembly may exempt from taxation "institutions of purely public charity," means charities that are purely and entirely public. The phrase is intended to exclude those charities which are private or only quasi public, such as many religious aid societies are. Where a library is held in trust as the property of a corporation for the advancement of knowledge and literature in a city, not used in any way for the purpose of private profit, no distinction being made between the parties and the general public, except members' privilege of commutation by annual payment for the hire of books, which payment is for the increase and preservation of the library, the corporation is an "institution of purely public charity," within the meaning of the Constitution. *Philadelphia Library Co. v. Donohugh* (Pa.) 12 Phila. 284, 285.

As used in the law of wills, a "charity" is a gift to any general public use extending to all, rich or poor, and a gift for public charity is not void, although in some forms it creates a perpetuity. A gift must be expressly, or by necessary implication, for the

public benefit, and so a private museum or a library established by private subscriptions for the use of subscribers is not a charity. *Piper v. Moulton*, 72 Me. 155, 159.

A "charitable trust," or a "charity," is a donation in trust for promoting the welfare of mankind at large, or of a community, or of some part of it, indefinite as to numbers and individuals. It may, but it need not, confer a gratuitous benefit upon the poor. It may, but it need not, seek to spread religion or piety. Schools and libraries, equally with asylums, hospitals, and religious institutions, are included within its scope. *People v. Cogswell*, 45 Pac. 270, 271, 113 Cal. 129, 35 L. R. A. 269.

The word "charity" includes a bequest for the erection, creation, and preservation of a free library in a large city. *Crerar v. Williams*, 34 N. E. 467, 471, 145 Ill. 625, 21 L. R. A. 454, 471.

#### **Masonic societies.**

Const. art. 207, providing that charitable institutions shall be exempt from taxation on property owned and used for their corporate purposes, comprises all institutions whose primary objects are benevolence and universal charity, within which description are Masonic societies. *State ex rel. Bertel v. Board of Assessors*, 34 La. Ann. 574, 575.

The grand and subordinate lodges of Free Masons, acquiring money and property beyond their current expenses as a society for the sole purpose and object of the bestowal of relief and charities to the needy, constitute a "charitable and eleemosynary corporation." *Burdine v. Grand Lodge of Alabama*, 37 Ala. 478, 482.

#### **Public buildings and improvements.**

In the case of *Perin v. Carey*, 65 U. S. (24 How.) 465, 506, 16 L. Ed. 701, the Supreme Court of the United States said: "All property held for public purposes is held as a charitable use in the legal sense of the term 'charity,'" and in *Ould v. Washington Hospital for Foundlings*, 95 U. S. 303, 309, 311, 24 L. Ed. 450, the court declared: "A charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing and the well-being of social man." A grant of land by the proprietaries of Pennsylvania in trust for the erecting thereon a courthouse for the public use and service of the county is a gift for a charitable use. *Stuart v. City of Easton* (U. S.) 74 Fed. 854, 859, 21 C. C. A. 146.

A legacy of a sum of money to a town for the purpose of erecting a townhouse for transacting the town's business is a legacy for a charitable purpose. *Coggeshall v. Pelton* (N. Y.) 7 Johns. Ch. 292, 294, 11 Am. Dec. 471.

A devise of land to a town, with directions that all the interest thereof should be used in annually repairing highways and bridges, is a devise for a public and charitable use. *Town of Hamden v. Rice*, 24 Conn. 350, 355.

A bequest in trust for the erection in a public park of a memorial arch in memory of Pennsylvania soldiers, upon which are to appear statues of certain Union generals, and also a statue of testator, with his name in large letters underneath, is a charitable gift. It is true the gift does not provide for the hungry, naked, sick, or homeless, nor for the scholastic or scientific education of the general public, but, with an equally exalted benevolence and love for mankind, has in view the foundation of an almost imperishable, magnificent memorial, far excelling in beauty any creation of the sculptor's art heretofore erected within the limits of the park, the pleasure resort of hundreds of thousands of our population, which for generations yet unborn will tend to the elevation and refinement of the people, cultivate a love for the beautiful in art and architecture, and keep alive their patriotism and remembrance of the martial prowess and good deeds in statesmanship and civil life of heroes, patriots, and citizens worthy of perpetuation; and not only this, but furnishes a secure place for the comfort and gratuitous healthful amusement and recreation of young children, amid pure and attractive rural surroundings, removed from the dangers of the streets and contaminated atmosphere of a great city. We cannot conceive of any more strictly "charitable use," within its legal definition, than the purposes and objects contemplated by the testator in this disposition of his large estate. The memorial monument is for the beautifying and adornment of the city, and for these reasons alone the gift would be upheld as charitable. In re *Smith's Estate*, 37 Atl. 114, 115, 181 Pa. 109.

#### **Public charity.**

"Charity" is understood to refer to something done or given for the benefit of our fellows or of the public. In re *Knight's Estate*, 28 Atl. 303, 159 Pa. 500.

A more concise and practicable rule is that of Lord Camden in *Jones v. Williams*, Amb. 651, adopted by Chancellor Kent, by Lord Lyndhurst, and by the Supreme Court of the United States: A gift to a general public use, which extends to the poor as well as the rich. *Jackson v. Phillips*, 96 Mass. (14 Allen) 539, 556. This definition is followed in many other cases. See *Coggeshall v. Pelton* (N. Y.) 7 Johns. Ch. 292, 294; *Gerke v. Purcell*, 25 Ohio St. 229, 243; *Kain v. Gibboney*, 101 U. S. 362, 365, 25 L. Ed. 813; *Perin v. Carey*, 65 U. S. (24 How.) 465, 506, 16 L. Ed. 701; *Stuart v. City of Easton* (U. S.) 74 Fed. 854, 858, 21 C. C. A.

146; *Dexter v. Harvard College*, 57 N. E. 371, 374, 176 Mass. 192.

To constitute a "charity" in the legal sense, the use must be public in its nature. A trust created for the use of a particular person, a single individual, would not be a charity in a legal sense. A bequest to a church mission for the education of a boy to whom the testatrix had previously advanced money is not a bequest to a charity, it not being public. *Sherwood v. American Bible Soc.*, \*40 N. Y. (1 Keyes) 561, 568.

The term "charity" does not extend to particular gifts to particular persons. A sum supplied from a private gift for any private or general purpose is a charity. The establishment of a school for learning of any description, and donations for the establishment of colleges and schools, are charities. *Yates v. Yates* (N. Y.) 9 Barb. 324, 334.

An act, to be "charitable" in a legal sense, must be designed for some public benefit to an indefinite and vague number; that is, the persons to be benefited must be vague, uncertain, and indefinite, until they are selected or appointed to be the particular beneficiaries of the trust for the time being. *Franta v. Bohemian Roman Catholic Cent. Union*, 63 S. W. 1100, 1101, 164 Mo. 304, 54 L. R. A. 723, 86 Am. St. Rep. 611; *Burke v. Roper*, 79 Ala. 138, 142.

A charitable use is one of a public nature, tending to the relief or benefit, in some shape or other, of the community at large, not restricted to the mutual aid of a few, as in a mutual benefit association. *Babb v. Reed* (Pa.) 5 Rawle, 151, 158, 28 Am. Dec. 650.

As used in the law of wills, a "charity" is a gift to any general public use extending to all, rich or poor, and a gift for public charity is not void, although in some forms it creates a perpetuity. A gift must be expressly or by necessary implication for the public benefit. *Piper v. Moulton*, 72 Me. 155, 159.

A "purely public charity," within the meaning of Const. art. 9, § 1, providing that the Legislature may exempt from taxation institutions of a purely public nature, is not one necessarily solely controlled and administered by the state, but extends to private institutions for purposes of public charity, and not administered for private gain. *Appeal of Donohugh*, 86 Pa. 306, 318.

An instrument of writing purporting to convey lands to trustees and their successors, in perpetual trust, to provide a home and school for the maintenance and education of children of the deceased members of a secret society, is not a gift for the purpose of public charity. *Troutman v. De Boussiere Odd Fellows' Orphans' Home & Industrial School Ass'n*, 71 Pac. 286, 66 Kan. 1.

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An infirmary established in connection with a medical college to make it more attractive to students is not exempt from taxation as an institution of public charity. *Gray St. Infirmary v. City of Louisville*, 65 S. W. 11, 23 Ky. Law Rep. 1274, 55 L. R. A. 270.

#### Relief of the poor and sick.

The general relief of the poor is a charitable use. "Assistance of the poor is required not only by the moral and religious duty of every citizen, but by a sound public policy, and a regard for the interests of the whole community. A gift to the poor generally, or to the poor of a particular town, parish, age, sex, or condition, is a good charitable gift. It is the number and indefiniteness of the objects, and not the mode of relieving them, which is the essential element of a charity. It makes little difference to the contributors, the poor, or the public, and none in the nature of the charity, what is the mode of distributing relief. In every act of relieving the poor, by whatever means, the immediate benefit is to the individual. Hunger, nakedness, and disease are personal, and the relief is also personal, and in one sense private. A good charitable use is public in the sense that it must be executed openly and in public, or in the sense of being so general and indefinite in its objects as to be deemed of common and public benefit. Each individual immediately benefited may be private, and the charity may be distributed in private and by a private hand. It is public and general in its scope and purpose, and becomes definite and private only after the individual objects have been selected." *Saltonstall v. Sanders*, 93 Mass. (11 Allen) 446, 454.

The term "charitable gift" includes a bequest, in trust, the income of which is to be applied to the relief of the worthy poor of the town, although it adds nothing to what the poor are entitled to receive from the town. The conclusion that such a gift is not charitable is unsupported by any authority in this state or elsewhere. The decisions are to the contrary. So are the best and most thoroughly recognized definitions, such as that in *Perin v. Carey*, 85 U. S. (24 How.) 465, 506, 16 L. Ed. 701, or in *Jackson v. Phillips*, 96 Mass. (14 Allen) 539, 556. *Appeal of Strong*, 37 Atl. 395, 396, 68 Conn. 527.

A charity is "a gift to be applied, consistently with existing laws, for the benefit of indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves for life, or by erecting and maintaining public buildings or works, or otherwise lessening the burdens of government." The purpose need not be called "charitable" in the gift, itself, if so described as to show that it is so in its nature. A bequest of a fund to trustees to

form a county benevolent fund, the trustees being empowered, upon such plan as they may choose, to apply the annual income to poor families, widows, and orphans, newcomers in distress, or persons in such county suffering for want of clothing, food, or fuel, but not to drunkards, but to their suffering families, if worthy, not to companies or corporations, unless formed for the relief of the poor, not to church, but to those in distress, and especially to suffering families from whatsoever country, is a gift to charity. *Erskine v. Whitehead*, 84 Ind. 357, 358.

"A gift is charitable where a fund is to be permanently maintained, and its income to be devoted to the relief of the poor and unfortunate, although its distribution is private and to private persons." *Bullard v. Chandler*, 21 N. E. 951, 953, 149 Mass. 532, 6 L. R. A. 104.

A "charitable gift" is one to a class of persons of limited means, and, when made to a town in trust, the object is in no sense incompatible with the object of the town's organization. *Lovell v. Town of Charlestown*, 32 Atl. 160, 161, 66 N. H. 584.

"Charitable purposes," as used in St. p. 1152, § 5, subd. 2, exempting from taxation all buildings used "exclusively for charitable purposes," includes a corporation owning real estate, the products of which are exclusively expended in the training and furnishing of persons for charitable purposes, such as the visitation of the sick, and the care of hospitals and poor schools. "To tax such an establishment would be in fact to tax the sick and destitute, who are the beneficiaries thereof." *State v. Collector of Chatham*, 20 Atl. 292, 293, 52 N. J. Law (23 Vroom) 373, 9 L. R. A. 198.

The term "charitable bequest" applies to a bequest to any institution in a city that will give shelter to homeless people at night, irrespective of creed, color, or condition. In *re Croxall's Estate*, 29 Atl. 759, 760, 162 Pa. 579.

The term "charitable use" includes a testamentary disposition for the benefit of the poor of a defined locality. *Trim v. Brightman*, 31 Atl. 1071, 168 Pa. 395.

A devise, to a society incorporated for the relief of distressed widows and the schooling and maintaining of poor children, of buildings and lands to use and appropriate the receipts and profits for the support of the school and the charities of said institution, without said lot being at any time liable for the debts or contracts of said society, is a good charitable devise. *Jones v. Habersham*, 2 Sup. Ct. 336, 337, 107 U. S. 174, 27 L. Ed. 401.

#### Religious purposes.

Rev. St. § 2039, providing that the absolute power of alienation shall not be sus-

pended by any limitation or condition whatever for a longer period than during the continuance of two lives in being at the creation of the estate, except when real estate is given or devised to a charitable corporation, is intended to include only those which are formed for advancing charitable ends, and does not include a corporation organized and existing for religious and spiritual purposes, and the words cannot be so enlarged as to include what is generally called a "religious corporation." *De Wolf v. Lawson*, 21 N. W. 615, 619, 61 Wis. 469, 50 Am. Rep. 148.

The word "charitable," as used in Pub. St. c. 11, § 5, cl. 3, as amended by St. 1889, c. 465, exempting corporations organized for benevolent, charitable, scientific, and literary purposes from taxation, refers to hospitals and other charitable institutions for the relief of the poor or sick, which render a service to the public, and so relieve the state or municipality from expense, and hence cannot be construed to include a corporation having for its paramount object the dissemination of theosophical ideas and the procuring of converts thereto, one of the purposes of which was forming the nucleus of the universal brotherhood of humanity. *New England Theosophical Corp. v. Board of Assessors*, 51 N. E. 456, 457, 172 Mass. 60, 42 L. R. A. 281.

After approving the definition in *Jackson v. Phillips*, 14 Allen, 558, it was held that a gift to a church, to be used by it for religious purposes, is a gift for charitable uses. *De Camp v. Dobbins*, 29 N. J. Eq. (2 Stew.) 36, 44.

After quoting from *Allen v. Duffie*, 43 Mich. 1, 4 N. W. 427, 38 Am. Rep. 159, it was held that contributions to a church for the advancement of Christianity and the betterment of morals must be classed as a "charity." *First M. E. Church of Ft. Madison v. Donnell*, 81 N. W. 171, 110 Iowa, 5, 46 L. R. A. 858.

A devise for masses for the repose of the soul of testator, and the repose of the souls of other named persons, is valid as a charitable use. *Hoeffer v. Cloghan*, 49 N. E. 527, 529, 171 Ill. 462, 40 L. R. A. 730, 63 Am. St. Rep. 241, approving *Jackson v. Phillips*, 96 Mass. (14 Allen) 539.

A devise of real estate as a site for a church and parsonage, and of other real estate, with directions to sell the same for the purpose of building such church and parsonage, is a charitable trust. *Pennoyer v. Wadhams*, 25 Pac. 720, 722, 20 Or. 274, 11 L. R. A. 210.

A direction in a will by a member of the Society of Friends that his house be kept open for the reception and entertainment of ministers and others traveling in the service of truth does not create a charitable trust

Kelly v. Nichols, 25 Atl. 840, 841, 18 R. I. 62, 19 L. R. A. 413.

The owner of land having at his own expense built a chapel which was used for the purpose of public worship, and the congregation having subscribed a sum of money for the purpose of enlarging and improving the same, he, in consideration that the money so subscribed should be expended for that purpose, demised the premises by lease for 23 years, reserving a peppercorn rent during his life, and £10 per annum after his death. A declaration of trust was afterwards executed by some of the lessees, declaring that they would hold the premises in trust for the congregation assembling at the chapel, and that in case the public worship should be there discontinued, then that they would assign the premises for civil purposes. Held, that this was a conveyance for the benefit of a charitable use, and therefore void within 9 Geo. II, c. 36, § 1. *Wellard v. Hawthorn*, 2 Barn. & Ald. 96.

A bequest to a Catholic bishop, to be expended for the benefit of a religious community, is not a gift to charitable uses. *Kain v. Gibboney*, 101 U. S. 862, 365, 25 L. Ed. 813.

"As there can be no charitable use without a trust, an absolute gift or bequest to an incorporated missionary society is no more a charity than an absolute gift to an individual." *Owens v. Missionary Soc. of Methodist Episcopal Church*, 14 N. Y. (4 Kern.) 380, 385, 67 Am. Dec. 160.

Rev. St. § 2039, authorizing devises of real estate to "charitable corporations," does not authorize devises to "religious corporations." *De Wolf v. Lawson*, 21 N. W. 615, 619, 61 Wis. 469.

A bequest to the board of trustees of several churches was within the prohibition of Civ. Code, § 1313, prohibiting bequests in trust for charitable uses of more than one-third of the estate where the testator had legal heirs. *In re Hewitt's Estate*, 29 Pac. 775, 776, 94 Cal. 376.

A gift for the perpetual support of a Christian minister, the primary object of which is not the support of an individual, but is for the support and spread of Christian teaching and enlightenment, is a broad charity. Gifts to pastors have heretofore in adjudicated cases been considered charities. *Farmers' & Merchants' Bank v. Robinson*, 70 S. W. 372, 374, 96 Mo. App. 385.

#### **Society for prevention of cruelty to children.**

A society which cares for children charged with crime or held as witnesses against persons charged with cruelty, and brings into court for disposition children found in a state of destitution, and investigates applications for commitment of children, and de-

fends the custody by institutions of children committed through its instrumentality, and, in addition, affords shelter for children overnight, furnishing them food, clothing, and medical attendance, and aids needy families and children, is a charitable institution. *People v. New York Soc. for Prevention of Cruelty to Children*, 53 N. Y. Supp. 1017, 1019, 25 Misc. Rep. 53.

The New York Society for Prevention of Cruelty to Children, which is supported by public and private donations, and whose services are wholly gratuitous, and not limited to any particular form of cruelty, is a "charitable" institution within the meaning of Acts 1896, c. 546, §§ 9, 10, relating to the visitation and inspection by the state board of charities of charitable institutions. *People v. New York Soc. for Prevention of Cruelty to Children*, 53 N. Y. Supp. 953, 42 App. Div. 83.

The New York Society for the Prevention of Cruelty to Children, incorporated under Laws 1875, c. 130, for the prevention of cruelty to children, and the enforcement by all lawful means of all laws relating to or in any wise affecting children, is not a "charitable institution" within the meaning of Const. art. 8, §§ 11, 14, conferring on the state board of charities the right of visitation and inspection of all charitable institutions. *People v. New York Soc. for Prevention of Cruelty to Children*, 55 N. E. 1063, 1064, 161 N. Y. 233.

#### **State prison or penitentiary.**

As used in Act March 21, 1895 (Laws 1895, c. 54), providing that any person who shall become a pauper or public charge while at any charitable institution shall be chargeable for support to the county in which he last resided before entering such institute, the term "charitable institution" cannot be construed to include the state prison. *New Hampshire Asylum for Insane v. Belknap County*, 44 Atl. 928, 69 N. H. 174.

The state penitentiary is a charitable institution within Const. art. 15, § 4, limiting the annual tax levy except for the support of state, educational, and charitable institutions. *State v. Laramie County Com'rs*, 55 Pac. 451, 456, 8 Wyo. 104.

The state penitentiary is a "charitable institution" within Const. art. 15, § 4, limiting the annual state tax levy except for the support of a state, educational, and charitable institution, the payment of the state debt, and the interest thereon. *State v. Laramie County Com'rs*, 55 Pac. 451, 8 Wyo. 104, 130.

#### **Temperance.**

After quoting definitions of "charity" from the cases of *Jackson v. Phillips*, 96 Mass. (14 Allen) 539, 556, *Vidal v. Girard's*



*Ex'rs*, 48 U. S. (2 How.) 127, 11 L. Ed. 205, and *Missouri Historical Soc. v. Academy of Science*, 94 Mo. 459, 8 S. W. 346, it was held that a gift for the promotion of temperance will be construed charity. *Harrington v. Pier*, 82 N. W. 345, 357, 105 Wis. 485, 50 L. R. A. 307, 76 Am. St. Rep. 924.

#### **Woman's suffrage.**

A bequest to trustees "to be used by them, according to their best judgment, for the attainment of woman suffrage in the United States of America and its territories," is a valid charity. *Garrison v. Little*, 75 Ill. App. 402, 411.

#### **Young Men's Christian Association.**

"Charitable purposes," as used in 3 Gen. St. c. 8320, exempting buildings used for charitable purposes from taxation, means eleemosynary purposes, purposes connected with the distribution of charity, i. e., of aid to the needy, and cannot be construed to apply to the buildings of a Young Men's Christian Association. The word "charitable," like most other words, is capable of different significations. In the law relating to charitable uses it has a very wide meaning, but in this statute it has not so broad a meaning. *Trustees of Y. M. C. A. v. City of Paterson*, 39 Atl. 855, 61 N. J. Law, 420.

The work done by the Young Men's Christian Association is "charitable," within the meaning of that term as defined in the law. *People v. Willis*, 52 N. Y. Supp. 739, 23 Misc. Rep. 545.

#### **CHARITY (In Sunday Law).**

"Charity," as used in Gen. St. c. 84, §§ 1, 2, prohibiting the doing of any business, labor, or work on Sunday, save what is done from necessity or charity, means everything which proceeds from a sense of moral duty or a feeling of kindness or humanity, and is intended wholly for the purpose of the relief or comfort of another, and not for one's own benefit or pleasure. *Doyle v. Lynn & B. R. Co.*, 118 Mass. 195, 197, 19 Am. Rep. 431.

"Necessity or charity," within the meaning of the exception of a statute making it criminal for the proprietors of carriages to allow any person or persons to travel therein on Sunday, except from necessity or charity, means for the purpose or with a view of contributing to the relief of necessity, or to some office of charity. The letting of a carriage for the conveyance of persons on Sunday, from a belief that it is to be used in a case of necessity or charity, though no such case in fact exists, is not an offense within the prohibition of the statute. *Myers v. State*, 1 Conn. 502, 506.

Gen. St. Mass. c. 84, § 2, provides that whoever travels on the Lord's Day, except

for necessity or charity, shall be punished, etc. Held that, in order to constitute the purpose of travel on the Lord's Day a charity or necessity, the act which is done or which is to be performed by the traveler must be in itself a charitable act, and therefore, where the charitable purpose is made subservient to secular ends, the fact that the travel includes a charitable purpose would not be sufficient to satisfy the provisions of the exception of the act. *Bucher v. Cheshire R. Co.*, 8 Sup. Ct. 974, 976, 125 U. S. 555, 31 L. Ed. 795.

Traveling on Sunday is, *prima facie*, not a work of charity. *Hinckley v. Inhabitants of Penobscot*, 42 Me. 89, 92.

#### **Business transactions.**

The words "necessity or charity," in the exception to the Sunday law prohibiting traveling on Sunday except for necessity or charity, do not characterize the act of a servant in traveling to see his master to induce the latter to change the servant's hours of work from night to day in order that the servant may sleep better, as the traveling was merely for a matter of secular business. *Connolly v. City of Boston*, 117 Mass. 64, 65, 19 Am. Rep. 396.

The loaning of money on Sunday is not a work of "charity," within the meaning of that word as used in an exception to a Sunday statute. *Meador v. White*, 66 Me. 90, 91, 22 Am. Rep. 551.

A creditor drew an order upon his debtor on Sunday. The debtor accepted the order on the same day, and the amount was paid to the debtor by a third person, who took the order, the payment being also made on Sunday. The transaction took place on Sunday in order that the creditor, who was about to leave, might receive his money before going. Held, that the transaction was not a work of "charity" within the exception of a Sunday statute. *Mace v. Putnam*, 71 Me. 238.

The term "necessity" or "charity," in a statute forbidding travel on Sunday except traveling for charity or necessity, does not characterize traveling in order to conduct negotiations between a creditor and his debtor, nor for every other act done for the purposes of profit or gain. *Stanton v. Metropolitan R. Co.*, 96 Mass. (14 Allen) 485, 486.

#### **Care of poor or sick.**

The term "necessity or charity," in a statute prohibiting work, etc., on Sunday, but excepting work of necessity or charity, includes the care of the poor on Sunday by the overseers of the town, and a contract made on such day by the overseers for the relief of a sick pauper is not in violation of the statute. *Aldrich v. Inhabitants of Blackstone*, 128 Mass. 148, 151.

A person who travels from one town to another on the Lord's Day for the sole purpose of visiting an invalid sister whom he believes to be ill, and another person who drives the former at his request solely for the same purpose, are "traveling from charity," within Pub. St. c. 98, § 3, prohibiting all traveling, other than that from charity, on the Lord's Day. *Cronan v. City of Boston*, 136 Mass. 384, 385.

The words "necessity or charity," in the exception in the statute prohibiting traveling on Sunday except through necessity or charity, characterize the act of traveling by a mother to obtain medicine for her sick child. *Gorman v. City of Lowell*, 117 Mass. 65, 66.

#### Pleasure trips.

Rev. St. § 2000, providing for the punishment of any person found at common labor or engaged in his usual vocation on Sunday, works of "necessity and charity" alone excepted, cannot be construed to include the carrying of persons for their own pleasure solely. Carrying persons for their own pleasure is no business at all, much less is it business of an urgent nature, demanding prompt action. The exception cannot be enlarged so as to include persons who, in pursuing their usual vocation, carry pleasure seekers to and from picnics. *Dugan v. State*, 25 N. E. 171, 172, 125 Ind. 130, 9 L. R. A. 321.

The exception in a Sunday law prohibiting work on Sunday, except works of "charity or necessity," may properly be said to cover everything which is morally fit and proper, under the particular circumstances of the case, to be done upon the Sabbath. Riding upon Sunday for exercise, and for no other purpose, is not a violation of the statute. "Our own court, in *O'Connell v. Lewiston*, 65 Me. 34, 20 Am. Rep. 673, and *Davidson v. City of Portland*, 69 Me. 116, 39 Am. Rep. 253, has held that walking out in the open air upon the Sabbath for exercise is not a violation of the statute. In other jurisdictions, also, it has been held not to be unlawful to ride to a funeral (*Horne v. Meakin*, 115 Mass. 326); walking to prepare medicine for a sick child (*Gorman v. City of Lowell*, 117 Mass. 65); riding to visit a sick sister (*Cronan v. City of Boston*, 136 Mass. 384); traveling to visit a sick friend (*Doyle v. Lynn & B. R. Co.*, 118 Mass. 195, 19 Am. Rep. 431); a servant riding to prepare needful food for her employer (*King v. Savage*, 121 Mass. 303); a father riding to visit his two boys (*McClary v. Town of Lowell*, 44 Vt. 116, 8 Am. Rep. 366); walking for exercise (*Hamilton v. City of Boston*, 96 Mass. [14 Allen] 475; and walking partly for exercise and partly to make a social call." *Sullivan v. Maine Cent. R. Co.*, 19 Atl. 169, 82 Me. 196, 8 L. R. A. 427 (citing *Barker v.*

*City of Worcester*, 139 Mass. 74, 29 N. E. 474).

#### Raising money for church.

"Charity," as used in Comp. Laws, § 1984, providing that no person shall keep his shop, warehouse, or workshop open on Sunday, or do any manner of labor, business, or work, except only works of necessity and charity, on such day, should be construed to include the raising of money for the purchase of a house of worship, and the solicitation of contributions from the congregation, assembled on Sunday for religious worship, in order to pay for a house of worship which had been erected for their occupation for religious purposes. "Charity is active goodness; it is doing good to our fellowmen. It is fostering those institutions that are established to relieve pain, to prevent suffering, and to do good to mankind in general, or to any class or portion of mankind. As the term 'charity' is made use of in our law, it no doubt takes shades of meaning from the Christian religion which has largely affected the great body of our laws, and to which we must trace the laws which furnish what the Christian regards as the desecration of the first day of the week. It was never doubted that all the necessary or usual work connected with religious worship was work of charity. The work of the minister who preaches, the organist and precentor who furnish the music, and the sexton who cares for the building on Sunday, is in the very highest sense 'charitable.' Religious societies are formed to do good to mankind. The support of public worship is a work of 'charity' within the meaning of the statute. Such an act does not pertain to religious worship, but is a means by which religious worship is supported." *Allen v. Duffie*, 1 N. W. 427, 429, 43 Mich. 1, 38 Am. Rep. 159 (definition quoted and approved in *First M. E. Church v. Donnell*, 81 N. W. 171, 110 Iowa, 5, 46 L. R. A. 858).

"Charity," as used in Act April 22, 1794, providing a penalty for any person doing or performing any worldly employment or business whatsoever on the Lord's Day, commonly called "Sunday," works of necessity and "charity" only excepted, should be construed to include the raising of money to build a house of worship, or the solicitation of contributions for that purpose from a congregation assembled on Sunday for religious worship. "Charity is active goodness. The means which long-established common usage of religious congregations show to be reasonably necessary to advance the cause of religion may be deemed works of charity. It is not essential that they be purely charitable. It is sufficient if they so far partake of that character as to be recognized by the congregation as part of its active goodness and are not expressly forbidden by the statute. The support of religious societies is a

charity. It is a giving for the love of God, or the love of a neighbor, in a broad, catholic sense. Whatever is merely fit and proper to be done on Sunday in furtherance of the great object is likewise a charity." *Dale v. Knepp*, 98 Pa. 389, 391, 88 Am. Rep. 165, note, 42 Am. Rep. 624.

#### Shaving.

The word "charity" does not characterize the work of a barber in shaving his customers on Sunday, and therefore he is not within the exception of a statute prohibiting work on Sunday, but excepting works of charity or necessity. *State v. Frederick*, 45 Ark. 347, 348, 55 Am. Rep. 555.

Where an old man has been injured so that he cannot well shave himself, the act of another in shaving him at his own house on Sunday is not in violation of a statute prohibiting the doing of any manner of labor, business, or work, except works of charity and necessity, on the Lord's Day. *Stone v. Graves*, 13 N. E. 906, 145 Mass. 353.

#### CHARIVARI.

Webster defines "charivari" as a mock serenade of discordant noises. Worcester defines "charivari" as a vile or noisy music made with horns, bells, kettles, pans, etc., in derision of some person or event; a mock serenade. The Supreme Court in Wisconsin, in *Higgins v. Minaghan*, 78 Wis. 602, 47 N. W. 941, 11 L. R. A. 138, 23 Am. St. Rep. 428, says: "A charivari is an unlawful and riotous assembly, wholly indefensible in law and morals, and reprobated by every well-disposed person." *Gilmore v. Fuller*, 198 Ill. 130, 132, 65 N. E. 84, 60 L. R. A. 286. "It was first directed against widows who married a second time at an advanced age, but is now extended to other occasions of nocturnal annoyance." *Bankus v. State*, 4 Ind. 114, 116.

#### CHART.

"Chart," as used in 4 Stat. 436, providing that charts and certain other articles may be made the subject of copyright, means some form of map. *Ehret v. Pierce* (U. S.) 10 Fed. 553, 554.

"Chart," as used in Rev. St. U. S. § 4965 [U. S. Comp. St. 1901, p. 3414], and 1 Stat. 124, refers to charts of the class of maps, and does not include tables of figures or other methodically arranged information. As the word was originally used in the copyright act of 1790, it meant a marine map. Sheets of paper exhibiting tabulated or methodically arranged information came to be called "charts," so that a definition of "chart" covering them was put in an edition of Worcester's Dictionary in 1864, and in Webster's Dictionary in 1865. In the construction of a penal statute, however, the word must be

understood in its strictest sense, as including only drawings of the nature of a map. *Taylor v. Gilman* (U. S.) 24 Fed. 632, 634.

#### CHARTER.

See "Private Charter."

A charter is a legislative grant, and in case of doubt is to be construed most strongly against the grantee, but not against the state. *Starkweather & Shepley v. Brown* (R. I.) 55 Atl. 201, 203.

The word "chartered," as used in the statement that a steamer belonging to a corporation was chartered to certain parties, means hired. *White v. Norfolk & S. Ry. Co.*, 20 S. E. 191, 115 N. C. 631, 44 Am. St. Rep. 489.

An insurance upon a charter is an insurance of the risk of losing the freight to be carried under the charter. *Ocean Ins. Co. v. Sun Mut. Ins. Co.* (U. S.) 18 Fed. Cas. 540, 546.

#### As law.

The charter of a private corporation enacted by the Legislature of another state is a law, within the meaning of Code Proc. § 426, which declares that printed copies in volumes of statute codes or other written law of other states shall be admissible in evidence in courts of this state. *Persse & Brooks Paper Works v. Willett* (N. Y.) 19 Abb. Prac. 416.

#### Of corporation.

As contract, see "Contract."

As public act, see "Public Act or Statute."

The word "charter," when used in a statute, may include the articles of agreement by which a corporation is formed under the general laws. *Pub. St. N. H.* 1901, p. 63, c. 2, § 10.

A corporate charter is in the nature of a commission from the state to its citizens and their successors in interest, whether at home or abroad. Each government, in the exercise of its own discretion, determines the conditions of its grant, being free to impose or omit territorial restrictions. It cannot enlarge its own jurisdiction, but it can confer general powers to be exercised within its bounds, or beyond them, wherever the comity of nations is respected. For the purposes of commerce such a commission is revered like a government flag, as a symbol of allegiance and authority, entitled to recognition abroad until it forfeits recognition at home. *Merrick v. Van Santvoord*, 34 N. Y. 208, 214.

The charter of a corporation is the law by which it is created, together with the

articles of association adopted in pursuance thereof. It may be either a special act of the Legislature enacted for the purpose of creating the corporation, or general laws enacted for the organization of all corporations, intended to be sufficiently broad to authorize them to exercise necessary powers. The charter of a corporation is also sometimes called the "constituting instrument," and it defines and limits the powers and rights of the corporation as such. *Attorney General v. Perkins*, 41 N. W. 426, 431, 73 Mich. 303.

The charter of a corporation formed under a general law consists of its articles of association and the law under which it is organized. *State v. Anderson*, 67 N. E. 207, 210, 31 Ind. App. 34 (citing *Bent v. Underdown*, 156 Ind. 516, 60 N. E. 307).

"Every charter of a private corporation is a contract, first, between the state and the corporation, to which each is solemnly bound—the state that it will not impair the obligation, the corporation that it will perform the objects of its incorporation and keep within the powers granted to it; secondly, between the stockholders themselves. The stockholders are bound to consent to the management of the affairs of the corporation by the majority, and by the by-laws which that majority makes. And the whole, on the other hand, agree with each other that they will apply the funds of the company to the objects and purposes of the charter, and not otherwise." *Central R. Co. v. Collins*, 40 Ga. 582, 624.

Corporation charters are in many respects compacts between the government and the corporators, and, as the former cannot deprive the latter of their franchises in violation of a compact, so the latter cannot put an end to the compact without the assent of the former. It is equally obligatory on both parties. The surrender of a charter can only be made by some formal, solemn act of the corporation, and will be of no avail until accepted by the government. *Economy Building & Loan Ass'n v. Paris Ice Mfg. Co.* (Ky.) 68 S. W. 21, 23; *Boston Glass Manufactory v. Langdon*, 41 Mass. (24 Pick.) 49, 53, 35 Am. Dec. 292.

A charter of a corporation is a contract to the validity of which the consent of both the corporation and the state is essential, and hence it cannot be altered or added to without such consent. *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 663, 4 L. Ed. 629.

The charter of a corporation is a contract made by the state with the corporators, and as such it is protected in all the privileges granted it by the Constitution of the United States. *Alabama & F. R. Co. v. Burkett*, 46 Ala. 569, 578.

A charter is not simply an executed grant, but a continuing contract. There is a duty of performance by the recipients of the grant which continues during the life of the charter. *Long Island Water Supply Co. v. City of Brooklyn*, 17 Sup. Ct. 718, 722, 166 U. S. 685, 41 L. Ed. 1165.

A charter is a contract between the corporation and the sovereign, so that none but the parties and their privies can take advantage of a breach of a condition therein. *Farrington v. Putnam*, 37 Atl. 652, 657, 90 Me. 405, 38 L. R. A. 339 (citing *Trustees of Davidson College v. Chamber's Ex'rs*, 56 N. C. 253).

The term "charter," as applied to corporations, means a grant made by sovereign authority, either to the whole people or to a portion of them, securing to them the enjoyment of certain rights. Every grant or franchise is a charter. It may be a grant of the mere franchise of being a corporation, or a grant of powers to a corporation already in existence. In either case the grant is the company's charter to exercise the rights and privileges and enjoy the immunities granted. *Morris & E. R. Co. v. Commissioner of Railroad Taxation*, 87 N. J. Law (8 Vroom) 228, 237.

The word "charter," as used in the charter of the Memphis & Little Rock Railroad Company authorizing the company to mortgage its charter, means the franchises of the corporation, in the sense of the right to own and operate the road, take tolls, and carry on its business. *Memphis & L. R. Co. v. Berry*, 41 Ark. 436, 443.

"Charter," as used in Const. art. 16, § 1, declaring that all existing charters or grants of special or exclusive privileges, under which a bona fide organization shall not have taken place and business been commenced in good faith, shall thereafter have no validity, is synonymous with the words, "grants of exclusive or special privileges," immediately following it. *Appeal of Lehigh Water Co.*, 102 Pa. 515, 517.

The charter of a mutual benefit association is the foundation of authority for the corporation. *Supreme Council C. K. A. v. Densford* (Ky.) 56 S. W. 172, 174, 49 L. R. A. 776.

In the rule of law that the charter alone of a corporation is recognized in another state by comity, the word "charter" signifies an agreement between the shareholders of the corporation, whether this agreement be contained in a special act of Legislature, or in articles of association, or in either of these taken in connection with certain general laws of the state. *Floyd v. National Loan & Investment Co.*, 38 S. E. 653, 661, 49 W. Va. 327, 54 L. R. A. 536, 87 Am. St. Rep. 805.

The words "charter accepted," in the usual meaning, signify, under our system of government, a special act of the Legislature, offering corporate existence and franchise to designated individuals, who thereupon accept the offer, and corporations organized under general laws do not come within its meaning; the document under which they are formed being called "articles of association," "articles of incorporation," "certificate of organization," "certificate of incorporation," and such instruments would not be called a "charter accepted." *Trenton St. Ry. Co. v. United New Jersey R. & Canal Co.*, (N. J.) 48 Atl. 763, 764, 60 N. J. Eq. 500.

#### **Of municipal corporation.**

As contract, see "Contract."

As statute, see "Statute."

The "charter of a municipal corporation" is a delegation of powers to its governing authority by the legislative branch of the government, and no powers will be presumed to have been granted that are not mentioned or not necessarily included in a general grant of power. Certainly a power that the Legislature itself cannot exercise will not be presumed to be granted to a municipal corporation. *Board of Council v. Renfro (Ky.)* 58 S. W. 795, 796, 51 L. R. A. 897.

The "charter of a municipal corporation" is not a contract, within the meaning of the constitutional inhibition of laws impairing the obligation of contracts; and where there is no constitutional restriction, either express or implied, upon the action of the Legislature, it has absolute control to create, change, modify, or destroy such corporations at pleasure. *State v. Barker*, 89 N. W. 204, 206, 118 Iowa, 96, 57 L. R. A. 244, 93 Am. St. Rep. 222.

The charter of a public or municipal corporation is not a contract between the corporation and the state, nor between the corporators themselves. The effect of an act of the Legislature incorporating a municipality is to invest the government authorities of the municipality—either a majority of the voters, or such officers as are prescribed—with the power of local government over the inhabitants of that district. Such an act, strictly speaking, confers powers which did not exist before. The governing authorities possess no powers or faculties not conferred upon them either expressly or by fair implication by the law which creates them or by other statutes applicable to them. *Goodwin v. Town of East Hartford*, 38 Atl. 876, 884, 70 Conn. 18 (citing *Dill. Mun. Corp.* § 21; *Coler v. City of Cleburne*, 131 U. S. 162, 9 Sup. Ct. 720, 33 L. Ed. 146).

The charter of a municipal corporation consists of the creative act and of laws relating to the corporation, whether in defining its powers or regulating their mode of

exercise. *People v. Briggs*, 50 N. Y. 553, 559.

The word "charter," as used in *Sp. Laws* 1891, c. 6, § 1, may be defined "as the enabling acts under which a municipal corporation exercises its privileges and performs its duties and obligations, including all matters in which the municipality has a direct interest, and the right to regulate and control." These acts must necessarily include all laws relating to the material affairs and direct interests of the municipality. *State v. Ehrmantraut*, 65 N. W. 251, 253, 63 Minn. 104.

It is laid down in the authorities that the charter of a city bears the same general relation to the ordinances of a city that the constitution of a state bears to its statutes. 1 *Dill. Mun. Corp.* (4th Ed.) p. 385, § 305, and notes; *Quintette v. City of St. Louis*, 76 Mo. 402. Hence a city ordinance which does not comply with the city charter is as invalid as a statute which does not conform to the requirements of the state constitution. *People v. Mount*, 58 N. E. 360, 363, 186 Ill. 560.

The expression "charter and law," as used in a city charter forbidding the improvement and repair by the city of streets not acquired according to the provisions of the charter and law, comprehends both statutory and common law, so that the provision is not equivalent to forbidding the city to acquire control of streets otherwise than in the statutory way. *McGinnis v. City of St. Louis*, 57 S. W. 755, 757, 157 Mo. 191.

#### **CHARTER PARTY.**

As a maritime contract, see "Maritime Contract."

As conveyance, see "Conveyance."

The contract by which a ship is let is termed a "charter party." *Civ. Code S. D.* 1903, § 1446.

The contract by which a ship is let is termed a "charter party." By it the owner may either let the capacity or burden of the ship, continuing the employment of the owner's master, crew, and equipments, or may surrender the entire ship to the charterer, who then provides them himself. The master or a part owner may be a charterer. *Civ. Code Cal.* 1903, § 1959; *Civ. Code Mont.* 1895, § 2644.

A "charter party" is defined to be an agreement by indenture whereby the owners of a ship and the freighters covenant with each other that such a ship shall take in such a lading and carry the same to such a place in consideration of a certain sum by the freighter. *Ashley v. Cornwell (Va.)* 2 Munf. 268, 270.

A charter party is a contract in writing by which an entire ship, or some principal part thereof, is let for the specified purpose of the charterer during a specified term, or for a specified voyage, in consideration of a certain sum of money per month, or per ton, or both, or for the whole period or adventure described. Controversies arising upon charter parties are cognizable in admiralty, because they are maritime contracts. *The Harvey and Henry* (U. S.) 86 Fed. 656, 30 C. C. A. 380.

A charter party is a specific contract by which the owners of a vessel let the entire vessel or some principal part thereof to another person, to be used by the latter in transportation for his own account, either under their charge or his. The charter party must provide and express that the charterer hired the whole ship, and took it absolutely into his own possession, and manned, equipped, furnished, and controlled her during a certain period or for a certain voyage. In accordance with such definition, a charter party is often called a "mercantile lease." *The New York* (U. S.) 93 Fed. 495, 497.

A "charter party" is defined to be a contract by which an entire ship, or some principal part thereof, is let to a merchant for the conveyance of goods on a determined voyage to one or more places. *The Erie* (U. S.) 8 Fed. Cas. 757, 758; *Vanderwater v. Mills*, 60 U. S. (19 How.) 82, 91, 15 L. Ed. 554; *Ward v. Thompson*, 63 U. S. (22 How.) 330, 333, 16 L. Ed. 249; *Wilson v. Morgan*, 27 N. Y. Super. Ct. (4 Rob.) 58, 67. Thus, where there was no letting or hiring of a ship for a given voyage to be employed by the hirer for his own profit, but the owners contributed the vessel to be put into a line for freight and passengers, and the hirer contributed the good will of an established line, together with his care, skill, and experience, the receipts of the boat to be applied to expenses, insurance, a certain sum to the owners, and a certain sum to the hirer, and the balance to be equally divided, there was no charter party between the owners and the hirer. *Ward v. Thompson*, 63 U. S. (22 How.) 330, 333, 16 L. Ed. 249. So, also, an agreement that passengers and freight carried by one vessel to a certain place should be turned over to another to be transported still further, the passage money and freight to be divided between them, was not a charter party. *Vanderwater v. Mills*, 60 U. S. (19 How.) 82, 91, 15 L. Ed. 554.

A charter party is the hiring of the whole or a part of a vessel for the transportation of merchandise or passengers; and if it does not, *ex vi termini*, convey a proprietary interest, it certainly does pass a claim or interest in the vessel, recognized by the maritime law, the privilege to look on her as answerable for the goods placed

on board. In charter parties there is a mutuality of lien. The ship is answerable to the goods, and these again to the ship. *Vanderwater v. The Yankee Blade* (U. S.) 28 Fed. Cas. 980, 981.

A charter party is a contract by which the owner lets his vessel to another for freight. It is a special contract, whereby compensation is stipulated for a service to be performed, and is not an account concerning trade or merchandise. *Spring v. Gray*, 81 U. S. (6 Pet.) 151, 163, 8 L. Ed. 352.

A charter party is a mere hiring of a vessel, and hence cannot be an element of loss where the vessel has suffered a total loss in a collision. *The Hamilton* (U. S.) 95 Fed. 844.

#### **As demise or affreightment.**

A "charter party" is not a demise of the ship itself as contradistinguished from a right to have goods carried by the vessel, but is a mere affreightment, sounding in covenant. *The George Dumois* (U. S.) 88 Fed. 537, 540.

A "charter party," in order to amount to a demise of the entire ship and clothe the charterer with all the rights and liabilities of owners, must therefore give the possession of the ship as well as a right to the profits of her employment. The general rule is that, although he lets the whole capacity of the ship, that if he appoints the master and crew it is not a demise of the ship, but a contract of affreightment. *The Erie* (U. S.) 8 Fed. Cas. 757, 758.

A "charter party" is of two kinds: One is where the owner agrees to carry a cargo, which the charterer agrees to provide; the second is where there is an entire surrender by the owner of the vessel to the charterer, who hires the vessel as one hires a house, takes her empty, and provides the officers and provisions, and, in short, the entire outfit. In such a contract the charter is substituted in place of the owner, and becomes the owner for the voyage. *Fish v. Sullivan*, 3 South. 730, 732, 40 La. Ann. 198.

"There are two kinds of contracts passing under the general name of 'charter party,' differing from each other very widely in their nature, their provisions, and in their legal effects. In one the owner lets the use of his ship to freight, he himself retaining the legal possession, and being liable to all the responsibilities of owner. The master is his agent, and the mariners are in his employment, and he is answerable for their conduct. The charterer obtains no right of control over the vessel, but the owner is in fact and in contemplation of law the carrier of whatever goods are conveyed in his ship. The charter party is a mere covenant for the transportation of merchandise or the performance of the service which is stipulated

in it. In the other, the vessel is herself let to hire, and the charterer takes her into his own possession. It is a contract for the lease of the vessel. The owner parts with possession and the right of possession, and the hirer has not only the use, but the entire control, of the vessel herself. He becomes the owner during the term of the contract. He appoints the master and mariners, and is responsible for their acts. If goods are taken on freight, the freight is due to him, and if, by the barratry or other misconduct of the master or crew, the shippers suffer a loss, he must answer for it. If he ships his own goods, he is his own carrier. Under a charter party of the former description the charterer may hire the use of the whole vessel, and it may be employed in carrying his own goods or the goods of other merchants on freight. His own goods become liable to the owner of the vessel for the charter, to the full extent of their value, and, though he is entitled to the freight of the goods shipped by the subfreighters, the owner of the ship has a lien on that freight for the charter of the vessel, and his lien extends to the goods of each subfreighter for the amount of freight due on his shipment. This was the decision in the case of *Paul v. Birch*, 2 Atk. 621, and it has ever since been held to be law. *Holt, Shipp*. 471. It is so recognized in *Christie v. Lewis*, 2 Brod. & B. 410, and in *Faith v. East India Co.*, 4 Barn. & Ald. 630. In a charter party of the second kind, not only the entire capacity of the ship is let, but the ship itself, and the possession is passed to the charterer. The entire control and management of it is given up to him. The general owner loses his lien for freight, but the lien itself is not destroyed; the charterer is substituted in his place, in whose favor the lien continues to exist when goods are taken on freight. But the general owner has no remedy for the charter of his vessel, but his personal action on the covenants of the charter party. It is a contract in which he trusts to the personal credit of the charterer." *Drinkwater v. The Spartan* (U. S.) 7 Fed. Cas. 1085, 1088.

#### CHARTER RIGHTS.

The "charter rights, privileges, and franchises of every kind," within the meaning of a conveyance by a railroad company of all and singular the charter rights, privileges, and franchises of every kind belonging to the grantor, do not include land grants which are not directly connected with the operation of the road. *Shirley v. Waco Tap R. Co.*, 10 S. W. 543, 551, 78 Tex. 131.

#### CHARTERER.

Within Rev. St. art. 2899, rendering a charterer or hirer of any railroad, steamboat, etc., liable for death caused by negligence, a charterer is one who by contract acquires

the right to use a vessel or road belonging to another, and does not include a receiver. The word "charterer" applies to persons who in their own rights are entitled to possess, use, and have the benefits resulting from the use of the thing chartered, and those rights must be acquired by contract with persons having such dominion over the thing chartered as enables them to confer on the charterer the right to use the thing chartered and have the benefits resulting therefrom. The ordinary meaning of the word "charterer" is that no person can hold that relation to property unless he has a personal interest in or right to it. A charterer is one in possession in his own right, while a receiver is an officer of the court that appoints him, and at all times he is the agency of the court, subject to its orders, and having no personal interest in the property in his hands resulting from the existence of the receivership. *Turner v. Cross*, 18 S. W. 578, 579, 83 Tex. 218, 15 L. R. A. 262, 263. See, also, *Houston & T. C. Ry. Co. v. Roberts* (Tex.) 19 S. W. 512; *Yoakum v. Selph*, 19 S. W. 145, 83 Tex. 607; *Bonner v. Thomas* (Tex.) 20 S. W. 722.

#### CHASTE.

"Chaste" is defined by Webster as meaning "pure from all unlawful commerce of the sexes." Applied to persons before marriage, it signifies pure from all sexual intercourse, undefiled; and as applied to married persons it means true to the marriage bed. *State v. Carron*, 18 Iowa, 273, 275, 87 Am. Dec. 401.

A girl of 15, who has led a virtuous life for six or seven years, is, notwithstanding possible unchastity before that time, a girl "theretofore chaste," within *Laws Mich.* 1837, No. 143, declaring a penalty against any one who shall carnally know a girl of the age of 14 "theretofore chaste." *People v. Mills*, 54 N. W. 488, 94 Mich. 630.

#### CHASTE CHARACTER.

See "Previous Chaste Character."

The expression "chaste character," as used in the laws providing for the punishment of any one guilty of seducing an unmarried woman of previous chaste character, means actual personal virtue, and not reputation. *Kenyon v. People*, 28 N. Y. 203, 207, 84 Am. Dec. 177; *People v. Kenyon* (N. Y.) 5 Parker, Cr. R. 254, 285; *Carpenter v. People* (N. Y.) 8 Barb. 603, 609; *Crozler v. People* (N. Y.) 1 Parker, Cr. R. 453, 457. See, also, *State v. Shean*, 32 Iowa, 88, 92; *State v. Carron*, 18 Iowa, 372, 374, 87 Am. Dec. 401; *People v. Clark*, 33 Mich. 112, 118; *People v. Mills*, 54 N. W. 488, 491, 94 Mich. 630. By the term "chaste character" the Legislature could only have meant personal qualities that make up the real character.

and not public reputation, which is the estimated character formed by the public. *Kenyon v. People*, 28 N. Y. 203, 207, 84 Am. Dec. 177. The fact that a female was known as a person of chaste character and reputation at the time of the abduction was not sufficient, where it appeared on the trial that she was not in fact a person of chaste character. *Carpenter v. People* (N. Y.) 8 Barb. 603, 606. There is a distinction between actual personal virtue and good repute for chastity. The former may be preserved, while the latter is impaired by indiscreet conduct, and it does not necessarily follow that they are co-extensive. *Zabriskie v. State*, 43 N. J. Law (14 Vroom) 640, 645, 39 Am. Rep. 610.

The words "chaste character," in section 2586 of the Code, which provides for the punishment of any person who shall seduce and debauch an unmarried woman of previously chaste character, are not limited to the chastity of person, but extend to the mind and sentiments of the person seduced. *Boak v. State*, 5 Iowa, 430, 431.

"Chaste character," as used in the statute relating to the punishment of seduction under promise of marriage of a female of previous chaste character (Pen. Code, § 284), means actual personal virtue; and a woman who has voluntarily submitted to sexual intercourse prior to the alleged seduction is not within the statute, though she was at the time under the age of consent. *People v. Nelson*, 46 N. E. 1040, 1042, 153 N. Y. 90, 60 Am. St. Rep. 592.

Although a female may, from ignorance or other causes, have so low a standard of propriety as to commit or permit indelicate acts or familiarities, yet if she have enough of the sense of virtue that she would not surrender her person, unless seduced to do so under a promise of marriage, she cannot be said to be a woman of unchaste character. *State v. Brinkhaus*, 34 Minn. 285, 25 N. W. 642.

#### As including reformed woman.

A statute punishing the seduction of a female of "previous chaste character" means actual personal virtue; but if a female had previously fallen from virtue, but had subsequently reformed and become chaste, she is within the meaning of the statute. *People v. Mills*, 54 N. W. 488, 491, 94 Mich. 630.

Though a woman has fallen, yet if at the time of the seduction she is reformed, she is of "chaste character." The legal significance of "chaste," or "chaste character," is not the same as its usual or ordinary meaning. Webster defines "chaste" as meaning "one pure from all unlawful commerce of sexes. Applied to persons before marriage, it signifies pure from all sexual commerce, undefiled; applied to married persons, true to the marriage bed." *State v. Carron*, 18 Iowa, 372, 374, 87 Am. Dec. 401.

#### CHASTITY.

Chastity, in law, relates to the question whether a woman has improper sexual relations with a man or not, and, in case of an unmarried woman, whether she has had sexual intercourse with any man. *People v. Brown*, 24 N. Y. Supp. 1111, 1116, 71 Hun, 601.

"Chastity," as used in prosecutions for seduction, means, in case of an unmarried female, simply that she is *virgo intacta*; and, though one woman may permit familiarities, liberties, or even indecencies at the thought of which another woman would blush, so long as that woman has not surrendered her virtue, she is not put without the pale of the law. *People v. Kehoe*, 55 Pac. 911, 912, 123 Cal. 224, 69 Am. St. Rep. 52 (citing *Crozier v. People* (N. Y.) 1 Parker, Cr. R. 453, 455).

#### CHATTEL

See "Incorporeal Chattel."

All other chattel property, see "All Other."

Any chattels, see "Any."

Goods and chattels, see "Goods."

2 Bl. Comm. 385, says "that things personal by our law not only include things movable, but also something more, the whole of which is comprehended under the general name of 'chattels,' which Sir Edward Coke says is a French word signifying 'goods.' In the grand coutumier of Normandy," he observed, "a chattel is described as a mere movable, but at the same time set in opposition to a fief or feud, so that not only goods, but whatever was not a feud, were accounted chattels, and it is in this larger and more extended sense that our law adopts it; the idea of goods or movables only being not sufficiently comprehensive to take in everything the law considers a chattel interest." *People v. Holbrook* (N. Y.) 13 Johns. 90, 94; *Dowdel v. Hamm* (Pa.) 2 Watts, 61, 64.

"There is no term broader than 'chattel.' It includes all kinds of property, except the freehold and things which are parcel of it." *People v. Maloney* (N. Y.) 1 Parker, Cr. R. 593, 595; *Commonwealth v. Hazlewood*, 2 S. W. 489, 490, 84 Ky. 681; *International & Life Assur. Co. v. Haight*, 35 N. J. Law (6 Vroom) 279, 282; *In re Gay's Gold*, 80 U. S. (13 Wall.) 358, 362, 20 L. Ed. 606; *State v. Harvey*, 82 S. W. 1110, 1112, 131 Mo. 339; *Hawkins v. State Loan & Trust Co.* (U. S.) 79 Fed. 50, 51; *Fling v. Goodall*, 40 N. H. 208, 215.

"How extensively the meaning of the words 'goods and chattels' is to be understood in any instance must depend on the subject-matter and the context. 'Goods' may include everything but what descends to heirs. 'Choses in action' may pass by that name. The term 'goods and chattels' will



cover more than any possible or practicable enumeration of articles." *Gibbs v. Usher* (U. S.) 10 Fed. Cas. 303, 304.

"Chattels" include all personal property, the title to which is evidenced by possession. *Hornblower v. Proud*, 2 Barn. & Ald. 327, 335.

"Chattel" is a very comprehensive term and includes every species of property which is not real estate or a freehold. *State v. Bartlett*, 55 Me. 200, 211 (citing *Burrill*, Law Dict.).

The term "chattels" includes living things, as slaves, horses, cattle, hogs, etc. *Vaughan v. Town of Murfreesboro*, 2 S. E. 676, 677, 96 N. C. 317, 60 Am. Rep. 413.

"Chattels" include any movable property or goods, as furniture, money, horses, etc. *State v. Bartlett*, 55 Me. 200, 211 (citing *Worcester*, Dict.).

The term "chattels" includes goods and chattels. Laws N. Y. 1892, c. 677, § 4.

"Goods, wares, and merchandise" means all movable property that is ordinarily bought and sold, while "chattels" is a more comprehensive term, and includes animate property. *Smith v. Wilcox*, 24 N. Y. 353, 358, 82 Am. Dec. 302.

The words "goods, wares, chattels, implements, fixtures, tools, and other personal property," in a chattel mortgage so describing the mortgaged property, is insufficient in failing to identify any particular property so that it can be known as to what it is intended to apply. *Buskirk v. Cleveland* (N. Y.) 41 Barb. 610, 611.

The word "goods," in a statute relative to the recording of mortgages of negroes, goods, and chattels, means evidently what is usually understood by goods, wares, and merchandise. The term would not embrace horses, cattle, plate, household furniture, and the like, with sufficient clearness. *Ex parte Leland* (S. C.) 1 Nott & McC. 460, 462.

"The words 'goods and chattels' are the most comprehensive terms of description for passing personal property by will, yet they may be restricted by the context." *Foxall v. McKenney* (U. S.) 9 Fed. Cas. 645, 646.

"Chattels," as used in a will wherein testator devised all his household goods, furniture, provisions, and other goods and chattels to his wife, did not refer only to such as were in the house at the time of his death, but included those situated in various outbuildings on the home place. *Blackmer's Ex'r v. Blackmer*, 22 Atl. 600, 602, 63 Vt. 236.

"Chattels," as words of description in a bequest, will pass all the personal estate, but, where used after the word "furniture," restricts the articles to the same kind as

mentioned; that is, articles of furniture. *Stuart v. Marquis of Bute*, 11 Ves. 656, 665.

"The words 'goods and chattels' at common law include all personal property in possession, and if unrestrained in a will they will pass all personal property." *State v. Brown*, 68 Tenn. (9 Baxt.) 53, 54, 40 Am. Rep. 81.

In a will giving a wife all of testator's estate for life, without power to dispose of the profits, and any of the goods and chattels, the term "goods and chattels" will not be held to include therein any property which by the language of another clause it has been provided shall constitute part of the funds from which a legacy is to be paid. *Brady v. Brady*, 28 Atl. 515, 517, 78 Md. 461.

"Chattels," as used in statutes defining larceny, are to be understood as meaning such goods and chattels as were esteemed at the common law to be the subjects of larceny. *State v. Lymus*, 26 Ohio St. 400, 401, 20 Am. Rep. 772.

#### Accounts.

"Chattels" are articles of personal property which are capable of delivery, and hence, as used in How. Ann. St. § 6193, declaring that every mortgage or conveyance of goods and chattels, not accompanied by immediate delivery, etc., should be void, unless filed in the office of the clerk of the township where the mortgagor resides, etc., did not include a mortgage or transfer of accounts as security, there being no way in which an account may be delivered, it being a thing having no tangible entity, and exists only as an incorporeal right. *Preston Nat. Bank v. George T. Smith Middlings Purifier Co.*, 47 N. W. 502, 506, 84 Mich. 364.

#### Advancements.

The term "goods and chattels," used in reference to the goods and chattels as to which a decedent dies intestate, does not include advancements made by the decedent to his children in his lifetime. *Knight v. Oliver* (Va.) 12 Grat. 33, 37.

#### Bank bills.

The term "chattels," as used in an indictment for stealing bank notes, alleging that they were the goods and chattels of a certain person, denotes and signifies property and ownership, and includes notes or instruments in writing. *People v. Holbrook* (N. Y.) 13 Johns. 90.

The word "chattels" is so comprehensive that it may include bank bills. *Citizens' Bank v. Nantucket Steamboat Company* (U. S.) 5 Fed. Cas. 719, 731. See, also, *Garfield v. State*, 74 Ind. 60, 65.

The term "chattels," as used in Rev. St. p. 279, § 72, making it a misdemeanor to

receive stolen goods or chattels, cannot be construed to include bank notes. *State v. Calvin*, 22 N. J. Law (2 Zab.) 207.

Bank bills, though strictly within the terms "goods and chattels," are not in common parlance included in the phrase "goods and chattels," when used in connection with insurance companies and transportation by land or water. *Chicago & A. R. Co. v. Thompson*, 19 Ill. (9 Peck) 578, 584.

#### **Bonds and other securities.**

"Chattels," as used in Rev. St. p. 174, § 2, providing that, where any testator or intestate shall have in his lifetime taken or carried away or converted to his own use the goods or chattels of any person, such person could maintain the same action against the executors and administrators of such testator or intestate as he could have maintained against such testator or intestate, should be construed to include bonds and other documentary securities, for they are bona notabilia, and therefore property, though there is a distinction between "rights and credits" and "goods and chattels." *Terhune v. Bray's Ex'rs*, 16 N. J. Law (1 Har.) 53, 54.

#### **Chattels personal only.**

1 N. R. L. 393, providing that, whenever judgment shall be given by a justice of the peace, an execution may be granted commanding the collection thereof from the "goods and chattels" of the person against whom it is granted, is to be construed as only meaning chattels personal, and as not including chattels real. *Putnam v. Westcott* (N. Y.) 19 Johns. 78, 76.

In construing the term "chattels," in a statute relative to the recording of mortgages of negroes, goods, or chattels, as not including chattels real, the court said that the word "chattels" is "so extensive that it may often mean chattels real or leasehold estates. But it is a sound rule of interpretation that when an author makes use, first, of terms, each evidently confined and limited to a particular class of a known species of things, and then, after such specific enumeration, subjoins a term of very extensive signification, this term, however general and comprehensive in its possible import, yet, when thus used, embraces only things ejusdem generis; that is, of the same kind or species with those comprehended by the preceding limited and confined terms. In a word, the last is restricted to the subject-matter of the preceding terms. Now the terms 'negroes' and 'goods' are each confined to a known class of strictly personal estate; and the term 'chattels,' following them immediately, means 'chattels ejusdem generis'; that is, personal chattels." *Ex parte Leland* (S. C.) 1 Nott & McO. 460, 462.

#### **Chose in action or debt.**

A debt or chose in action is included within the term "chattels." *Dowdel v. Hamm* (Pa.) 2 Watts, 61, 64. See, also, *Gibbs v. Usher* (U. S.) Fed. Cas. No. 5,387; *Terhune v. Bray's Ex'rs*, 16 N. J. Law (1 Har.) 53, 54.

"Chattels," as used in Code 1873, p. 897, §§ 4, 5, 6, requiring every contract in writing made in respect to real estate or goods and chattels in consideration of marriage to be in writing and to be recorded, means "such property and such goods and chattels as are visible, tangible, or movable." It does not include a mere chose in action. *Kirkland v. Brune* (Va.) 81 Grat. 126, 131. See, also, *Tingle v. Fisher*, 20 W. Va. 497, 511.

Mere choses in action, such as notes or demands placed in another's hands for collection, are not chattel property, and therefore Laws 1869, c. 788, designed to afford means of realizing payment upon possessory liens, but which was so drawn as to apply only to liens "upon any chattel property," did not apply to an attorney's retaining lien upon papers, deeds, vouchers, etc., in his possession. *In re Wilson* (U. S.) 12 Fed. 235, 238. See, also, *Tingle v. Fisher*, 20 W. Va. 497, 511; *Kirkland v. Brune* (Va.) 81 Grat. 126, 131.

In construing a statute providing that persons garnished are required to appear and answer such interrogatories as shall be propounded touching goods, chattels, rights, and credits of the judgment debtor, the courts say that it would seem that the words here used, particularly "rights and credits" concerning which such garnishee must make disclosures, are sufficiently comprehensive to include the right of redemption in mortgaged or pledged personal property. *Burnham v. Doolittle*, 15 N. W. 606, 608, 14 Neb. 214.

The word "chattels," as used in a bequest of "my home place, with my household furniture and all my personal goods and chattels on said premises at the time of my decease," is restricted by the words "household furniture" to property of the same kind, and does not include promissory notes and cash on the premises at the time of the testator's decease, there being a residuary clause conveying the residue for another purpose. *Peaslee v. Fletcher's Estate*, 14 Atl. 1, 60 Vt. 188, 6 Am. St. Rep. 103.

An action by a receiver of an insolvent bank, in which it is alleged that the defendant to whom negotiable papers were sent by the bank for collection appropriated the proceeds thereof, and refused to pay the same over on demand, is an action for the conversion of a chattel. *Hawkins v. State Loan & Trust Co.* (U. S.) 79 Fed. 50, 51.

A claim to land under a certificate of location is not a chattel, but is an incorporeal hereditament, fulfilling Blackstone's definition thereof as "a right issuing out of a thing corporate, whether real or personal." The claim to land, until perfected by location and patent, was simply a right granted by the United States to receive so many acres of land—a mere equity. *Walker v. Daly*, 49 N. W. 812, 813, 80 Wis. 222.

Rev. St. Tex. 1895, art. 2548, providing that no gift of any "goods and chattels" shall be valid unless by deed or will, duly acknowledged, or unless actual possession be given, refers to corporeal personal property only, and does not include choses in action. *Cowen v. First Nat. Bank of Brownsville*, 63 S. W. 532, 533, 94 Tex. 547.

#### Coin and money.

The term "chattels," as used in Code 1880, § 1178, declaring that no transfer of goods or chattels, between husband and wife shall be valid as against any third person unless such transfer or conveyance be in writing and acknowledged and filed for record as a mortgage or deed of trust of such property is required to be filed for record, etc., does not include money. *Leinkauf v. Barnes*, 5 South. 402, 405, 66 Miss. 207. See, also, *Garfield v. State*, 74 Ind. 60, 65.

In its ordinary signification "chattel" includes every species of property which is not real estate or freehold, and includes gold coin. In *re Gay's Gold*, 80 U. S. (13 Wall.) 358, 362, 20 L. Ed. 606. See, also, *Hall v. State*, 3 Ohio St. 575, 576.

#### Crops and fruit.

A chattel is any species of property not amounting to a freehold in land. The perennial productions of the earth are regarded as a part of a freehold, while the annual fruits of annual labor are held to be chattels. *Westbrook v. Eager*, 16 N. J. Law (1 Har.) 81, 85.

Annual crops raised by yearly labor and cultivation are to be regarded as personal chattels, independent and distinct from the land, capable of a sale, without regard to whether growing or matured. *Swafford v. Spratt*, 67 S. W. 701, 702, 93 Mo. App. 631.

Annual crops raised by yearly labor and cultivation, or *fructus industriales*, are to be regarded as personal chattels, independent of and distinct from the land, capable of being sold by oral contract, and this without regard to whether the crops are growing or have ceased to draw nutriment from the soil. *Holt v. Holt*, 57 Mo. App. 272, 275 (citing *Smock v. Smock*, 37 Mo. App. 56; *Garth v. Caldwell*, 72 Mo. 622).

Annual crops raised by yearly labor and cultivation are regarded as personal chattels, independent of and distinct from the

land, capable of being sold by oral contract, and this without regard to whether the crops are growing, or, having matured, have ceased to derive any nutriment from the soil. *Garth v. Caldwell*, 72 Mo. 622, 627.

If the subject of a contract is comprehended in that class of products of the soil which are obtained by the labor and cultivation of man, and which the law has termed "*fructus industriales*," then it is in regard to chattels personal, and need not be in writing. 2 Schouler, *Pers. Prop.* 468 et seq.; *Vulicevich v. Skinner*, 19 Pac. 424, 77 Cal. 239; *Marshall v. Ferguson*, 23 Cal. 65; *Davis v. McFarlane*, 37 Cal. 634, 636, 99 Am. Dec. 340; *Benj. Sales*, §§ 120, 121, 126. Under this principle a contract in regard to apples, peaches, and blackberries which might be raised in a certain orchard during three successive years was in regard to chattels, and did not need to be in writing, since it is a matter of common observation that such fruit cannot be made to annually produce without the manurance and industry of man. *Smock v. Smock*, 37 Mo. App. 56, 60, 63.

Stacks of hay are chattels, within the statute providing that every person who shall willfully set fire to and burn the "goods and chattels" of another shall be guilty of arson. *State v. Harvey*, 32 S. W. 1110, 1112, 131 Mo. 339.

#### Dog.

A dog is a chattel, within the statutes relating to the larceny of goods and chattels. *People v. Maloney* (N. Y.) 1 Parker, Cr. R. 598, 595; *Commonwealth v. Hazelwood*, 2 S. W. 489, 490, 84 Ky. 681.

A dog is a chattel, within Code Cr. Proc. § 160, defining the crime of larceny, it being by statute taxable property. *State v. Langford*, 33 S. E. 370, 371, 55 S. O. 322, 74 Am. St. Rep. 746.

"Chattels" is a broader term than "goods," and includes all kinds of property except the freehold, and things which are a portion of it. So that a dog is the subject of larceny, being comprehended within the term "chattels," as used in Code 1873, § 3902, defining such crime. *Hamby v. Samson*, 74 N. W. 918, 919, 105 Iowa, 112, 40 L. R. A. 508, 67 Am. St. Rep. 285.

#### Fixtures.

Fixtures come within the expression "goods and chattels." *Pitt v. Shew*, 4 Barn. & Ald. 206. As to steam engine, see *Coombs v. Beaumont*, 5 Barn. & Adol. 72.

The general rule appears to be that, where an instrument or utensil is an accessory to anything of a personal nature as to the carrying on of a trade, it is to be considered a chattel, but where it is a necessary accessory to the enjoyment of the inher-

itance, it is to be considered as a part of the inheritance. The stage and scenery of a theater are chattels. In re Olympic Theater (Pa.) 2 Browne, 275, 285.

A steam engine erected for the purpose of working a colliery, to be used by the lessee during his term, to be held as the property of the landlord, does not come within the description of "goods and chattels." *Coombs v. Beaumont*, 5 Barn. & Adol. 72 (citing 16 Geo. IV, c. 16, § 72).

#### **Goods distinguished.**

The term "chattels" is more comprehensive than "goods," and includes animate property. *Smith v. Wilcox*, 24 N. Y. 353, 358, 82 Am. Dec. 302; *Dowdel v. Hamm* (Pa.) 2 Watts, 61, 65.

"The term 'chattels' is more comprehensive than the term 'goods,' and will include animate as well as inanimate property, slaves, horses, cattle, etc., being chattels, but 'goods' will not be included as that term is understood. Every movable thing which can be weighed, measured, or counted is included under the general term 'chattels,' which Lord Coke says is a French word signifying 'goods.' Blackstone says the term is in truth derived from the technical word 'catalla,' which primarily signified only beasts of husbandry, or, as we still call them, cattle, but in its secondary sense was applied to all movables in general. 2 Comm. 885. We may remark here that in the English statute of limitations (St. 21 Jac. I, c. 5) this phraseology is used, as regards the action of replevin: 'goods and cattle,' and not, as in our modern statutes, 'goods and chattels.'" *Chicago & A. R. Co. v. Thompson*, 19 Ill. (9 Peck) 577, 588.

"Chattel property" is a term which includes all kinds of property except the freehold or things which are parcel of it. It is a more extensive term than "goods" or "effects." *Pearce v. City Council of Augusta*, 87 Ga. 597, 599.

The term "chattels" not only includes goods, but also living things, as slaves, horses, cattle, etc. *Pippin v. Ellison*, 34 N. C. 61, 62, 55 Am. Dec. 403.

#### **Horse.**

Under Code, § 3985, making it criminal to destroy, injure, or secrete any goods or chattels of another, an indictment will lie of secreting and injuring a horse, since the term "chattels" is used in the section in its broadest sense, and covers every kind of personal property. *State v. Phipps*, 95 Iowa, 491, 64 N. W. 411.

#### **Lease for years.**

A lease for years is a chattel real, and, being less than a freehold, is considered as personal estate or property, and in statutory

interpretation is not included under the word "land," or the phrases "real estate" or "real property," but is included in the phrase "personal property" or the word "chattel." *Ment v. Rathbone*, 21 Ind. 454.

The word "chattels," as used in Rev. St. 1838, p. 373, which provides that executions issued by a justice of the peace shall operate as a lien upon personal property of the judgment debtor, and providing that in all cases where execution shall issue, and goods and chattels shall not be found to discharge the same, a transcript may issue, etc., includes a term for years in real estate. *Barr v. Blinford* (Ind.) 6 Blackf. 835, 836, 38 Am. Dec. 146.

#### **Legacy.**

A legacy is not a chattel, and therefore an assignment of it by way of mortgage need not be filed in accordance with the chattel mortgage act. *Woodward v. LaPorte*, 41 Atl. 443, 444, 70 Vt. 399.

#### **License.**

The term "chattels" refers to things that can be used, handled, transferred, as horses, carriages, furniture, machinery, tools, and the numerous objects to be seen about us in everyday life, the value of which is in the possession of the thing itself. The term in Rev. St. p. 2013, providing that any mortgage, etc., of goods and "chattels," which shall not be accompanied by actual change of possession, shall be void unless a copy of the mortgage be filed, etc., does not include a liquor tax certificate assigned by the holder to the brewer as security for loan. *Niles v. Mathusa*, 57 N. E. 184, 185, 162 N. Y. 546.

#### **Liquor tax certificate.**

In New York it is held that a liquor tax certificate is a mere chose in action which is incapable of seizure or delivery by the sheriff, and hence cannot be levied on and taken. It is not a chattel, but an intangible right. *McNeeley v. Welz*, 59 N. E. 697, 698, 166 N. Y. 124.

#### **Mortgages and securities.**

"Chattel," though ordinarily used with reference to things movable and tangible, is a very comprehensive word, including any species of property, not real estate or freehold, and in a tax law the term "chattels" includes mortgages. *International & Life Assur. Co. v. Haight*, 35 N. J. Law (6 Vroom) 279, 282.

A mortgage of leasehold interest does not come within the provision of Laws 1833, c. 279, requiring mortgages of goods and chattels to be filed. *State Trust Co. v. Casino Co.*, 41 N. Y. Supp. 1, 2, 18 Misc. Rep. 327.

A mortgage of the capital stock of a corporation is not a chattel. *Williamson v. New Jersey South. R. Co.*, 26 N. J. Eq. (11 C. E. Green) 398, 403.

A mortgage or transfer of accounts as security is not within the term "goods and chattels." *Preston Nat. Bank v. George T. Smith Middlings Purifier Co.*, 47 N. W. 502, 506, 84 Mich. 364.

"Goods and chattels" embraces all kinds of property other than realty, including bonds, mortgages, and other choses in action. *Terhune v. Bray's Ex'rs*, 16 N. J. Law (1 Har.) 53, 54.

#### Right to office.

The right to an office is not within the expression "goods and chattels." *State v. Moores*, 76 N. W. 530, 533, 56 Neb. 1.

#### Slaves.

"Chattels," as used in a statute declaring that all and singular the goods and chattels of a debtor shall be liable to execution, except certain exemptions, includes registered servants or slaves. *Nance v. Howard*, 1 Ill. (Breese) 242, 243.

#### Stocks.

As applied to bequests or devises, taken simply and without qualification, the word "chattels" comprises the whole personal estate of every description, including stocks. *Kendall v. Kendall*, 4 Russ. 360, 370. See, also, *First Nat. Bank v. Holland*, 39 S. E. 126, 129, 99 Va. 495, 55 L. R. A. 155, 86 Am. St. Rep. 898.

"Chattels," as used in *Nix. Dig.* p. 294, § 7, providing that the rights, credits, moneys or effects, goods and chattels, lands and tenements, of a defendant may be attached, should be construed to include corporate stock. *Curtis v. Steever*, 36 N. J. Law (7 Vroom) 304, 306.

"Chattels," as used in a statute requiring the filing of mortgages on all goods and chattels, means personal property of all kinds which is capable of visible possession, and hence a mortgage of capital stock of a corporation is not within the statute. *Williamson v. New Jersey South. R. Co.*, 26 N. J. Eq. (11 C. E. Green) 398, 403.

As used in *Code Va.* § 2414, declaring that no gift of goods or chattels shall be valid unless by deed or will, or unless the donee have actual possession, the words "goods and chattels" relate to some visible, tangible, movable thing, and hence do not include mere choses in action which are not capable of actual possession, so that a gift of a certificate of stock is valid. *First Nat. Bank v. Holland*, 39 S. E. 126, 129, 99 Va. 495, 55 L. R. A. 155, 86 Am. St. Rep. 898.

### CHATTEL INTERESTS.

Estates at will are chattel interests. *Civ. Code Cal.* 1903, § 765; *Rev. St. Okl.* 1903, § 4080; *Rev. Codes N. D.* 1899, § 3329; *Civ. Code S. D.* 1903, § 245.

Estates at will or by sufferance shall be chattel interests. *Rev. St. Wis.* 1898, § 2029.

By statute in New York, estates of inheritance are denominated "estates of freehold," estates for years are denominated "chattels real," and estates by will or by sufferance are called "chattel interests"; and it is further provided that the terms "real estate" and "lands" shall be coextensive with "lands, tenements, and hereditaments." *Nellis v. Munson*, 15 N. E. 739, 108 N. Y. 453.

### CHATTEL MORTGAGE.

See "Formal Mortgage."

"A regular mortgage of personal property is a transfer of the legal title, upon condition, as a security for the payment of a debt or the performance of some other obligation, and if the condition is not complied with the title of the mortgagee becomes absolute at law, and he has the right to take immediate possession." *Means v. Montgomery* (U. S.) 23 Fed. 421, 424; *Jordan v. Turner* (Ind.) 3 Blackf. 309, 311; *Brownell v. Hawkins* (N. Y.) 4 Barb. 491, 493. The possession of the goods may be in the mortgagor or in the mortgagee. *Brownell v. Hawkins* (N. Y.) 4 Barb. 491, 493; *Porter v. Parmly* (N. Y.) 43 How. Prac. 445, 453; *Robinson v. Fitch*, 28 Ohio St. 659, 663; *Heyland v. Badger*, 35 Cal. 404, 410; *Streeter v. Ward*, 12 N. Y. 333, 334; *McGriff v. Porter*, 5 Fla. 373, 376.

A mortgage of personal chattels in all cases vests the legal title in the mortgagee, and when by the terms or by the legal construction of the instrument he has an immediate right to the possession, although the possession may not in fact have been changed, he is, in judgment of law, the absolute owner, and it is merely as his bailee and by his sufferance that the mortgagor retains the possession. The latter has no interest that is bound by or can be sold under an execution against him. When, by the terms of a mortgage, the mortgagor is to remain in possession, his temporary interest subject to the mortgage may be levied on and sold; but his interest in other cases is a right of redemption only, a mere chose in action, which, unless united to a right to the possession for a definite period, can never be the subject of a levy and sale under execution. *Stewart v. Slater*, 13 N. Y. Super. Ct. (6 Duer) 83, 99.

In the earlier decisions, as well as in the later ones, which follow the principles of the common law, the rule is that a chattel mortgage is something more than a mere security; that it is a conditional sale of personal property, and operates to transfer the legal title to the mortgagee, which can only be defeated by full performance of the conditions mentioned in the mortgage. The decisions rendered under the statutes and registry laws of various states declare the rule to be that the title to personal property in a chattel mortgage remains in the mortgagor until divested by foreclosure and sale; that the mortgage is merely security for the debt, and only creates a lien upon the property; and this is the rule in California. *Alferitz v. Ingalls* (U. S.) 88 Fed. 964, 971 (citing *Shoobert v. De Motta*, 112 Cal. 215, 44 Pac. 487, 53 Am. St. Rep. 207; *First Nat. Bank v. Erreca*, 116 Cal. 81, 47 Pac. 926, 58 Am. St. Rep. 183).

"A chattel mortgage is an instrument of sale conveying the title of the property to the mortgagee with terms of defeasance, and, if the terms of redemption are not complied with, then at law the title becomes absolute in the mortgagee. The nature of the agreement must be such that by the mere nonperformance of the condition by the mortgagor the title will be transferred to the mortgagee by the force of the agreement." *People v. Remington*, 14 N. Y. Supp. 98, 99, 59 Hun, 282; *Parshall v. Eggart* (N. Y.) 52 Barb. 367, 371. An instrument on its face purporting to be an acknowledgment of the receipt of the property of another, to be accounted for and held subject to the order of the vendee, conditioned that it was held as a collateral security for the payment of the maker's note, but containing no words of sale, is not a chattel mortgage. *Parshall v. Eggart* (N. Y.) 52 Barb. 367, 371, 54 N. Y. 18, 23.

At common law a mortgage of chattels vested the title in the mortgagee, and after default by the mortgagor the title of the mortgagee was absolute; but under the statutes of Oregon the mortgagee is not entitled to the possession of the chattels as a matter of right until condition broken, and it appears from the different sections of the statutes relating to chattel mortgages that a chattel mortgage simply creates a lien on the property mortgaged in favor of the mortgagee, and does not vest any title without foreclosure. *Chapman v. State*, 5 Or. 432, 435.

A chattel mortgage vests the legal title, and also, unless it provides to the contrary, the right to the possession, in the mortgagee; and if the mortgagor or his vendee, without notice, refuse on demand to let the mortgagee have possession of the property, an action for conversion will lie. *Fletcher v. Nendek*, 30 Minn. 125, 14 N. W. 513.

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A mortgage of personal chattels is a sale on condition. The legal title to the chattel is vested in the mortgagee, subject to the right of the mortgagor to perform the condition. Until default there is no doubt of the mortgagor's right to perform, and upon performance to re-vest himself with the legal title. *Stoddard v. Denison* (N. Y.) 7 Abb. Prac. N. S. 309, 314; *Id.*, 32 N. Y. Super. Ct. (2 Sweeny) 54, 60.

"A mortgage of personal property regularly executed is defined to be 'a conditional sale as security for the payment of a debt or the performance of some other obligation.'" *Allen v. Steiger*, 31 Pac. 226, 229, 17 Colo. 552 (quoting *Jones, Chat. Mortg.* [2d Ed.] § 1); *Garwood v. Garwood*, 38 Atl. 954, 955, 56 N. J. Eq. 235. The condition upon the performance of which the transfer is to become void should be contained in the instrument by which the property is conveyed. *Williams v. Chadwick*, 50 Atl. 720, 721, 74 Conn. 252.

"A chattel mortgage is neither a sale absolute nor conditional; neither is it more than a pledge or an absolute pledge; neither does it vest an absolute title in the mortgagee, but, like a real estate mortgage, is nothing but a mere security; a lien upon the property therein described which the mortgagee may himself, or by an agent, sell for the satisfaction of his debt, and until so sold, or the mortgagor's title is foreclosed, does not vest in the mortgagee for any other purpose except that of satisfaction." *Shoe-craft v. Beard*, 19 Pac. 246, 247, 20 Nev. 182 (quoting *Herm. Chat. Mortg.* § 196, p. 471).

One characteristic of a chattel mortgage is that it is a transfer of personal property, or of some interest therein, by the mortgagor to the mortgagee as security. The mortgagee under a chattel mortgage acquires, not the legal title to the property, but merely a lien thereon, the legal title remaining in the mortgagor. *McCormick Harvesting Mach. Co. v. Mills*, 89 N. W. 621, 622, 64 Neb. 166.

A chattel mortgage is a mere security, under which no title can possibly pass except by foreclosure and sale. *Marsh v. Wade*, 20 Pac. 578, 580, 1 Wash. St. 538.

A chattel mortgage is regarded as a mere security for the debt, and does not entirely divest the property out of the mortgagor. It does not give the right of immediate possession until default to make payment on the due day, and therefore trover cannot be maintained by a mortgagee who has demanded possession of the mortgaged property before the due day of his mortgage. *Finkel v. Lepkin*, 41 Atl. 718, 62 N. J. Law, 580.

Wherever there is a conveyance of the legal title to personal property upon an express condition subsequent, the transaction

is a chattel mortgage; while where there is no conveyance of the legal title, there is no mortgage, though the instrument contained a condition subsequent. *Vanstone v. Goodwin*, 42 Mo. App. 39, 46.

A chattel mortgage is more than a mere security. It is a conditional sale, and operates to transfer the legal title to the mortgagee. *Hill v. Beebe*, 13 N. Y. (3 Kern.) 556, 565.

A mortgage of personal property vests the legal title in the mortgagee, and he may bring trover, after condition broken, and perhaps before, unless there be a stipulation that the mortgagor may retain possession until condition is broken. The assignment of a mortgage is in the nature of a bill of sale, and transfers the title to the assignee, who may therefore bring an action in his own name for a tort to the property. *Montgomery v. Kerr* (S. C.) 1 Hill, 291.

In a mortgage of chattels the general property passes to the mortgagee. *Bank of Rochester v. Jones*, 4 N. Y. (4 Comst.) 497, 507, 55 Am. Dec. 290.

A mortgage of personal property transfers the legal title, and a stipulation permitting the mortgagor to retain possession unless condition is broken is personal to him, and cannot be assigned. *Levi v. Legg*, 23 S. C. 282, 285.

A chattel mortgage merely creates a lien on the property, and vests no title in the mortgagee; but on the breaking of the condition of the mortgage a new right arises, which is a legal right, and the mortgagee becomes vested with a special property in the thing. *J. I. Case Threshing Mach. Co. v. Campbell*, 13 Pac. 324, 327, 14 Or. 460.

The legal title of mortgaged chattels vests in the mortgagee without foreclosure, unless otherwise stipulated. *Kellogg v. Olson*, 24 N. W. 364, 365, 34 Minn. 108.

A chattel mortgage is a conditional sale, the legal title being vested in the mortgagee. *Stoddard v. Denison* (N. Y.) 38 How. Prac. 296, 301.

A chattel mortgage transfers the whole legal title. *Adams v. Nebraska City Nat. Bank*, 4 Neb. 370, 373; *Stewart v. Hanson*, 35 Me. 506, 508.

A chattel mortgage, though in the nature of a sale upon condition, creates a mere lien upon the property to secure the payment of a debt or the performance of some other duty. *Backhaus v. Buells*, 73 Pac. 342, 344, 43 Or. 358.

In the state of Alabama a chattel mortgage conveys title to the mortgagee. *Peterson v. Kaigler*, 3 S. E. 655, 656, 78 Ga. 464.

A mortgagee of a chattel mortgage takes every interest the mortgagor had, except the

mere right of redemption. *Ohadwick v. Lamb* (N. Y.) 29 Barb. 518, 522.

In South Carolina a mortgagee of chattels is the legal owner, and chattels so mortgaged cannot be attached for a debt of the mortgagor. A mortgagor has therefore no property in such chattels sufficient, in case of his nonresidence, to support an attachment on that ground. *Simonds v. Pearce* (U. S.) 31 Fed. 137.

A chattel mortgage in Oregon does not merely give a lien, but conveys title and right to possession. *Marquam v. Sengfelder*, 32 Pac. 676, 678, 24 Or. 2.

A chattel mortgage in Washington is a mere security. *Byrd v. Forbes*, 3 Wash. T. 318, 13 Pac. 715.

An agreement, to constitute a valid verbal chattel mortgage, must contain all the essential elements and features of a written mortgage. *Bank of Highland v. Evans-Snyder-Buell Co.*, 57 Pac. 1046, 1047, 9 Kan. App. 80.

A chattel mortgage is a bill of sale or any other writing which is intended to create a security consisting of chattels, and it is not necessary that it should be under seal. *Rauch v. Blennerhassett Oil Co.*, 8 W. Va. 36, 40.

To constitute a chattel mortgage, a present title must pass. An agreement to deliver property at a future day or upon some future contingency does not create a mortgage. *Fielding v. Middlebaugh's Adm'rs*, 2 Ohio Dec. 55, 56, 1 West. Law Month. 218, 219.

A characteristic of a chattel mortgage is that there should be a defeasance. *Marshall v. Livingston Nat. Bank*, 28 Pac. 312, 313, 11 Mont. 351.

Mortgages in Ohio are usually under seal, but the term "mortgage," used in the statutes of that state, does not import or imply that a seal is necessary. In regard to chattels it is a mortgage, and not a deed of mortgage, that is required. A chattel mortgage is only a bill of sale with a defeasance incorporated in it, and, as a seal has never been held necessary to the validity of a bill of sale, the presence or absence of that formality in a chattel mortgage is wholly immaterial. *Gibson v. Warden*, 81 U. S. (14 Wall.) 244, 247, 20 L. Ed. 797.

A paper containing all the requisites of a mortgage of personal property is a mortgage from the date of execution thereof, even though it be not attested by an officer. *Nichols v. Hampton*, 46 Ga. 253.

A delivery of personal property as collateral security, where there is no written conveyance, cannot be regarded as a chattel mortgage. *Day v. Swift*, 48 Me. 368, 369.

There is no express restriction in the statutes of this state against making a mortgage upon any kind of personal property, and the comprehensive provision in section 2924 that every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, includes all such transfers, whether those for which specific provision is made in other parts of the Code, or such as rest upon the natural rights of citizens to deal with their property as they choose. *Works v. Merritt*, 38 Pac. 1109, 1110, 105 Cal. 467.

#### Assignment distinguished.

Expressions have crept into some decisions to the effect that, if property is conveyed in trust in a mortgage, the instrument is thereby changed from a chattel mortgage to an assignment; but such is not the law, unless the conveyance is absolute and places the title of the property in the trustee. The question is, is the title of the property conveyed to the trustee, so that it is beyond the reach of the creditors of the mortgagor? If their relation to the property is not so changed by the interposition of a trustee between them and the property of the debtor that they cannot reach the surplus, or redeem from the mortgage and become subrogated to the rights of the trustee, then the instrument is valid as a chattel mortgage. The mere use of the words "in trust for the benefit of creditors," in a chattel mortgage, does not render it a common-law assignment. Under these principles a chattel mortgage to one who was not a creditor, as trustee, conditioned that the mortgagor should pay to the mortgagee within a certain time certain amounts due to certain creditors, and to save certain obligors harmless from certain obligations, and providing for the distribution of the fund after payment of the expenses pro rata to certain creditors, did not become an assignment for the benefit of creditors, though it included all the mortgagor's property and was made to a trustee, since by it the property was not withdrawn from the right of the mortgagor or others to redeem. *Warner v. Littlefield*, 50 N. W. 721, 724, 89 Mich. 329.

A "chattel mortgage" is the security for a debt, and gives merely a lien on the property, leaving in the grantor an equity of redemption and any surplus or residue after the payment of the debt. The property does not pass beyond the grantor's control. He may satisfy the debt it is executed to secure, and the property reverts to him, while in the case of an assignment he disposes of the entire property. *Preston v. Carter*, 16 S. W. 17, 18, 80 Tex. 388.

An instrument making a conveyance of all the goods, wares, property, bills, book accounts, and demands, and all other property

of the maker, wheresoever situated, except such as is exempt from forced sale, and setting out the list of the creditors, stating the liabilities, and providing for the sale of the property and return of any surplus to the grantor, is not a mortgage, but an assignment for the benefit of creditors. *Padgett v. Wood* (Tex.) 24 S. W. 1108, 1112.

#### Bill of sale.

A chattel mortgage, whether in writing or not, is a pledge of personal property to secure the performance of the promise of the mortgagor, or some one for whom he stands sponsor. It need not be in writing. *Conchman v. Wright*, 8 Neb. 1; *Ostertag v. Galbraith*, 23 Neb. 730, 37 N. W. 637; *Sloan v. Coburn*, 26 Neb. 607, 42 N. W. 728, 4 L. R. A. 470. A bill of sale, absolute on its face, may be shown to be a chattel mortgage. *Omaha Book Co. v. Sutherland*, 6 N. W. 387, 10 Neb. 334.

The question is, what is the intention of the parties pledging the property? If it was intended to be a security, then it is a chattel mortgage, no matter how or in what form the pledge may be expressed, and the legal title to property pledged by a chattel mortgage remains in the mortgagor until divested by foreclosure proceedings and sale in pursuance of the statute. *Musser v. King*, 59 N. W. 744, 746, 40 Neb. 892, 42 Am. St. Rep. 700.

An instrument conveying chattels is a chattel mortgage, and not a bill of sale, where it provides that it is to be void on repayment of the consideration at a given time, though it provides that the sale is to become absolute, and the title is to pass, without any legal process, on the seller's failure to make such legal payment, and though it is described as a bill of sale, and hence is within 2 Sayles' Civ. St. art. 338, requiring chattel mortgages to be registered, to be valid against execution creditors. *Williams v. Farmers' Nat. Bank*, 56 S. W. 261, 22 Tex. Civ. App. 581.

A bill of sale, though absolute on its face, intended to secure the vendee against loss for money advanced toward the purchase of property, or for that and as security for the payment of other debts, no matter what language may have been employed in expressing the terms of the contract, must be held and treated as a chattel mortgage. *Scott v. Henry*, 13 Ark. 112, 116.

Where a debtor by a written instrument transfers personal property to his creditor, and delivers possession of such property to him with authority to sell, and, after paying all prior incumbrances, apply the excess to the payment of his own claim, no definite price being fixed for the property between the parties to the instrument, the writing is not a bill of sale, even though the words



"bargain," "sale," "transfer," and "delivery" are used therein; but such instrument will be construed to be a deed of trust or a chattel mortgage. A bill of sale of chattels, absolute on its face, may be shown, even by those not parties to it, to be a security for mortgage, void against subsequent lienholders, unless filed as required by law, or unless possession of the property be given to the mortgagee and such possession be actual and continuous. *Greenville Nat. Bank v. Evans-Snyder-Buel Co.*, 60 Pac. 249, 260, 9 Okl. 353.

A bill of sale, made for security, even though running directly to the person to be secured, and though accompanied by delivery of the goods, is at most only a pledge, and not a chattel mortgage. *Copeland v. Barnes*, 18 N. E. 65, 66, 147 Mass. 388 (citing *Shaw v. Siloway*, 145 Mass. 503, 14 N. E. 783).

An instrument executed by a party, in the nature of a bill of sale, but showing in its language the intent of the parties to be a security for a loan of money, is a mortgage. *Stokes v. Hollis*, 43 Ga. 262, 264.

**As a conveyance.**

See "Conveyance."

**As a deed.**

See "Deed."

**Lease of personalty.**

Where a sewing machine is delivered by the owner, who takes back an instrument, called a "lease," whereby the maker agrees to pay certain rent for a fixed time, and, on default, to return the machine, otherwise to retain possession permanently, it constitutes a chattel mortgage. *Singer Mfg. Co. v. Smith*, 19 S. E. 132.

**Mortgage of realty and personalty.**

An instrument in the form of a real estate mortgage, conveying real estate, which includes personal property, is a chattel mortgage so far as the personal property is concerned, and must be filed for record as provided by statute for chattel mortgages, and treated as a chattel mortgage. *Fitzgerald v. Atlanta Home Ins. Co.*, 70 N. Y. Supp. 552, 555, 61 App. Div. 350.

**Pledge distinguished.**

A chattel mortgage is distinguished from a pledge in that it is in form a sale of personal property, which passes title to the mortgagee with a condition that, if a debt which it is given to secure is paid, the sale shall be void, while a pledge contains no words of sale, and does not pass title, but only authorizes the pledgee to sell the property in case of default. *Mitchell v. Roberts* (U. S.) 17 Fed. 776, 778; *Thurber v. Oliver* (U. S.) 26 Fed. 224, 226; *Raper v. Harrison*,

15 Pac. 219, 220, 37 Kan. 243; *Lewis v. Graham* (N. Y.) 4 Abb. Prac. 106, 109; *Cortelyou v. Lansing* (N. Y.) 2 Oaines, Cas. 200, 202; *McFarland v. Wheeler* (N. Y.) 26 Wend. 467, 475; *People v. E. Remington & Sons*, 12 N. Y. Supp. 824, 826, 59 Hun. 282. See, also, *Haskins v. Kelly*, 24 N. Y. Super. Ct. (1 Rob.) 160, 172; *Wilson v. Little*, 2 N. Y. (2 Comst.) 443, 446, 51 Am. Dec. 307; *White v. Cole* (N. Y.) 24 Wend. 116, 142; *Appeal of Collins*, 107 Pa. 590, 605, 52 Am. Rep. 479; *Huntington v. Mather* (N. Y.) 2 Barb. 538, 542; *Sims v. Canfield*, 2 Ala. 555, 560.

A mortgage is a sale of goods with a condition that, if the mortgagor pays, it shall be void. A pledge contains no words of sale, but an authority, if the debt is not paid, to sell the pledge for that purpose. In the one case the title passes to the mortgagee; in the other the title remains in the pledgor, although possession is given to the pledgee. An instrument reciting that, "as security for the payment of the notes, I have deposited with them the securities," etc., shows merely an intention to pledge, and not to mortgage or sell, such securities. *Lewis v. Graham* (N. Y.) 4 Abb. Prac. 106, 109.

By the common law a pledge is a bailment of personal property as a security for some debt or obligation. It is usually confined to chattels. Where real or personal property is transferred by a conveyance of the title as a security, it is commonly denominated a "mortgage." In case of a mortgage the whole legal title passes conditionally to the mortgagee, and, if not redeemed at the time stipulated, the title becomes absolute at law; but in a pledge a special property only passes to the pledgee, the general property remaining in the pledgor. A delivery is essential to a pledge. It was for a long time doubted whether incorporeal things, like debts, money in stocks, etc., which cannot be manually delivered, were proper subjects of a pledge. It is now held that they are. Hence any species of personal property or chattel interest may be the subject of a pledge, and, although the pledgor parts with the possession of the pledge, he retains his general property in it, and the pledgee has but a special or qualified interest. The assignment of a bond and mortgage, though absolute on its face, but accompanied by a promissory note made by the assignor, which gives the assignee authority to sell the bond and mortgage upon default of the assignor to pay his debt, is a pledge of the bond and mortgage, and not a mortgage or sale of them. *Campbell v. Parker*, 22 N. Y. Super. Ct. (9 Bosw.) 322, 333.

The material distinction between a pledge and a chattel mortgage is that a mortgage is a conveyance of the legal title on condition, and it becomes absolute at law if not redeemed at a given time, while a pledge is a deposit of goods, redeemable on

certain terms, either with or without a fixed period for redemption. The general property does not pass in a pledge, as in the case of a mortgage, and a pawnee has only a special property in the thing deposited, and a right of redemption exists in the pawnor at any time before the pledge is legally disposed of by the pawnee. *Evans v. Darlington (Ind.)* 5 Blackf. 320, 322.

One of the important distinctions between a mortgage of personalty and a pledge is that in the former case the general owner may, as between the parties, retain possession of the chattels, and in the latter the special owner must have possession. *Conner v. Carpenter*, 28 Vt. 237, 240.

"A pledge differs from a chattel mortgage in three essential characteristics: (1) It may be constituted, without any contract in writing, merely by delivery of the thing pledged. (2) It is constituted by a delivery of the thing pledged, and is continued only so long as the possession remains with the creditor. (3) It does not generally pass the title to the thing pledged, but gives only a lien to the creditor while the debtor retains the general property." *Jones, Pledges*, § 4. "Whenever there is a conveyance of the legal title to personal property upon an expressed condition subsequent, whether contained in the conveyance or in a separate instrument, the transaction is a mortgage." *Id.* § 8. "A delivery must always accompany a pledge, while a mortgage may be valid without a delivery." *Jones, Chat. Mortg.* § 7. "A decisive test of a legal mortgage of personal property is the use of language which makes the instrument one of sale, conveying the title of the property to the creditor conditionally, so that the sale is defeated by the debtor's performance of his agreement." *Id.* § 8. Thus a writing, executed by a debtor, reciting that the debtor has sold to his creditor certain goods, which are held by the creditor as collateral security for the debt, and that said goods are stored in a certain warehouse, is a chattel mortgage, and not a pledge. *People v. E. Remington & Sons*, 12 N. Y. Supp. 824, 826, 59 Hun, 282.

The distinction between a pledge and a chattel mortgage is that, in the case of a pledge, the title is retained by the pledgor, while in the case of a chattel mortgage the title passes to the mortgagee, and the delivery of the possession of the property pledged to the pledgee is essential to a pledge, while between the parties, though not as against creditors or purchasers, such a delivery is not necessary to the validity of a mortgage. *McCoy v. Lassiter*, 95 N. C. 88, 91.

There is a clear and obvious difference between a pledge and a chattel mortgage. By a pledge of personal property by one to another as security for some debt or en-

gagement, the pledgee acquires only a special property in the thing pledged, while the general property remains in the pledgor. A chattel mortgage is a conditional transfer or conveyance of the property itself, and, if the condition be not duly performed, the whole title vests absolutely at law in the mortgagee. Delivery accompanies a pledge and is essential to its vitality. *Wright v. Ross*, 86 Cal. 414, 428.

"By a mortgage the general property passes. It is a conditional sale with the right of defeasance, and the chattel may remain in the possession of the mortgagor, if the transaction is not accompanied by actual fraud." But where a mere lien is intended to be created, the object being to give security, the owner must not be suffered to remain in possession. In a mortgage there must be a definite sum to be paid and a definite time for payment. A. having indorsed for B. certain promissory notes, B., before the notes became due, executed a deed of furniture to A., conditioned to be void if he saved A. harmless. The deed and furniture were formally delivered in the presence of a witness, who alone knew of the transaction, and B. remained in possession. Held, that the transaction might be viewed either as a mortgage or pledge; but, as the furniture remained in B.'s hands, it must be construed as a mortgage. *Ward v. Sumner*, 22 Mass. (5 Pick.) 59, 60.

The word "mortgage," within the meaning of the attachment act, declaring that the remedy of attachment does not exist where the contract is secured by a mortgage, is used in its most general signification, meaning "security," and hence a pledge of personal property as security for a debt is a mortgage, within the meaning of the act. *Payne v. Bensley*, 8 Cal. 260, 267, 68 Am. Dec. 318.

Where goods were not sold, assigned, or conveyed, but were intended to be simply delivered, to be held as collateral security for the payment of a note, with power to sell in case of default, when effectually accomplished, the transaction would be what is known as a "pledge" of chattels, as distinguished from a "mortgage" or "sale." The distinction between a mortgage and a pledge is clearly stated by Judge Miller in *Dungan v. Mutual Ben. Life Ins. Co.*, 38 Md. 242, 251: "The general distinction is that in a mortgage the title is conveyed with a condition of defeasance (that is to say, a condition rendering the conveyance void on the payment of a certain sum of money on or about a day agreed upon), while in a pledge the goods bailed are deposited as a collateral security, and only a special property is transferred to the bailee (the general title in the meanwhile remaining with the bailor). The difference has also been stated thus: A mortgage is a pledge,

and more; for it is an absolute pledge, to become an absolute interest if not redeemed at a certain time. A pledge is a deposit of personal effects, not to be taken back but on payment of a certain sum, by express stipulation or by the course of trade to be a lien upon them." To the same effect is the text in Jones, Pledges, § 8: "Whenever there is a conveyance of the legal title to personal property upon an express condition subsequent, whether contained in the conveyance or in a separate instrument, the transaction is a mortgage. Thus, if a bill of sale of a horse be made, and at the same time a defeasance be given back by the purchaser, engaging that on the payment of the purchase price within a specified time he will redeliver the horse, the transaction is a mortgage, and not a pledge, of the horse. An instrument in writing, which records a debt and declares that the debtor does thereby deliver certain property to his creditor to secure the debt, is a pledge, and not a mortgage, because there is no transfer of the title to the property, but only a deposit of it. Although an instrument contains a covenant to warrant and defend the title, such as is usual in a mortgage, the character of the instrument is not thereby changed. The covenant is not a present conveyance, but an executory stipulation. A delivery of personal property by a debtor in security for a debt, accompanied by a written agreement whereby the debtor agrees that, if he does not pay the debt by a certain time, the creditor may dispose of the property to pay the debt, is a pledge, and not a mortgage; for the agreement does not show any intention to transfer a title to the property absolutely or conditionally, but only to deliver the property as security, with a right in the creditor to sell it if the debt be not paid by a certain time." To constitute a pledge the pledgee must take possession, and to preserve it he must retain possession. The delivery and possession required is not a mere agreement of parties, which they can make on paper, but must be some sufficient act of an unequivocal character. *Thurber v. Oliver* (U. S.) 26 Fed. 224, 228.

One test whether a transfer of property is a pledge or a mortgage is whether a debt exists independent of it, for the payment of which it is security, in which case is the former. A pledge of property capable of physical delivery requires that it should be so delivered. Property not capable of such delivery may be pledged in writing. The transfer of choses in action as mere security for a debt is always a pledge. When so received, without special authority, the pledgee cannot sell them or compromise them. He can only wait until they mature and collect them. So an assignment of a mortgage by the mortgagee to secure a debt due from him to the assignee is clearly a

pledge of the mortgage, and not a mortgage or conditional sale. *Haskins v. Kelly*, 24 N. Y. Super. Ct. (1 Rob.) 160, 172.

"The difference," says Bradley, J., in *Casey v. Cavaroc*, 96 U. S. 467, 24 L. Ed. 779, "between a mortgage and a pledge is: The title is transferred by the former, and possession by the latter." *Fidelity Ins., Trust & Safe Deposit Co. v. Roanoke Iron Co.* (U. S.) 81 Fed. 439, 445.

A note, delivered to a party, with a power of redemption, and as a security for a debt, is a pledge. Such act does not constitute a sale. The property in the note was not intended to pass until after the default. It was merely deposited with the party, and the legal property did not pass, as it does in the case of a mortgage. *McLean v. Walker* (N. Y.) 10 Johns. 471, 474.

Where defendants loaned \$2,000 to plaintiffs for the space of 44 days, and received in return a check for the same amount, and as collateral security for the repayment of the money plaintiffs deposited with them notes taken in the course of their business as margins, amounting to the sum of \$2,614, the contract was a pledge of the notes, and not a mortgage. *Wheeler v. Newbould*, 16 N. Y. 392, 396.

A bill of sale of goods to secure the payment of rent as it became due, providing that, if the rent should be paid as it became due, the said bill of sale should be void, is a mortgage of the goods, and not a technical pledge. A pledge is a deposit of goods, to be redeemed on certain terms. Delivery always accompanies a pledge, but a mortgage of goods is often valid without delivery. Possession continuing in the vendor is only prima facie evidence of fraud, and may be explained. *Barrow v. Paxton* (N. Y.) 5 Johns. 258, 261, 4 Am. Dec. 354.

The radical distinction between a pledge and a mortgage is that by a mortgage the general title is transferred to the mortgagee, subject to be revested by performance of the condition; but, in case of a pledge, the pledgor retains the general title in himself and parts with the possession for a special purpose. To constitute a pledge the pledgee must take possession, and to preserve it he must retain possession. *Walker v. Staples*, 87 Mass. (5 Allen) 84, 35.

A pledge differs from a mortgage in that the pledgee must have possession and the pledgor the legal title of the property, while a mortgage passes the title to the mortgagee and may allow the possession to remain in the mortgagor. *American Pig Iron Storage Warrant Co. v. German*, 128 Ala. 194, 223, 28 South. 603, 614, 85 Am. St. Rep. 21.

A mortgage of personal property is a conveyance of title upon condition, to be

come an absolute interest at law if not redeemed by a given time. Under Code Dak. § 1722, a mortgage is defined as a contract by which specific property is hypothecated for the performance of an act, without the necessity of a change of possession. This definition makes a clear distinction between a pledge and a chattel mortgage, and at the same time avoids the idea of a mortgage being in any sense a transfer or conveyance of title. The property is hypothecated—that is to say, according to the well-recognized meaning of the term in the civil and admiralty law—and is thereby rendered liable for the debt, interest, and costs out of the proceeds of a sale. Pledge requires actual possession; hypothecation does not. The former is confined to personal property; but a mortgage is not. By a pledge the title or ownership does not pass, and so with regard to hypothecation or mortgage. The contract of mortgage and the contract of pledge are both charges imposed on property as security only. These contracts simply confer a right or lien, by which is not meant a lien in the narrow sense applicable exclusively to the common-law liens, which give a right to retain possession of a specific thing until the charge attached to it is satisfied, but by which is to be understood a lien in the sense of the Civil Code, which embraces in one definition both common-law and equitable liens and has brought under one head all the general principles which affect liens by possession or mortgage. *Everett v. Buchanan*, 8 N. W. 31, 33, 2 Dak. 249.

A mortgage of personal estate is a sale, and operates to transfer the whole legal title of the thing mortgaged to the mortgagee, subject only to be defeated by a full performance of the condition. After forfeiture no tender can revest the title in the mortgagor, and even acceptance of part is no waiver. The distinctions between mortgages of real and personal estate cannot prevail in case of a pledge, which is settled to be a mere security, conferring only a special property in the property pledged for the full value, in which, after a tender, the pledgee is responsible, which would not be the case if a bill to redeem was necessary. The interest of the pledgee is in fact a mere lien, like a mortgage of lands, and should be relieved by the same process. A transfer of a chattel mortgage merely by way of collateral security for the payment of a debt is a pledge, not a mortgage thereof, and need not be recorded. *Haskins v. Kelly* (N. Y.) 1 Abb. Prac. (N. S.) 63, 75.

In a late work the difference between a mortgage and a pledge of stocks is concisely stated. "A mortgage," says the author, "is a sale of the stock by way of securing a debt, with a condition that, if the mortgagor pays the debt, the sale shall be void. A pledge contains no words of sale,

but an authority, if the debt is not paid, to sell the pledge for that purpose. In the former case the title passes to the mortgagee; in the latter, the title remains in the pledgor, although possession is given to the pledgee." *Dos Passos*, Stock Brokers, 658. At common law a mortgage was a conveyance to the mortgagee, to be void upon condition the mortgagor paid the debt at a specified day, and to become absolute on failure so to pay. The mortgagee was invested with the legal title. It was not necessary to the validity of the mortgage that the possession should pass to the mortgagee, though the right of possession was in him. The mortgagee acquired the title of the property, and the mortgagor parted with the title as in the case of sale, reserving only the right to defeat the transfer and reacquire the property by paying the debt on the day named. If the mortgagee paid the debt or made a legal tender of it at the specified day, the condition of the mortgage was satisfied, and the property forever discharged from the incumbrance; but upon default of payment according to the condition the absolute title at law vested in the mortgagee. A pledge is a bailment of personal property as a security for some debt or engagement. It is completed by a delivery of the property. It does not transfer the title. It only gives the pledgee a lien upon the property for his debt and the right to retain the possession until his debt is paid. But the nonpayment of the debt, even after it is due, does not work a forfeiture of the pledge. The title remains in the pledgor until it is divested, either by a foreclosure in equity or by a sale on due notice. *Mitchell v. Roberts* (U. S.) 17 Fed. 776, 778.

The difference between a mortgage and pledge is that by the former the general property passes; by the latter it does not, but the pawnee has only a special property. A mortgage is a conveyance of the title upon condition, and it becomes an absolute interest at law if not redeemed by a given time. A pledge or pawn is a deposit of goods, either with or without a fixed period for redemption. Delivery of possession must accompany a pledge, but need not accompany a mortgage. *Lobban v. Garnett*, 39 Ky. (9 Dana) 389, 390.

While the distinction between mortgage and pledge is well defined, yet owing to the haste with which transactions are often made, and to the meagerness or abbreviations of the written papers which accompany them, it is not easy always to determine what character is properly to be attributed to them. By a mortgage the granted property passes to the grantee, subject to be revested in the grantor by the performance of the condition. By a pledge the pledgee acquires a special property only in the article pledged, the general title remaining in the pledgor. That which the

pledgee has is a lien only, and to the existence of this lien possession is essential. Without possession there is no pledge, and if, having obtained this, the pledgee parts with it voluntarily, it is a relinquishment of his security. A receipted bill of parcels of chattels, purporting on its face to be as security for a debt, is a pledge, and not a mortgage; and if the pledgee, after receiving possession of the chattels, permits the pledgor to resume possession of them and to hold them until his death, he cannot, by then taking possession of them, defeat the right of the administrator to maintain against him an action for their conversion. *Thompson v. Dolliver*, 132 Mass. 103, 104.

The term "pledge" is ordinarily confined to personal property, and where real or personal property is transferred by conveyance for debt or security it is a mortgage. It is essential, in case of a pledge, that possession be given of the goods pledged. *Hurst v. Jones*, 78 Tenn. (10 Lea) 8, 14.

A mortgage differs from a pledge, in that the legal property does not pass with a pledge, as it does in the case of a mortgage, with a condition of a defeasance. The mortgage, pledge, or pawn of goods seems, however, generally to have been confounded in the books, and it was not until lately that this just discrimination has been well attended to and explained. *Cortelyou v. Lansing* (N. Y.) 2 Caines, Cas. 200, 202.

A mortgage of goods is a pledge, and more. It is an absolute pledge, to become an absolute interest if not redeemed at the specified time. After the condition forfeited, the mortgagee has an absolute interest in the thing mortgaged, whereas as a pawnee he has but a special property in the goods to detain them for his security. *Brown v. Bement* (N. Y.) 8 Johns. 96, 97; *Smith v. Acker* (N. Y.) 23 Wend. 653, 668; *Luckett v. Townsend*, 8 Tex. 119, 129, 49 Am. Dec. 723.

A mortgage of personal property is a pledge, and more; for it is an absolute pledge, to become an absolute interest if not redeemed in a certain time. A mortgage of personal property in law differs from a pledge. The former is a conditional transfer or conveyance of the property itself, and, if the condition is not duly performed, the whole title vests absolutely at law in the mortgagee, exactly as it does in a mortgage of lands; the latter, a pledge, only passes the possession, or at the most is a special property in the pledge, with the right of retention until the debt is paid. *Doak v. Bank of State*, 28 N. C. 309, 319.

A mortgage is a pledge, and more; for it is an absolute pledge, to become an absolute interest if not redeemed at a certain time. "This definition," says the court, "is perhaps not precisely correct at the present time. A pledge is the bailment of property.

In the case of a mortgage, the property may remain in the possession of the mortgagor; but a mortgage of chattels is a sale of them upon condition, and, if the condition is not performed, the title becomes absolute at law. The mortgagor becomes, by failure to perform the condition, a vendee, and he has in law an absolute power over the property." *Chamberlain v. Martin* (N. Y.) 43 Barb. 607, 610.

A mortgage of goods is a conditional transfer or conveyance of the property itself, and, if the condition be not performed, the whole title vests absolutely at law, exactly as it does in the case of a mortgage of lands. It differs from a pawn or pledge in that it is a conveyance of the title on condition, and may be valid without actual delivery. A mortgage is a pledge, and more; for it is an absolute pledge, to become an absolute interest if not redeemed at a certain time, while a pledge is a deposit of personal effects, not to be taken back except on payment of a certain sum, by express stipulation or the course of trade made to be a lien on them. In the case of a mortgage, the legal property passes, with a condition of defeasance; in that of a pledge, the general property does not pass, but remains with the pawnor. *Luckett v. Townsend*, 8 Tex. 119, 129, 49 Am. Dec. 723 (citing 2 Story, Eq. § 1030; 4 Kent, Comm. 138; *Jones v. Smith*, 2 Ves. Jr. 372, 378; *Cortelyou v. Lansing* [N. Y.] 2 Caines, Cas. 200, 206).

A delivery of personal property for security is not a transfer on condition, and does not constitute a mortgage thereof, but a pledge merely. *Eastman v. Avery*, 23 Me. (10 Shep.) 248, 250.

#### **Real estate mortgage distinguished.**

See "Mortgage."

### **CHATTELS PERSONAL.**

Personal chattels are properly things movable, which may be carried about by the owner, such as animals, household stuff, money, jewels, corn, garments, and everything else that can be put in motion and transferred from one place to another. *Hawkins v. State Loan & Trust Co.* (U. S.) 79 Fed. 50, 51 (citing *Bouv. Law Dict.* p. 305); *Chicago & A. R. Co. v. Thompson*, 19 Ill. (9 Peck) 578, 584; *State v. Harvey*, 32 S. W. 1110, 1112, 131 Mo. 339; *Niles v. Mathusa*, 57 N. E. 184, 185, 162 N. Y. 546; *State v. Bartlett*, 55 Me. 200, 211; *Woodward v. Laporte*, 41 Atl. 443, 70 Vt. 399. Thus stacks of hay are chattels, within the statute providing that every person who shall willfully set fire to and burn the goods and chattels of another shall be guilty of arson. *State v. Harvey*, 32 S. W. 1110, 1112, 131 Mo. 339.

"Chattels personal include movable things, only as belonging immediately to the person." *Putnam v. Westcott* (N. Y.) 19 Johns. 73, 76.

Where a building is erected by one man on the land of another by his permission, on an agreement that it may be removed at the pleasure of the builder, it does not become a part of the real estate, but continues a personal chattel, and the property of the person who erected it. *Van Ness v. Packard*, 27 U. S. (2 Pet.) 137, 7 L. Ed. 374. It is merely personal, and is governed by the same rules as any other article of personal property. *Dame v. Dame*, 38 N. H. 429, 431, 75 Am. Dec. 195 (citing *Smith v. Benson* [N. Y.] 1 Hill, 176).

## CHATELS REAL.

As included in term land, see "Land."

Chattels real are such as concern or savor of the realty, including terms for years, and are called "chattels real," as being interests arising out of or being annexed to real estate, of which they have one quality, to wit, immobility, but want the quality of indeterminate duration, the want of which constitutes them chattels. *Lycoming Fire Ins. Co. of Muncy v. Haven*, 95 U. S. 242, 251, 24 L. Ed. 473; *Putnam v. Westcott* (N. Y.) 19 Johns. 73, 76; *People v. McComber*, 7 N. Y. Supp. 71, 72; *Hyatt v. Vincennes Nat. Bank*, 5 Sup. Ct. 573, 576, 113 U. S. 408, 28 L. Ed. 1009 (citing 2 Bl. Comm. 386).

Bouvier's definition of a "chattel real" is substantially the same as that of text-writers generally. He says: "Chattels real are interests which are annexed to or concern real estate, as a lease for years of land; and the duration of the lease is immaterial, whether it be for one or a thousand years, providing there be a certainty about it and a reversion or remainder in some other person. A lease to continue until a certain sum of money can be raised out of the rents is of the same description, and so, in fact, will be found other interests in real estate whose duration is limited to a time certain beyond which it cannot subsist, and which is therefore something less than a freehold." A grain elevator or permanent structure built by a lessee on ground held under a lease which provides that the lessor may terminate the lease on 60 days' notice, and that the lessee may remove his buildings at any time before the expiration of the lease, is, together with the leasehold estate, a chattel real. *Knapp v. Jones*, 32 N. E. 382, 383, 143 Ill. 875.

Burrill's Law Dict. defines a "chattel real" to be such as concern, are annexed to, or savor of the realty, as terms for years in land. *People v. McComber*, 7 N. Y. Supp. 71, 72.

In the case of *First Nat. Bank v. Consolidated Electric Light Co.*, 97 Ala. 465, 12 South. 71, it was said: "A chattel real, such as a freehold interest in lands, though per-

sonal property, has different attributes from those of other chattels. It is an immovable thing, attached to and issuing out of lands." *Milliken v. Faulk*, 20 South. 594, 595, 111 Ala. 658.

Leasehold interests are chattels real, and not mere chattels; so that a mortgage of a leasehold is conveyance of the chattel real. *State Trust Co. v. Casino Co.*, 46 N. Y. Supp. 492, 493, 19 App. Div. 344.

A building erected by a lessee on leased ground is a chattel real, and not personal property. *Knapp v. Jones*, 38 Ill. App. 489, 495.

By statute in New York estates of inheritance are denominated "estates of freehold," estates for years are denominated "chattels real," and estates by will or by sufferance are called "chattel interests," and it is further provided that the terms "real estate" and "land" shall be coextensive with "lands, tenements, and hereditaments." *Nellis v. Munson*, 15 N. E. 739, 108 N. Y. 453.

Estates for years are chattels real. Civ. Code Cal. 1903, § 765; Rev. St. Okl. 1903, § 4030; Rev. Codes N. D. 1899, § 3329; Civ. Code S. D. 1908, § 245.

An estate for the life of a third person, whether limited to heirs or otherwise, shall be deemed a freehold only during the life of the grantee or devisee; but after his death it shall be deemed a chattel real. Comp. Laws Mich. 1897, § 8788.

Estates for years shall be denominated "chattels real." Rev. St. Wis. 1898, § 2020.

## CHEAT.

See "Common-Law Cheat."

In the form of an indictment for a conspiracy to cheat, the word "cheat" implies a corrupt act. *Wood v. State*, 1 Atl. 509, 511, 47 N. J. Law (18 Vroom) 461.

"Cheat and defraud," as ordinarily used, mean "every kind of trick and deception, from false representation and intimidation to suppression and concealment of any fact or information by which a party may be induced to part with his property for less than its value or to give more than its worth for the property of another." *State v. Parker*, 43 N. H. 83, 85.

A fraudulent sale of goods, for the purpose of preventing them from being attached by the creditors of the vendor, is a fraud in law, which will justify the application of the epithets "cheating" and "swindling." *Richardson v. Butterfield*, 60 Mass. (6 Cush.) 185, 191.

Where there is a sale of goods and delivery of possession, even though the buyer intends at the time not to pay for them, and

conceals his insolvency from the vendor, it is not a cheat that will avoid the sale. There must be artifice practiced, such as was intended and fitted to deceive, to constitute a cheat. In *Rodman v. Thalheimer*, 75 Pa. (25 P. F. Smith) 232, the court said: "The law in this state is not that insolvency, and the mere knowledge of it, are such a fraud as to set aside the sale, and enable the seller to rescind and to replevy the goods after they have come fully and fairly into the possession of the purchaser. It requires artifice, trick, or false pretense, as a means of obtaining possession, to avoid the purchase. There must be bad faith; an intent at the time to defraud the seller. Insolvency and a knowledge of it at the time of the sale are evidence to go to the jury, with other facts, to show the intended fraud, but, standing alone, will not operate to rescind after a possession fully and fairly acquired. The New York doctrine does not hold in this state." *Wessels v. Weiss*, 27 Atl. 535, 537, 156 Pa. 591.

#### **As actionable per se.**

A charge that another "will swear, lie, cheat, or steal" may import that he lies, swears, cheats, and steals, and, if used in the latter sense, it is to be determined by the jury whether the language is actionable. *Dottarar v. Bushey*, 16 Pa. (4 Harris) 204, 209.

The term "cheat" does not import a crime known to the law, and hence words charging one with being a cheat are not actionable per se. *Chase v. Whitlock* (N. Y.) 3 Hill, 139, 140; *Odiorne v. Bacon*, 60 Mass. (8 Cush.) 185, 191; *Pollock v. Hastings*, 88 Ind. 248, 250.

It is actionable to call a lawyer a "cheat"; for, though he were not indictable for cheating his client, or punishable for it by striking from the roll, it is enough to support an action for words which impute it that they touch the business by which he gets his bread. *Rush v. Cavanaugh*, 2 Pa. (2 Barr) 187, 189.

A statement that plaintiff in an action for slander had cheated and robbed orphan children out of \$1,400 is held not to impute the crime of larceny or robbery, so as to be actionable per se. In discussing the meaning of the word "robbed," as here used, the court says that "while it is doubtless actionable to say of another that he robbed any person, unless the words were used in a connection which shows that they were not intended to impute the crime of robbery, yet the word 'robbed,' as used in the statement under consideration, indicated not a taking by force, but rather a taking by fraud and wrong, and did not import a charge of the technical crime of robbery." *Filber v. Dautermann*, 28 Wis. 134, 135.

#### **As common-law offense.**

To cheat is an offense at common law, and is such an act as would affect the public—such a deception that common prudence cannot guard against it, as by using false weights and measures, or false tokens, or where there is a conspiracy to cheat. *People v. Babcock*, 7 Johns. 201, 5 Am. Dec. 256; *Blanchard v. State*, 29 N. H. 783, 784, 8 Ind. App. 395; *Cross v. Peters*, 1 Me. (1 Greenl.) 376, 387, 10 Am. Dec. 78.

In Pen. Code, § 168, subd. 4, making it a misdemeanor for two or more persons to conspire to defraud another out of property by means which, if executed, would amount to a cheat, the word "cheat" is used in its common-law significance, and therefore must be such a fraud as would affect the public, or as common prudence cannot guard against, and is synonymous with "fraud"; and cheats punishable at common law may generally be described to be such as did not amount to a felony, but which affect or may affect the public, and are effected by deceitful or illegal practice, against which common prudence could not have guarded. *People v. Olson*, 15 N. Y. Supp. 778, 780.

Deceitful practices, involving considerations of public trade which defraud another of his known rights by means of some artifice or device contrary to the plain rules of common honesty, are cheats, punishable at common law. Acts of this character are always unlawful, and, when they cause special injury, give to the person injured a right of action, and the right in the proper case to the protection of the court of equity. *Von Mumm v. Frash* (U. S.) 56 Fed. 830, 836.

"Cheating" by false pretenses or by false tokens is an offense at common law. *State v. Hewett*, 31 Me. 396, 398.

#### **Crime imported.**

"The term 'cheating and defrauding' does not necessarily import the commission of any indictable offense, either at common law or by statute. It may embrace only such civil frauds as are in common violation of common honesty, and for which the party is amenable to justice, not by indictment, but by a civil action." *Commonwealth v. Eastman*, 55 Mass. (1 Cush.) 189, 223, 226, 48 Am. Dec. 596.

An allegation that one obtained the goods of another by false pretenses or by cheating is not in the legal sense a charge of a crime; for it may be true, and yet no crime may have been committed. *People v. Brady*, 56 N. Y. 182, 188.

"Cheat and defraud," as used in an indictment for conspiracy, which charged that defendants conspired to cheat and defraud, do not import the commission of any indictable offense, and hence the indictment is in-

sufficient. *Commonwealth v. Wallace*, 82 Mass. (16 Gray) 221, 223.

The words "cheating and defrauding" of themselves do not import an offense, and do not define an offense, unless effected by false tokens or pretenses. Pursuant to this construction of the words, it is held that an indictment for conspiracy to cheat and defraud must set out the false tokens and pretenses to be used in effecting the contemplated fraud. *Alderman v. People*, 4 Mich. 414, 424, 9 Am. Dec. 321.

## CHECK.

See "Bank Check"; "Bogus Check"; "Certified Check"; "False Checks"; "Memorandum Check"; "Time Check."

"A check is a draft or order upon a bank or banking house, purporting to be drawn upon a deposit of funds for the payment, at all events, of a certain sum of money to a person or his order, or to bearer, and payable instantly on demand." *Ridgely Nat. Bank v. Patton*, 109 Ill. 479, 484 (quoting and approving 2 Daniel, Neg. Inst. 528); *Industrial Bank of Chicago v. Bowes*, 46 N. E. 10, 12, 165 Ill. 70, 56 Am. St. Rep. 228; *State v. Murphy*, 42 S. W. 936, 937, 141 Mo. 267; *Connor v. Becker*, 76 N. W. 893, 894, 56 Neb. 343; *First Nat. Bank of Farmersville v. Greenville Nat. Bank*, 84 Tex. 40, 19 S. W. 334; *State v. Warner*, 53 Pac. 342, 343, 60 Kan. 94. It is presumed to stand on a valid and valuable consideration. *Martin v. Martin*, 67 N. E. 1, 2, 202 Ill. 382.

"A check or draft on a banker is defined to be a written order or request addressed to persons carrying on the business of bankers, drawn on them by a party having money in their hands, requesting them to pay on presentment to a person therein named, or to bearer, a specified sum of money." *Douglass v. Wilkeson* (N. Y.) 6 Wend. 637, 643 (citing Chit. Bills, 322); *Hawley v. Jette*, 10 Or. 31, 34, 45 Am. Rep. 129; *In re Brown* (U. S.) 4 Fed. Cas. 342, 346.

"A check is defined to be a written order on a bank or banking house, directing it to pay a certain sum of money." *Grisson v. Commercial Nat. Bank*, 10 S. W. 774, 779, 87 Tenn. (3 Pickle) 350, 3 L. R. A. 273, 10 Am. St. Rep. 669. It is an order for the payment of money. *State v. Crawford*, 13 La. Ann. 300. A check is an instrument for the payment of a specified sum of money, having a drawer and a payee, and drawn on some bank or banker. *State v. Curtis*, 40 N. W. 263, 264, 39 Minn. 357. "A 'check' is a written order or request for the payment of money, addressed to a bank or banker." An order addressed to a banker requesting him to let the bearer, son of the alleged drawer, have a certain sum, is a check. *Thompson v. State*, 49 Ala. 16, 18; *Connor v. Becker*, 76

N. W. 893, 894, 56 Neb. 343; *Industrial Bank of Chicago v. Bowes*, 46 N. E. 10, 12, 165 Ill. 70, 56 Am. St. Rep. 228; *Ridgely Nat. Bank v. Patton*, 109 Ill. 479, 484; *Rogers v. Durant*, 11 Sup. Ct. 754, 755, 140 U. S. 298, 35 L. Ed. 481. A check is a written request by the one drawing it, on the drawer, to pay money to the drawer or his order. *State v. Rickey*, 9 N. J. Law (4 Halst.) 293, 312. Thus an indorsement on an architect's certificate reciting that a certain amount is due the contractor, "P. H. & Co.—pay to the order of E." (the contractor), and signed by the owner of the building, P., H. & Co. having in their hands funds of the owner to be paid out as required for the construction of the building, is a check, not a bill of exchange. *Industrial Bank of Chicago v. Bowes*, 46 N. E. 10, 12, 165 Ill. 70, 56 Am. St. Rep. 228.

A check is a written request by one, called the "drawer," directed to another, called the "drawee," requesting him to pay a third, called the "payee," a certain sum of money therein specified, at all events, on a day certain, or so many days after date or after presentment. *Westminster Bank v. Wheaton*, 4 R. I. 30, 33.

A check is a bill of exchange drawn upon a bank or banker, or a person described as such upon the face thereof, and payable on demand, without interest. Civ. Code Cal. 1903, § 3254; Civ. Code Idaho 1901, § 2956; Civ. Code Mont. 1895, § 4230; Rev. Codes N. D. 1899, § 4964; Civ. Code S. D. 1903, § 2279; Rev. St. Okl. 1903, § 3703; Rev. St. Utah 1898, § 1663; Rev. St. Wyo. 1899, § 2440. See, also, *House v. Kountze*, 43 S. W. 561, 563, 17 Tex. Civ. App. 402.

A check is a bill of exchange drawn on a bank, payable on demand. Rev. Laws Mass. 1902, p. 652, c. 73, § 202; Bates' Ann. St. Ohio 1904, § 3177v; Ann. Codes & St. Or. 1901, § 4587; Code Supp. Va. 1898, § 2841a.

### As appropriation or assignment of money.

A check is an order drawn on an existing fund for immediate payment of money. It is an absolute transfer or appropriation to the holder of so much money in the hands of the drawee. *Morrison v. Bailey*, 5 Ohio St. 13, 17, 64 Am. Dec. 632.

A check is the acknowledgment of a certain sum due. It is an absolute appropriation of so much money in the hands of the drawer's banker to the holder of the check, and there the money should remain until called for by the holder, unless the drawer actually suffers by the delay, as by the intermediate failure of the banker, but he has no reason to complain of delay not unreasonably protracted. If the holder does not unreasonably delay, the drawer assumes the risk of drawee's failure. A check differs from a bill of exchange in that it has no days of



grace, and requires no acceptance distinct from payment being made promptly. The drawer of a check is not a surety, but the principal debtor, as much as the maker of a note. *In re Brown* (U. S.) 4 Fed. Cas. 342, 346.

As banks are debtors to their customers for the amount of their deposits, a check is a request of the customer to pay the whole or a portion of such indebtedness to the bearer, or to the order of the payee. Until presented and accepted, it is inchoate. It vests no title, legal or equitable, in the payee to the fund; before acceptance, the drawer may withdraw his deposit. *Attorney General v. Continental Life Ins. Co.*, 71 N. Y. 325, 27 Am. Rep. 55. A check, therefore, does not constitute an equitable assignment of such portion of the fund drawn on. *Akin v. Jones*, 27 S. W. 669, 672, 98 Tenn. (9 Pickle) 353, 25 L. R. A. 523, 42 Am. St. Rep. 921; *Florence Min. Co. v. Brown*, 8 Sup. Ct. 531, 534, 124 U. S. 385, 31 L. Ed. 424.

A check is only a direction to the bank to pay a certain sum of money to the person therein named. The money does not thereby become the property of the payee, nor is it placed beyond the control of the depositor. Neither does a check of itself, before presentation, operate as an assignment to the payee of the money for which it was drawn. *O'Connor v. Mechanics' Bank*, 124 N. Y. 324, 26 N. E. 816. A check not accepted does not constitute a transfer of any money to the credit of the holder. *Pullen v. Placer County Bank*, 71 Pac. 83, 84, 138 Cal. 169, 94 Am. St. Rep. 19 (citing *Florence Min. Co. v. Brown*, 124 U. S. 385, 8 Sup. Ct. 531, 31 L. Ed. 424).

A check is, and always has been, primarily an authority from the maker upon which his banker may rely, but in which the latter has no interest until he has acted thereon. Where, however, a check for a valuable consideration works an assignment of the deposit, equitable or legal, such a check is something more than a mere authority to pay. It also evidences a contract between the maker and payee, and, if that contract is a valid and irrevocable one, the check cannot be revoked as between them. *Raesser v. National Exch. Bank*, 88 N. W. 618, 620, 112 Wis. 591, 56 L. R. A. 174, 88 Am. St. Rep. 979.

As the execution and delivery of a check assigns to the payee a specified amount represented as belonging to the drawer in the hands of the drawee, it is really an undertaking that the bank or banker on whom it is drawn will deliver to the payee the amount of money expressed, and comes within the provision of the statute of limitations relating to simple contracts in writing. *Haynes v. Wesley*, 37 S. E. 990, 991, 112 Ga. 668, 81 Am. St. Rep. 72.

A bank check is a bill of exchange under Civ. Code, § 3254, and does not operate at the

time of delivery as an equitable assignment pro tanto of the sum on deposit. It was held by the Supreme Court of the United States, in *Fourth St. Bank v. Yardley*, 165 U. S. 634, 17 Sup. Ct. 439, 41 L. Ed. 855, to be the settled law that a check drawn in the ordinary form does not, as between the maker and the payee, constitute an equitable assignment pro tanto of an indebtedness owing by the bank on which the check has been drawn. *Donohoe-Kelly Banking Co. v. Southern Pac. Co.*, 71 Pac. 93, 94, 138 Cal. 183, 94 Am. St. Rep. 28.

#### **Bank note distinguished.**

See "Bank Note."

#### **Bill of exchange distinguished.**

A check is denominated a species of inland bill of exchange; not with all the incidents of an ordinary bill of exchange, but still it belongs to that class of commercial paper. *Moses v. Franklin Bank*, 34 Md. 574, 579; *Exchange Bank v. Sutton Bank*, 28 Atl. 563, 564, 78 Md. 577, 23 L. R. A. 173.

A check is substantially the same as an inland bill of exchange, and in general is governed by the law applicable to bills of exchange and promissory notes. *Barnet v. Smith*, 30 N. H. 256, 264, 64 Am. Dec. 290; *Foster v. Paulk*, 41 Me. 425, 428; *Neal v. Coburn*, 42 Atl. 348, 350, 92 Me. 189, 69 Am. St. Rep. 495. And hence decisions as to bills of exchange are applicable to cases involving checks. *Neal v. Coburn*, 42 Atl. 348, 350, 92 Me. 139, 69 Am. St. Rep. 495.

A check on a bank is in legal effect an equivalent to a bill of exchange payable to bearer or order on demand, so that an action on a check is a suit on a written instrument. *Connor v. Becker*, 76 N. W. 893, 894, 56 Neb. 343.

"Checks upon banks have most of the qualities of inland bills of exchange. They are drawn for a sum certain upon a person or corporation usually having funds of the drawer sufficient for their payment, and are payable on presentation. If payable to bearer they pass by delivery, and, if to the order of the payee, by indorsement in the usual form. They are not payable on time, and are therefore not presented for or subject to acceptance, and in this particular they differ from bills of exchange. The drawer may be made liable, as the drawer of a bill of exchange, upon presentation within a reasonable time and notice of nonpayment." *Farmers' & Mechanics' Bank v. Butchers' & Drovers' Bank*, 28 N. Y. 425, 427.

It is said in *Cruger v. Armstrong* (N. Y.) 3 Johns. Cas. 5, 7, 2 Am. Dec. 126: "A check, although generally received as cash, when given in payment is in form and reality a bill of exchange. It possesses all the requisites of the bill, and has been treated as such. Lord Kenyon said in the case of *Bo*

hem v. Sterling, 7 Term R. 480, that at the trial of that case he thought there was a distinction between a banker's check and a bill of exchange, but on further consideration he did not think that distinction well founded." *Douglass v. Wilkeson* (N. Y.) 6 Wend. 637, 643.

"A check is a bill of exchange, drawn on a banker, payable on demand." *Rand. Com. Paper*, § 8. The authorities and text-books, as a general thing, class them among commercial instruments. All checks are bills, but all bills are not checks, is the conclusion of the authorities. *Id.*, and authorities there cited; *Morse, Banks*, §§ 363, 393; 2 *Daniel, Neg. Inst.* § 583; *Byles, Bills*, 13; 1 *Edw. Bills & N.* § 19; 2 *Pars. Bills & N.* 57; *Story, Prom. Notes*, 487; 3 *Am. & Eng. Enc. Law*, 211, note 1. In *Branch Bank v. Crocheron*, 5 Ala. 250, 254, this court, in defining the term "notes and bills" as employed in a statute against the issuance of such instruments by a corporation, said they were sufficiently comprehensive to include checks, drafts, bills single, bonds, or tokens. *First Nat. Bank v. Nelson*, 16 South. 707, 708, 105 Ala. 180.

Judge Story says that the distinguishing characteristics of checks, as distinguished from bills of exchange, are that they are always drawn on a bank or banker, they are payable immediately on presentment, without the allowance of any days of grace, and that they are never presented for mere acceptance, but only for payment. By a check on a bank, payable at a future day, the drawer thereof simply undertakes that he will have money there at that day, and no days of grace will be allowed on such a check. *Champlon v. Gordon*, 70 Pa. (20 P. F. Smith) 474, 475, 10 Am. Rep. 681. See, also, *Outler v. Reynolds*, 64 Ill. 321, 324.

A check is in form and effect a bill of exchange. 3 *Kent, Comm.* § 44. The difference between one and the other is that the former is drawn upon a bank or on the house of a private banker, is payable on presentment, and the bank or banker is not entitled to days of grace upon it, although payable on some other day than its date. *Veazie Bank v. Winn*, 40 Me. 60, 61.

A check differs from a bill of exchange in several particulars. It has no days of grace, and requires no acceptance distinct from prompt payment. The drawer of the check is not a surety, but the principal debtor, as much as the maker of a promissory note. It is an absolute appropriation of so much money in the hands of the banker to the holder of the check, and there it ought to remain until called for. *People v. Compton*, 123 Cal. 403, 410, 56 Pac. 44.

A check is an order for the payment of money, and is not, either in common par-

lance or in the technical language of the law, a bill of exchange or promissory note, though in some respects it has the same legal operation. *People v. Howell* (N. Y.) 4 Johns. 296, 301.

Mr. Justice Story, in *Re Brown* (U. S.) 4 Fed. Cas. 342, says: "I agree that it nearly resembles a bill of exchange, or nullum simile est idem. The distinguishing characteristics of 'checks,' as contradistinguished from 'bills of exchange,' are that they are always drawn on a bank or bankers, that they are payable immediately on presentment without the allowance of any days of grace, and that they are never presentable for mere acceptance." *Hawley v. Jette*, 10 Or. 31, 34, 45 Am. Rep. 129.

The distinction between checks and inland bills of exchange has been clearly and concisely stated by Mr. Justice Swayne in *Merchants' Nat. Bank v. State Nat. Bank*, 77 U. S. (10 Wall.) 604, 647, 19 L. Ed. 1008, in which he says: "Banks checks are not inland bills of exchange, but have many of the properties of such commercial paper, and many of the rules of the law merchant are alike applicable to both. It is for a specified sum payable in money. In both cases there is a drawer, a drawee, and a payee. Without acceptance, no action can be maintained by the holder upon either against the drawer. The chief points of difference are that a check is always drawn on a bank or banker; no days of grace are allowed; the drawer is not discharged by the laches of the holder in presentment for payment, unless he can show some injury by the default; it is not due until payment is demanded, and the statute of limitations runs only from that time. It is by its face the appropriation of just so much money of the drawer in the hands of the drawee to the payment of an admitted liability of the drawer." *Hawley v. Jette*, 10 Or. 31, 34, 45 Am. Rep. 129; *Haynes v. Wesley*, 37 S. E. 990, 991, 112 Ga. 668, 81 Am. St. Rep. 72; *Levy v. Laclede Bank* (U. S.) 13 Fed. 193, 194; *Bull v. First Nat. Bank*, 8 Sup. Ct. 62, 63, 123 U. S. 105, 31 L. Ed. 97; *Exchange Bank v. Sutton Bank*, 28 Atl. 563, 564, 78 Md. 577, 23 L. R. A. 173.

A check is a short bill of exchange, payable on demand, and is therefore within the term "bill of exchange" in Act III. Nov. 5, 1849, § 2, providing that all actions founded on bills of exchange, orders, etc., shall be commenced within five years after the action accrued. *Rogers v. Durant*, 11 Sup. Ct. 754, 755, 140 U. S. 298, 35 L. Ed. 481.

"A check is an order to the bank to pay the money of the drawer to the payee. It is an appropriation of money; cash. It differs from a bill of exchange in that the element of credit inheres in the latter, as it is made payable at some future day." *George Nat.*

**Bank v. Henderson**, 46 Ga. 487, 491, 12 Am. Rep. 590.

**As cash.**

See "Cash."

**Cashier's check distinguished.**

A "cashier's check," so called, differs radically from an ordinary check. The latter is merely a bill of exchange drawn by an individual on a bank, payable on demand; or, in other words, it is an order upon a bank, purporting to be drawn upon a deposit of funds for the payment of a certain sum of money to a person named, or to order or bearer, on demand. As between himself and the bank, the drawer of the check has the power of countermanding his order of payment at any time before the bank has paid it or committed itself to pay it. A cashier's check is of an entirely different nature. It is a bill of exchange drawn by the bank upon itself, and is accepted by the act of issuance, and, of course, the right of countermand as applied to ordinary checks does not exist as to it. *Drinkall v. Movius State Bank*, 88 N. W. 724, 726, 11 N. D. 10, 57 L. R. A. 341, 95 Am. St. Rep. 693.

**Deposit presumed.**

A check purports to be made upon a deposit to meet it, and presupposes funds of the drawer in the hands of the drawee. *First Nat. Bank of Portland v. Linn County Nat. Bank*, 47 Pac. 614, 615, 30 Or. 296.

A check is an order for the payment of money, drawn on bankers, and payable immediately on presentment without any days of grace, and by its terms is supposed to be drawn on a previous deposit of funds, and is, in fact, an absolute appropriation of so much money in the hands of bankers to the holder of the check, to remain there until called for. *Lester v. Given*, 71 Ky. (8 Bush) 357, 360.

**Draft.**

Under Civ. Code, § 3254, defining a "check" as a bill of exchange drawn upon a bank or banker, payable on demand, without interest, instruments having these characteristics do not cease to be checks because drawn by a bank. *Garthwaite v. Bank of Tulare*, 66 Pac. 326, 327, 134 Cal. 237. The fact that they are payable in another state than the one in which they are drawn does not change their character as checks. *Bowen v. Needles Nat. Bank* (U. S.) 87 Fed. 430, 437.

A draft is an order for the payment of money, drawn by one person on another. *Wildes v. Savage* (U. S.) 29 Fed. Cas. 1226. It is said to be a nomen generalissimum, and to include all such orders. *Wooster* defines it: "An order by which one person draws

on another for a certain sum of money; a check; a bill of exchange." Thus the word "draft," as used in *Laws 1891, c. 43, § 16*, relates to forgery as a general term, and includes checks. *State v. Warner*, 55 Pac. 342, 343, 60 Kan. 94.

**As false token.**

See "False Token."

**As money.**

See "Money."

**As note or order.**

See "Note"; "Order (In Commercial Law)."

**Payable on demand or presentment.**

Nearly every definition of a "check" given in the books is to the effect not only that it must be drawn on a bank or banker, but that it must be payable on demand. A draft on a bank payable on a day subsequent to its date is a bill of exchange, and not a check. *Harrison v. Nicollet Nat. Bank of Minneapolis*, 43 N. W. 336, 41 Minn. 488, 5 L. R. A. 746, 16 Am. St. Rep. 718.

A check is a bill of exchange, payable on demand, on which an action will not lie against the drawer until after notice of presentment and nonpayment, which must be made within a reasonable time. *Harker v. Anderson* (N. Y.) 21 Wend. 372, 373. It imports an instrument payable on its date. *Church v. Pontifex*, 9 C. B. 229, 248.

A check is an order to pay the holder a sum of money at a bank on presentment and demand. No previous notice is necessary; no acceptance is required or expected; it has no days of grace; is payable on presentment, and not before. *Head v. Hornblower*, 31 N. E. 489, 156 Mass. 458, 16 L. R. A. 510, 32 Am. St. Rep. 472. *Bullard v. Randall*, 67 Mass. (1 Gray) 605, 606, 61 Am. Dec. 433.

**As personal property.**

See "Personal Property."

**As thing of value.**

A check represents a certain sum of money which the drawer of the check intends that the payee shall in fact have. While not money, a check is a thing of value, and therefore it is the subject of conversion. *Pawson v. Miller*, 72 N. Y. Supp. 1011, 1012, 66 App. Div. 12.

## CHECK GUERRILLA.

A "check guerilla" is one who frequents gambling rooms and solicits money, on the checks used therein to represent money, from the proprietor, bystanders, or bettors. *Comp. Laws Nev. 1900, § 4861*.

## CHECK-ROWER.

A "check-rower" is an attachment to a machine for planting corn. Joliet Mfg. Co. v. Dice, 105 Ill. 649, 650.

## CHEESE.

See "Filled Cheese"; "Skimmed Milk Cheese."

For the purpose of the provision relating to the sale of adulterated cheese or butter, the terms "butter" and "cheese" mean the products usually known by those names, and which are manufactured exclusively from milk or cream, or both, with salt and rennet, and with or without coloring matter. Rev. St. Me. 1883, p. 923, c. 128, § 6.

For the purpose of the statutory provisions relative to the sale of imitation butter and cheese, the terms "butter" and "cheese" shall mean the products which are usually known by these names, and are manufactured exclusively from milk or cream, with salt and rennet, and with or without coloring matter. Rev. Laws Mass. 1902, p. 547, c. 56, § 35.

The terms "butter" and "cheese" shall be understood to mean the products usually known by those names, and which are manufactured exclusively from milk or cream, or both, with salt, and with or without coloring matter, and, if cheese, with rennet. Pub. St. N. H. 1901, p. 402, c. 127, § 22.

The term "cheese," as used in the chapter of the Penal Code relating to adulterated dairy products, is understood to mean the product usually known by that name, and which is manufactured exclusively from milk or cream, or both. Rev. Codes N. D. 1899, § 7648.

The word "cheese," as used in an act relating to internal revenue tax on filled cheese, shall be understood to mean the food product known as "cheese," and which is made from milk or cream, and without the addition of butter, or any animal, vegetable, or other oils or fats foreign to such milk or cream, with or without additional coloring matter. U. S. Comp. St. 1901, p. 2236.

## CHEESE FACTORY.

For the purpose of the pure food act, a "cheese factory" is defined as "factory where milk with or without the addition of salt, rennet and coloring matter is manufactured into cheese." Cobbey's Ann. St. Neb. 1903, § 9410.

## CHEMICAL.

A chemical is a substance used for producing a chemical effect, or one produced by

a chemical process; a chemical agent prepared for scientific or economic use. Shreveport Gas, Electric Light & Power Co. v. Assessor of Caddo Parish, 16 South. 650, 651, 47 La. Ann. 65 (citing Cent. Dict.); Phoenix Ins. Co. v. Flemming, 44 S. W. 464, 465, 65 Ark. 54, 39 L. R. A. 789, 67 Am. St. Rep. 900.

The word "chemical," however, as used in a constitutional exemption from taxation of capital and machinery employed in the manufacture of chemicals, is to be understood not from a scientific point of view, but in its generally accepted meaning, and in that meaning cannot be held to include illuminating gas. Shreveport Gas, Electric Light & Power Co. v. Assessor of Caddo Parish, 16 South. 650, 651, 47 La. Ann. 65.

Benzine put up in bottles containing from two to six ounces, to be sold for cleansing purposes, is included in the term "chemicals," as used in a fire policy, and insuring drugs and chemicals. Phoenix Ins. Co. v. Flemming, 44 S. W. 464, 465, 65 Ark. 54, 39 L. R. A. 789, 67 Am. St. Rep. 900.

Soda and similar drinks are not "chemicals," within the meaning of Const. art. 207, as amended by Act 1886, No. 92, p. 129, exempting property employed in manufacturing chemicals, though the making of such drinks depends in part on the result of a chemical process. Crescent City Seltz & Mineral Water Co. v. City of New Orleans, 19 South. 943, 944, 43 La. Ann. 768.

We do not understand that illuminating gas is generally understood to be chemicals, so as to exempt capital and machinery employed in its manufacture from taxation under the amendment to the 270th article of the Constitution exempting from taxation capital and machinery employed in the manufacture of chemicals. Shreveport Gas, Electric Light & Power Co. v. Assessor of Caddo Parish, 16 South. 650, 651, 47 La. Ann. 65.

## CHEMICAL SALTS.

"Chemical salts," as used in Tariff Act Oct. 1, 1890, par. 76, include muriate or hydrochlorate of cocaine. Lehn v. United States (U. S.) 66 Fed. 748.

## CHEMICALLY PURE.

"Chemically pure," as used in reference to substances employed in chemical process, means absolutely pure. Matheson v. Campbell (U. S.) 69 Fed. 597, 608.

## CHEMIST.

See "Pharmaceutical Chemist." Apothecary distinguished, see "Apothecary."

**CHEROKEE.**

The Cherokee Nation has been variously described by the courts as a domestic, dependent nation (*Cherokee Nation v. Georgia*, 30 U. S. [5 Pet.] 1, 8 L. Ed. 25); as a state, in a certain sense, although not a foreign state or a state of the Union (*Holden v. Joy*, 84 U. S. [17 Wall.] 211, 21 L. Ed. 523); as a distinct community, with boundaries accurately described (*Worcester v. Georgia*, 31 U. S. [6 Pet.] 515, 8 L. Ed. 483); an alien, though dependent, power (*Elk v. Wilkins*, 112 U. S. 94, 103, 5 Sup. Ct. 41, 28 L. Ed. 643); not a foreign, but a domestic, territory; a territory which originated under our Constitution and laws. *Thebo v. Choctaw Tribe of Indians* (U. S.) 66 Fed. 372, 374, 13 C. C. A. 519 (citing *Mackey v. Cox*, 59 U. S. [18 How.] 100, 15 L. Ed. 299).

**CHEROKEE LANDS.**

Lands described in a deed as "Cherokee lands" are not necessarily lands ceded to the Cherokee Indians by the United States. *Ephraim v. Garlick*, 10 Kan. 280, 281.

**CHEROKEE OUTLET.**

As Indian country, see "Indian Country."

**CHERRY JUICE.**

Tariff Act 1890, par. 389, relating to the duties on "cherry juice," includes cherry juice so concentrated that five gallons in its natural condition are reduced to one gallon, the entire amount of acidity and coloring matter being retained, and the bulk of the water eliminated. In *re Rheinstrom* (U. S.) 60 Fed. 599, 600.

Cherries of an inedible variety, imported in casks in a surrounding fluid containing alcohol, added for the purpose of resisting fermentation and decay, intended for use in the manufacture of cherry juice, are dutiable under paragraph 263, Schedule G, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 171 (U. S. Comp. St. 1901, p. 1651), as "fruits preserved in spirits," and not under paragraph 299, Schedule H, § 1, c. 11, of said act, 30 Stat. 174 (U. S. Comp. St. 1901, p. 1655), as "cherry juice, etc." *Voight v. Mikhailovitch* (U. S.) 125 Fed. 78, 82.

**CHEST.**

The words "trunk" and "chest" are not synonymous, and therefore an indictment charging the theft of a trunk or chest, being in the alternative, is bad for want of certainty. *Potter v. State*, 39 Tex. 388, 389.

**CHICORY.**

Chicory is a compound used to some extent to flavor coffee, and more largely, both in Germany and in this country, to mix with coffee, or as a substitute for coffee for purposes of economy. It is sold for about six cents per pound, and is also used by dealers as an adulterant to mix with ground coffee, and by consumers to mix with, or as a substitute for, coffee. *United States v. Rosenstein* (U. S.) 60 Fed. 74, 75, 8 C. C. A. 474.

**CHIEF.**

"A person engaged chiefly in farming," within the bankrupt act, is one whose chief occupation or business is farming, and one's chief occupation or business, so far as worldly pursuits are concerned, is that which is of principal concern to him, of some permanency in its nature, which he deems of paramount importance to his welfare, and on which he chiefly relies for his livelihood, or as the means of acquiring wealth, great or small. In *re Mackey* (U. S.) 110 Fed. 355, 358.

**CHIEF FISCAL OFFICER.**

Code Civ. Proc. § 3245, provides that costs cannot be awarded to the plaintiff in an action against a municipal corporation in which the complaint demands judgment for a sum of money only, unless the complaint upon which the action is founded was, before the commencement of the action, presented for payment to the "chief fiscal officer" of the corporation. Under other provisions of the statute the comptroller of the city of Buffalo was charged with superintendence of the fiscal concerns of the city and management of the same, and it was made his duty, by and with the advice of the common council, to appoint an auditor, who shall examine and report upon all unliquidated claims against the city before the same should be audited by the common council. Other provisions require that money should only be drawn from the treasury by warrants authorized by the common council, and signed by the mayor and city clerk and countersigned by the comptroller, etc., and it was held that the comptroller was the "chief fiscal officer" of the corporation within the meaning of the statute. *Williams v. City of Buffalo* (N. Y.) 25 Hun, 801.

**CHIEF JUDGE.**

The term "chief judge" is equivalent to that of presiding justice or presiding magistrate. *Bean v. Loryea*, 22 Pac. 513, 81 Cal. 151.

**CHIEF MAGISTRATE.**

Under an act authorizing the acknowledgment of deeds before any "mayor, chief magistrate, or officer" of the cities, towns, or places where the deed was made, it is held that the word "mayor" refers to cities, "chief magistrate" to towns, and "officers" to places. *McIntire's Lessee v. Ward* (Pa.) 3 Yeates, 424, 426.

**CHIEF OFFICE.**

Code, § 92, provides, as one of the grounds of attachment, that defendant is a corporation whose "chief office or place of business" is out of the state. In construing this section, the court holds that the expressions "chief office" and "place of business," while not strictly synonymous, must be regarded as equivalent, saying: "The essential characteristics of each might be very different. The former would ordinarily be the place where the officials charged with the general management of its affairs might meet and direct them, while the latter might be the same, or the place where its business operations were carried on under the direction and supervision of an authorized agent. The two designations are mentioned in the disjunctive, but it is clear that one must be considered the equivalent of the other, although each may be maintained at a separate place." *Rocky Mountain Oil Co. v. Central Nat. Bank*, 67 Pac. 153, 154, 29 Colo. 129.

**CHIEF PLACE OF BUSINESS.**

The words "chief place of business in the county" within the act of 1893, giving courts of common pleas jurisdiction to issue mandamus to corporations having their chief place of business within the county, authorizes mandamus against a railroad company operating its road almost entirely within one county where its operating officers dwell, but having its principal offices in Philadelphia, to be brought in either county. *Lorraine v. Pittsburg, J., E. & E. R. Co.*, 54 Atl. 580, 583, 205 Pa. 132, 61 L. R. A. 502.

**CHIEFEST.**

The construction of the words "chiefest and discretest," as relating to the persons authorized to nominate to an advowson, is difficult. The use of these words is a strong badge of antiquity. Formerly a few of the principal people of the parish met and settled the business themselves, and the rest of the parish were obliged to them for taking the trouble on themselves, and did not interfere. The degree of chiefness and discreteness it is impossible to grasp. The distinction of rich and poor has only been determined by paying the parish rates. This is certainly a much wider range than was originally intended, but it is the only one

that can be followed, though the court may be perfectly satisfied that it never was the intent of the original donor. *Fearon v. Webb*, 14 Ves. 18, 24.

**CHILD—CHILDREN.**

See "Abortive Child"; "After-Born Child"; "Census Children"; "Colored Child"; "Legitimate Child"; "Natural Child"; "Neglected Child"; "Poor Children."

All children, see "All."

Any child, see "Any."

Other children, see "Other."

**Adults.**

"The word 'children,' when used irrespective of parentage, may denote that class of persons under the age of twenty-one years as distinguished from adults, but its ordinary meaning with respect to parentage is sons and daughters, of whatever age." *Miller v. Finegan*, 7 South. 140, 142, 26 Fla. 29, 6 L. R. A. 818.

**Grandchildren.**

Ordinarily, the word "children" means the immediate offspring, and does not include grandchildren. *Shanks v. Mills*, 25 S. C. 358, 362.

"Children" is not a word of art; it has a natural sense, in which it is most generally used. When applied to the remote descendants of any person, it is altogether a figurative expression; thus we read of the "children of Seth," the "children of Ham," and the "children of Israel." In the latter instance it is used to denote a whole nation. When not used in that figurative sense it means the immediate offspring of a man or woman. *Smith v. Chapman* (Va.) 1 Hen. & M. 240, 290.

The term "children" does not ordinarily, and properly speaking, comprehend grandchildren, or issue generally, yet sometimes that meaning is affixed to it in cases of necessity. *Waldron v. Taylor*, 45 S. E. 336, 338, 52 W. Va. 284.

**Heirs.**

In popular language children are often called "heirs," but the legal rule of construction, as applied in many cases of written instruments, is that the word "heirs" is to be accepted in its technical and artistic sense, unless there be something in the context to interpret it differently. *Huss v. Stephens*, 51 Pa. (1 P. F. Smith) 282, 287.

An allegation, in proceedings for the allotment of dower, that certain persons are the only "children" of decedent, is not a sufficient averment that they are his only heirs. There may have been others who "are not," but, having died, may have left children who would also be, heirs, although they would

not in common parlance be the "children" of the decedent. *Martin's Heirs v. Martin*, 22 Ala. 86, 100.

**As representative.**

See "Representative."

**Stepchildren.**

Where the minor children of a wife are recognized and treated as members of the family of their stepfather, and are supported and maintained by him, he stands to them in loco parentis, and may exercise the control and authority of a parent over them. *Gorman v. State*, 42 Tex. 221, 222.

**As a sufficient description.**

The use of the word "children," in a notice by a town furnishing support to paupers, to the town liable therefor, that support has been furnished to A. and three children, is sufficient, the number of the children being given, and it not being suggested or shown that A. had a larger number of children. *City of Lynn v. City of Newburyport*, 87 Mass. (5 Allen) 545, 546; *Inhabitants of Orange v. Inhabitants of Sudbury*, 27 Mass. (10 Pick.) 22, 24.

The use of the word "children," in a notice by a town furnishing support to paupers, to the town chargeable therewith, that the support has been furnished to the children of A., is insufficient, by reason of its uncertainty, as a designation of the persons to whom the support has been furnished. *Town of Middletown v. Town of Berlin*, 18 Conn. 189, 195.

The words "child of W.," in a notice by a town furnishing support to the child, to the town chargeable with its support, that such support has been furnished to the child of W., is a sufficient description of the pauper. *Inhabitants of Ware v. Inhabitants of Williamstown*, 25 Mass. (8 Pick.) 388, 389.

The words "children of N.," in a deed conveying property to children of N., is sufficient as a description of the grantees, if it can be shown who were intended by such words, and that they were in life and capable of taking at the time the deed was executed. *Hogg v. Odom* (Ga.) Dud. 185.

**Youth distinguished.**

The words "children" and "youth" are frequently used in connection. The word "children" includes persons of both sexes, and "youth" differs from it only by referring to and including persons of somewhat more advanced age and proficiency. *Nelson v. Cushing*, 56 Mass. 519, 533.

**CHILD—CHILDREN (In Conveyances).**

**After-born child.**

The term "children," in a deed conveying property to the children of a person, will

not include children born after the conveyance. *Hogg v. Odom* (Ga.) Dud. 185.

The term "children," in a deed to a woman and her children, will include a child en ventre sa mere, but not a child born more than a year after the conveyance. *Heath v. Heath*, 114 N. C. 547, 19 S. E. 155.

Where a father deeds certain lands to a daughter, her husband, and her children forever, it applies to the children then living and after-born children, where, familiar as the grantor was with his daughter's family, he forbore to name them as grantees, but used the broad and generic term "children," comprehensive enough to embrace all those who at any time were born to this daughter. *Blackburn v. Blackburn*, 73 S. W. 109, 110, 109 Tenn. 674.

**Children living only.**

"Children," when used in a deed by which the grantor conveys land in trust for his wife and her children, means only those children then living. *Varner v. Young's Ex'r*, 56 Ala. 260, 266.

Where a deed of trust provided that the income of the trust estate should, after the death of the settlor and his wife, go to the children and issue of the deceased's children. It was held that the words "children and issue" were intended to apply to the ones in being at that time. *In re Eyre's Estate*, 55 Atl. 541, 542, 205 Pa. 561.

**Heirs.**

"Children and heirs at law," as used in a deed creating a life estate in the grantee, and providing that after his death the title in fee simple should vest in his children and heirs at law equally, must be construed as constituting a class. The word "heirs at law" may well be construed as being interchangeable with "children." *Waddell v. Waddell*, 12 S. W. 349, 350, 99 Mo. 338, 17 Am. St. Rep. 575.

"Children," as used in an instrument reciting the purchase of a farm which the writer intended for the benefit of his sister and her children, cannot be given the effect of "heirs" as determinative of the nature of the estate. *Cathcart v. Nelson's Adm'r*, 40 Atl. 826, 827, 70 Vt. 317.

"Children," as used in a deed to a woman, and at her death to her children by her present husband, meant heirs. *Ross v. Adams*, 28 N. J. Law (4 Dutch.) 160, 169.

"Children," as used in a deed conveying real estate to one for and during her natural life, and at her death to the children of her body in fee simple, is a word of purchase and not of limitation, and is not synonymous with "heirs" or "heirs of the body," which are words of limitation, and the grantee took only a life estate. *Burns v. Weesner*, 34 N.

*E. 10, 184 Ind. 442; Bowers v. Bowers, 51 Tenn. (4 Heisk.) 293, 295.*

#### Heirs of body.

In a deed granting realty to A. and her children, her heirs and assigns, the word "children" will not be construed to mean heirs of the body. *Sease v. Sease, 41 S. E. 898, 64 S. C. 218.*

#### Issue.

The word "children" usually means descendants of the first degree, and, where used in a deed of property to a wife to have and to hold the land to her and to the children of her body begotten by E., her husband, being used in connection with the word "begotten," must be confined to immediate descendants—those of the first generation. *Downing v. Birney, 70 N. W. 1006, 1008, 112 Mich. 474.*

#### Legitimate children.

"Children," as used in a deed conveying the property to the grantee, and at her death to such child or children as she may leave living, does not include illegitimate children. *Johnstone v. Tallafarro, 32 S. E. 931, 934, 107 Ga. 6, 45 L. R. A. 95. See, also, Hall v. Cressey, 43 Atl. 118, 119, 92 Me. 514.*

Property was conveyed to trustees for the use of the grantor's freed mulatto woman during her life, and then for the use of her son C., and to his heirs and assigns, and, "in case of the death of C. without leaving issue, then to have and hold the property to any other quarteron child or children that she may have \* \* \* but in case she should die without leaving issue of the aforesaid description, then to hold the property to and for use of her heirs and assigns forever." C. died without issue, and she executed a deed of the property, and died leaving illegitimate quarteron children, who claimed the property; but, as a trust to illegitimate children to be thereafter born is void as against good morals, the terms "issue" and "child or children" must be construed to mean legitimate children, and, as she left none such, the property passed under her deed to her grantee. *Kingsley v. Broward, 19 Fla. 722, 745.*

#### As words of inheritance.

"Children" usually means descendants of the first degree, and includes neither grandchildren nor more remote descendants, and as used in a deed will not be considered words of inheritance. *Downing v. Birney, 70 N. W. 1006, 1008, 112 Mich. 474.*

#### As words of purchase.

Ordinarily the words "child" and "children" are words of purchase, vesting a new estate in those persons, and not words of

limitation, ineffectual to vest an estate, but effectual to mark out the limits of the ancestor's estate, showing it to be an estate of inheritance, and prescribing the course of descent. Therefore, when they are used in a deed, they are never words of limitation, and they are always words of purchase in a will, unless the context and circumstances are such as to show that they were used in a sense of "heirs," and with the intent to make them words of limitation. *Martin v. Martin, 44 S. E. 198, 201, 52 W. Va. 381.*

The words "children, issue of their or either of their bodies," are necessarily words of purchase in a deed, and ordinarily so in a will. *Melsheimer v. Gross, 58 Pa. (8 P. F. Smith) 412, 414.*

The word "children," used in a grant to one and his children, etc., will be construed to be a word of purchase, and not a word of limitation. *McIlhinny v. McIlhinny, 37 N. E. 147, 149, 187 Ind. 411, 24 L. R. A. 489, 45 Am. St. Rep. 186.* "Children," as used in a deed to an unmarried woman and her children, is to be construed as a word of purchase, and hence the grantee took an estate for life with remainder to her children. "If there had been children living at the time of the grant, they probably would have been taken as tenants in common with their mother." *Fales v. Currier, 55 N. H. 392, 394.*

"Although the word 'children' is sometimes used to denote the entire class of persons who are to take in succession, and in such case is synonymous with the word 'heirs,' yet generally the word 'children' is used as a word of purchase." As used in a conveyance to the grantor's children for life, and after their death to their children, it was a word of purchase. *Haywood's Heirs v. Moore, 21 Tenn. (2 Humph.) 584, 586; Perry v. Calhoun, 27 Tenn. (8 Humph.) 551, 556.*

The rule in *Wild's Case* by which, where lands are devised to a person and his children, and he has no child at the time of the devise, the parent takes an estate tail, has no application to a case in which there is a child or children of the mother living at the time of the execution of the deed. The word "children" is not, therefore, a word of limitation, but of purchase. *Coursey v. Davis, 46 Pa. (10 Wright) 25, 27, 84 Am. Dec. 519.*

The word "children," in a deed conveying land to the grantee for life, and after his death to the then living children of his body, which declares that the grantee is to have no greater interest than a life estate, and that at his death said contract shall go to the children of his body then living, is a word of purchase, and not of limitation, and the grantee takes a life estate, remainder over to the children. *Jackson v. Jackson, 26 N. E. 897, 127 Ind. 346.*



**CHILD—CHILDREN (In Criminal Law).****As minor child.**

The term "child," as used in the chapter of the Penal Code prohibiting the sale of obscene literature to minors, imports any person not exceeding 18 years of age. *Rev. Codes N. D. 1899, § 7216.*

The word "child," as used in the definition of aggravated assault, is not synonymous with "minor," or "one under 21 years of age," but is used in its ordinary signification. *Allen v. State, 7 Tex. App. 298, 301; McGregor v. State, 4 Tex. App. 599, 601.*

"Child," as defined by Black, means generally the young under the age of puberty, and a male person who has attained the physical strength and stature of manhood, and who is almost as large as his father, but not quite as strong, is not a "child" within Code, § 4612h, making any one guilty of a misdemeanor who shall torture, torment, misuse, etc., any child. *Collins v. State, 25 S. E. 325, 326, 97 Ga. 433, 35 L. R. A. 501.*

In construing the word "child" in article 496 of the Penal Code, declaring an assault aggravated when committed by an adult male upon a child, the court holds that inasmuch as no statutory definition of the word "child" has been given, and that as article 59 of the Code of Procedure requires words to be understood in their usual acceptation, except when their meaning is particularly defined by law, the word "child" means a young person as contradistinguished from a person whose age implies settled habits and discretion, and that the word when applied to a boy means a male not above the age of 14, and when applied to a girl means a female not above the age of 12. *Bell v. State, 18 Tex. App. 53, 56, 51 Am. Rep. 293.*

**Males and females.**

The use in the Penal Code of any word expressive of relationship, state, condition, office, or trust of any person, as the "parent," "child," "ascendant," "descendant," "minor," "infant," "ward," "guardian," or the like, or of the relative pronouns "he" or "they" in reference thereto, includes both males and females. *Pen. Code Tex. 1895, art. 22.*

**As quick child.**

"Child," as used in Pen. Code, § 81, relating to abortion, means a living child; that is to say, an unborn child so far developed as to be ordinarily called "quick," and which is still alive when the alleged unlawful means are employed to produce the miscarriage or abortion. *Taylor v. State, 33 S. E. 190, 105 Ga. 846.*

**As under age of puberty.**

"Child," as used in Cr. Code Neb. § 12, providing that any person who shall have

carnal knowledge of a female child, etc., does not necessarily mean a child between birth and puberty, it being sufficient to prove that the female was not a child under the age of 15 years. The definition of "childhood," when used in the abstract, according to Webster, includes the time intervening between birth and puberty, and it is no doubt true that such definition should be applied in cases where the word is used in the concrete, but such definition is not applicable to the word in the sense in which it is used in this statute. The common law fixed the age of consent at 10, but with a provision that, if it be shown that the female was so far advanced physically and intellectually as to be able to understand the consequences of the act, the limitation did not apply. *State v. Wright, 40 N. W. 596, 597, 25 Neb. 38.*

"Child," as used in 3 How. Ann. St. § 9094, providing that if any person shall unlawfully carnally know or abuse any female child under the age of 14 years he shall be punished, includes any female under such age, even though she has attained the age of puberty. *People v. Miller, 55 N. W. 675, 676, 96 Mich. 119.*

"Child," as used in Pen. Code, art. 496, declaring an assault aggravated when committed by an adult on a child, means a young person as contradistinguished from a person whose age implies settled habits and discretion. When applied to a boy the term means a male not above the age of 14, and when applied to a girl means a female not above the age of 12. *Bell v. State, 18 Tex. App. 53, 51 Am. Rep. 293.*

The word "child" is quite frequently applied to any young person who is under age, less than majority, and is often used in the broader sense of offspring. As used in an indictment for rape, it means that the prosecutrix was immature, but it would be a false construction to say that it meant that she was not 13 years of age. *State v. Gaston, 65 N. W. 415, 416, 96 Iowa, 505.*

**CHILD—CHILDREN (In Insurance).****Adopted children.**

"The word 'child,' in legal documents, is not always confined to immediate offspring. It may include grandchildren, stepchildren, children of adoption, etc., as may be necessary to carry out the intention." As used in a life policy payable to the wife of the insured, or to their children if the wife should die before the insured, which policy was written at the time when the insured had no children except an adopted child, it was construed to include such adopted child. *Martin v. Aetna Life Ins. Co., 73 Me. 25, 27.*

As used in the by-laws of a mutual insurance company providing that, on the

death of a member leaving children and no wife, then the whole sum shall be paid to the "children," an adopted child will be held to be included, as under the laws of the state the adopted child became a member of the family of his adopter, the same as a natural child. *Kemp v. New York Produce Exchange*, 54 N. Y. Supp. 678, 679, 34 App. Div. 175.

#### Adults.

The terms "child or children," as used in a regulation of a benevolent association, providing that certain benefits shall be paid to the lodge of which deceased was a member for the use or benefit of his orphan child or children in equal shares, and that in case there should be no widow, child or children, or designated person or object, the amount shall be paid to his executor or administrator, necessarily relate to the child or children mentioned in a preceding clause, namely, orphan child or children. The last clause does not purport to create any right in any class of children, but merely undertakes to prevent a lapse or forfeiture in a certain case; and it is evident that it was not designed that the fund should lapse if deceased left adult children, and yet vest in the personal representative if he left no children at all. *Hammerstein v. Parsons*, 29 Mo. App. 509, 517.

#### After-born child.

A life policy expressed to be for the benefit of the wife and children of the assured vests, when issued, the amount of the policy in the wife and children then in being, to the exclusion of after-born children. *Connecticut Mut. Life Ins. Co. v. Baldwin*, 23 Atl. 105, 106, 15 R. I. 106. Where a benefit certificate is payable to the children of the insured, the word "children" means those in existence at the time and those born afterward. *Thomas v. Leake*, 3 S. W. 703, 704, 67 Tex. 469.

The word "children," as used in a policy of life insurance providing that it should be payable to the children of the insured, includes children born after the issuance of the policy. In a policy of insurance payable to the children, the interests of the beneficiaries become vested at the time of the delivery of the policy, or when it takes effect, and will open and let in any after-born children whether of a first or second marriage. *Scully v. Aetna Life Ins. Co.*, 43 S. E. 504, 505, 132 N. C. 30, 60 L. R. A. 615, 95 Am. St. Rep. 615.

#### Child by future marriage.

A life policy provided that the amount of the insurance should be payable on the insured's death to S., his wife, and in case of her death before his decease the policy should be paid to his children. S. died in-

testate before the insured, leaving children, after which insured married another, by whom he had a child, who, with its mother, survived the insured. Held, that the term "children" as used in the policy should not be construed as limited to the children of insured's first wife, but included children of both marriages. *Ricker v. Charter Oak Life Ins. Co.*, 6 N. W. 771, 772, 27 Minn. 193, 38 Am. Rep. 289.

#### Grandchildren.

"Children," as used in the by-laws of a benevolent association providing that on the death of a member a sum of money should be paid to the widow of such member, if there be one, or, if he leaves no widow, then to the child or children or their lawful guardian, means immediate progeny, and cannot be extended to include grandchildren. In recognition of the fact that in the absence of such construction the amount of the insurance or benefit would revert to the association, the court says: "We should be very much inclined to hold that the word 'children' as used in the by-laws of the association is broad enough to include 'grandchildren,' such grandchildren to take in lieu of their parent by representation, if we could find in the charter or by-laws any language to warrant this construction, inasmuch as this construction is completely consonant with the spirit and purposes of the association. We know of no precedent in point. The only cases that we think of which afford an analogy are cases relating to the use of the word in wills. Those cases held that the word is to be understood in its simple and primary signification when it can be so understood, and that it cannot be held to include grandchildren unless it is necessary to hold so in order to give effect to the words of the will or the evident intent of the testator. These cases do not give countenance to the construction for which the defendant contends. To reach that construction it is necessary to take two steps away from the letter of the by-law. The first step is to hold that the word 'children' includes 'grandchildren'; the second step is to hold that grandchildren, though designated by the word 'children,' do not take per capita like the children, but only through their deceased parent by representation. To take these two steps would be rather to supply what may be supposed to be a defect or omission in the by-law, than simply to interpret it." *Winsor v. Odd Fellows' Beneficial Ass'n*, 13 R. I. 149, 150.

"Children," as used in a life insurance policy providing that payment shall be made to the children of the insured, or, if there are no such children surviving, then to his executors, etc., will not be held to have been used in the sense of "issue," so as to entitle a grandchild of a deceased child to

an interest in the policy. *Elgar v. Equitable Life Assur. Soc.*, 88 N. W. 927, 929, 113 Wis. 90.

"Children," as used in a life insurance policy payable to the insured's executors for the benefit of his widow, if any, and his then surviving children, mean the direct offspring, and not the grandchildren or later descendants. Grandchildren will not be considered as included in the term "children," unless such intention is clearly expressed. *Small v. Jose*, 29 Atl. 976, 86 Me. 120.

The term "children," in a life policy issued upon the life of a husband for the use of his wife if she survived him, otherwise payable to their children, was construed to include a grandchild of the insured, the issue of one of the children who died before his mother, who also died before insured. *Hull v. Hull* (N. Y.) 62 How. Prac. 100.

The term "children," in a life policy payable to the children of insured, includes a child of a child deceased at the time of the death of insured, though there are other children of insured living. *Continental Life Ins. Co. v. Palmer*, 42 Conn. 60, 64, 19 Am. Rep. 530.

#### **Legitimate children.**

St. 1888, c. 429, limiting the beneficiary of a member of a beneficial association to the husband, wife, "children," relatives of, or persons dependent on, such member, means legitimate children. *Lavigne v. Ligue des Patriotes*, 59 N. E. 674, 675, 178 Mass. 25, 54 L. R. A. 814, 86 Am. St. Rep. 460 (citing *Kent v. Barker*, 68 Mass. [2 Gray] 535; 2 Jarm. Wills [6th Am. Ed.] 1076).

#### **CHILD—CHILDREN (In Statutes).**

"Children," as used in the Constitution, providing that a guardian or trustee of a family of minor children shall be entitled to a homestead, etc., should not be construed as meaning exclusively the plural number, but may mean simply "child," so that one child would be a family of minor children. *Rountree v. Dennard*, 59 Ga. 629, 630, 27 Am. Rep. 401.

"Children," as used in Gantt's Dig. § 7, providing that when any man shall die leaving minor "children" and no widow, and his estate shall not be above a certain sum, it shall pass to and vest in the minor children for their support and education, and no administrator of said estate shall be required, means one child only, as well as several. *Smith v. Allen*, 31 Ark. 268, 271.

The words "child or children" may mean one or more children. *Bates' Ann. St. Ohio* 1904, § 548-38.

#### **Adopted children.**

Within the act exempting children from the collateral inheritance tax, an adopted

child is not included in the term "child." *Commonwealth v. Nancrede*, 32 Pa. (8 Casey) 889, 890; *In re Miller's Estate*, 18 N. E. 139, 140, 110 N. Y. 216.

In Laws N. Y. 1887, c. 713, exempting from transfer tax transfers to child of a decedent, the word "child" will not include the child of a person who stood in the mutually acknowledged relation of child to the deceased, but was a stranger to the blood. *In re Moore's Estate*, 35 N. Y. Supp. 782, 784, 90 Hun, 162.

"Children" is not synonymous with "issue" and "heirs," and in Rev. St. 1855, p. 355, c. 32, § 5, changing an estate in fee tail into a life estate in the grantee, with remainder to his children, or, if he have no issue, then to his heirs, the word "children" was used in its primary technical sense as lineal descendants, so as to exclude a child by adoption. *Clarkson v. Hatton*, 44 S. W. 761, 762, 143 Mo. 47, 39 L. R. A. 748, 65 Am. St. Rep. 635.

In Elliot, Supp. § 423, providing that if a man marry a second wife, but has children alive by a former wife, the fee in his land shall on his death vest in such children, subject to a life estate in the widow, "children" includes a child adopted by the husband and his former wife, since an adopted child is entitled to all of the rights and interests in the estate of its adoptive father or mother, by descent or otherwise, that such child would be entitled to if it were a natural heir. *Markover v. Krauss*, 31 N. E. 1047, 1049, 132 Ind. 294, 17 L. R. A. 806.

The word "children" as used in statutes of descent is not confined to children born in lawful wedlock, but includes children by adoption. *Power v. Halfey*, 4 S. W. 683, 685, 85 Ky. 671; *Ross v. Ross*, 129 Mass. 243, 267, 37 Am. Rep. 321.

An "adopted child," within the meaning of the statute, is a legitimate child of its adopting parent, within the meaning of the statute of descent, though the word "child," as used by law-writers and in the adjudicated cases, means, unless otherwise designated, natural-born children. *Bray v. Miles*, 54 N. E. 446, 459, 23 Ind. App. 432.

The term "children" includes children by birth and by adoption. Rev. Codes, N. D. 1899, § 5112; Civ. Code S. D. 1903, § 2446; Rev. St. Okl. 1903, § 2785.

#### **Adults.**

The term "child," within the meaning of a statute authorizing a recovery, for the negligent killing of a husband or father, by the widow or child, does not include an adult child, and therefore, where there is no widow or minor children, there can be no recovery. *Mott v. Central R. R.*, 70 Ga. 680, 48 Am. Rep. 595.

The term "child," within the meaning of the statute authorizing a recovery, for a wrongful killing, by the wife or children of deceased, includes a child over 21 years of age. *Murray v. Gulf, C. & S. F. R. Co.*, 11 S. W. 125, 131, 73 Tex. 2; *Putnam v. Southern Pac. Co.*, 27 Pac. 1033, 1037, 21 Or. 230.

The word "child," though usually meaning a person under age, is often applied to persons who have passed their majority, especially when dealing with the relation which involves parent and child. *Putnam v. Southern Pac. Co.*, 27 Pac. 1033, 1037, 21 Or. 230.

Act Ga. Oct. 27, 1887 (Acts 1887, p. 43; Civ. Code 1897, § 3828), provides that the husband may recover for the homicide of his wife, and, if she leave "a child or children surviving," said husband shall sue jointly. Held, that the phrase "child or children surviving" is extremely broad language, and includes children who have attained their majority, as well as minors. *Roberts v. Central of Georgia R. Co.* (U. S.) 124 Fed. 471, 473.

Within the widow's exemption law, the word "children" does not necessarily mean minor children only, and adult unmarried daughters of a decedent, who lived with him and were dependent upon him for support, are included in the term. In *re Young's Estate*, 3 Pa. Dist. R. 758. "Children" who are entitled to an exemption on the death of their father are not necessarily minor children, but the word includes an unmarried daughter, without means of support, living with and dependent upon the father, equally with his minor children. In *re Halbe's Estate* (Pa.) 20 Phila. 117.

A person of the age of 21 years is not a "poor child" whom the parish officers are authorized to bind out as an apprentice, with the assent of two justices, within the meaning of 56 Geo. III, c. 139. *Rex v. Inhabitants of St. John Bedwardine*, 5 Barn. & Adol. 169.

The word "child" as commonly used, carries with it the idea of tender years and of minority. But one's child does not cease to be his child when it attains its majority. And though the statute providing that the record of adoption of children in other states may be filed and entered in the order book of any circuit court in this state, and when so entered have the same force and effect as though the original adoption was in this state, in all cases, in referring to the adopted person, refers to him as a "child," there is no reason why its provisions may not apply to adults equally with infants, and the record of the foreign adoption, filed after the adopted child has attained his majority, is equally as effective as if it had been filed before that time. *Markover v. Krauss*, 31 N. E. 1047, 1048, 132 Ind. 294, 17 L. R. A. 806

#### After-born child.

In the statute of distribution, providing that the children whom an intestate leaves shall take his property, "children" includes a posthumous child. *Pearson v. Carlton*, 18 S. C. 47, 56. As used in the statute of distribution, "children" means not only those living at the time of the ancestor's decease, but includes posthumous children. *Hill v. Moore*, 5 N. C. 233, 251.

Laws 1873, c. 646, providing that every child who shall be injured in means of support in consequence of the intoxication of any person may sue, etc., gives a child, born after its father's death from intoxication, a right to sue for the injury arising from such death. *Quinlen v. Welch*, 23 N. Y. Supp. 963, 964, 69 Hun, 584.

"Children," in statutes providing that an action on account of injuries causing death shall be for the sole and exclusive benefit of the surviving children, includes not only those children who are alive at the time, but those born afterward. *Nelson v. Galveston H. & S. A. Ry. Co.*, 14 S. W. 1021, 1022, 78 Tex. 621, 11 L. R. A. 391, 22 Am. St. Rep. 81; *Texas & P. Ry. Co. v. Robertson*, 17 S. W. 1041, 82 Tex. 657, 27 Am. St. Rep. 929.

#### Child en ventre sa mere.

A child en ventre sa mere is a child while yet unborn. From the time of conception the infant is in esse for the purpose of taking any estate which is for his interest, whether by descent, devise, or under the statute of distributions. The early English doctrine that an unborn child is not to be regarded as in esse has been long ago exploded, and the decisions of the courts now are uniformly to the effect that children en ventre sa mere are included within the meaning of the word "children." This principle is so well established and so fully understood by the profession that it is not deemed necessary to cite authorities to support it. As bearing upon this point, however, we may call attention to section 1328, Code N. C., which reads as follows: "An infant unborn, but in esse shall be deemed a person capable of taking by deed or other writing any estate whatever in the same manner as if he were born." In *re Seabolt* (U. S.) 113 Fed. 766, 771. See, also, *Heath v. Heath*, 19 S. E. 155, 114 N. C. 547.

#### Children of both husband and wife.

"Children," as used in Mill. & V. Code, § 3128, providing that exempt personal property, on the death of the head of a family who leaves a wife or children surviving, shall go to the widow for herself, and in trust for the benefit of the children of the deceased or of the widow, or of both, means the young sons or daughters of either deceased or his widow who may form part of a family of

which deceased was the head. *Compton v. Perkins*, 23 S. W. 66, 92 Tenn. (8 Pickle) 715.

#### Collateral heirs.

"Children," as used in the general provision of Const. § 10, entitling orphan children of early emigrants to public lands, is to be construed as including only the emigrant's own children, or at most his grandchildren or descendants, and can by no just interpretation be held to include his collateral relations or heirs. *Kennedy's Heirs v. State*, 11 Tex. 108, 110.

#### Grandchildren and other descendants.

"Children," as used in Code 1880, § 1277, providing that a homestead shall descend to the children of the decedent by a former marriage in case there are no children by the second marriage, does not include grandchildren. *Peeler v. Peeler*, 8 South. 392, 393, 68 Miss. 141.

The word "children," as used in the donation act, includes grandchildren, so that the children of a deceased child are entitled, by right of representation, to a child's part in the donation occupied therein by their grandparents. *American Ins. Co. v. Canter*, 26 U. S. (1 Pet.) 511, 546, 7 L. Ed. 242.

"Children," as used in Act July 4, 1836, providing that on the death of a pensioner the bounty shall be given to his widow, and if he leave no widow to his children, includes the grandchildren of the deceased pensioner, whether their parents die before or after his decease, and such grandchildren are entitled per stirpes to the distributive share of the deceased parent. *Walton v. Cotton*, 60 U. S. (19 How.) 355, 358, 15 L. Ed. 658.

The commonly accepted definition of the word "child" is a son or daughter in the first degree. Grandchildren are rarely called "children," the word "descendants" being ordinarily considered more comprehensive than the word "children" or "grandchild." The term "children" cannot be said to have a technical or peculiar meaning in the law, though it has been held to extend to grandchildren in some cases. In *re Curry's Estate*, 39 Cal. 529; *Adams v. Law*, 58 U. S. (17 How.) 417, 15 L. Ed. 149. This construction of the word "children" has been confirmed in many cases involving wills, although cases are not rare where the term "children" has been held coextensive with "issue" or "descendants." Such holdings are not put upon the ground that the word "children" has a technical or peculiar meaning in the law, but because such meaning is necessary to give effect to the instrument, or because of an evident intent on the part of the testator; but as used in 3 How. Ann. St. Mich. § 5772a, providing that the estate of an intestate shall descend to the children of deceased's brothers and sisters in certain cases, the word "children" will be held to

have been used in its ordinary meaning, as a son or daughter in the first degree. In *re Chapoton's Estate*, 61 N. W. 892, 893, 104 Mich. 11, 53 Am. St. Rep. 454.

"Children," in the popular sense of the word, does not include grandchildren, but is confined to descendants in the first degree or immediate offspring; and in general the construction put on the word by law accords with its popular signification, and as used in Statute of Descents and Distributions, § 1, subd. 3, providing that if there be no issue, nor wife nor father, then the property shall be distributed in equal shares to the brothers and sisters of the intestate, and to the children of any deceased brother or sister by right of representation, the word must be confined to the immediate offspring of a deceased brother or sister, and not as including their grandchildren. In *re Curry's Estate*, 39 Cal. 529, 530.

"It is a general rule of the common law that the words 'child' and 'children' do not in their natural sense and proper signification include a grandchild or grandchildren, or descendants in a more remote degree. This rule is subject to some exceptions in case of sales and other conveyances, where it is apparent that it was intended to give the expression a more extended signification. These exceptions are perhaps generally and universally confined to cases where it was necessary to so hold in order to give effect to the words of the instrument, or to the evident intention of the party executing it." And as used in Rev. St. art. 1653, providing that upon the dissolution of the marriage relation by death, all the common property belonging to the community estate of the husband and wife shall go to the survivor if the deceased have no child or children, but if the deceased have a child or children his survivor shall be entitled to one-half of said property, "children" refers to descendants in the first degree only; and if a husband or wife die leaving grandchildren, but no children, the entire community estate passes to the surviving spouse. *Burgess v. Hargrove*, 64 Tex. 110, 112.

"Children," as used in Gen. St. c. 91, § 1, cl. 3, and chapter 94, § 1, providing that the estate of an intestate who leaves no issue or father shall go in equal shares to his mother, brothers, and sisters, and to the children of any deceased brother or sister by right of representation, cannot be construed to include more remote issue, as it is not synonymous with "issue," and does not include grandchildren of the deceased's sister. *Bigelow v. Morong*, 103 Mass. 287, 288.

"Child," as used in Rev. St. c. 61, § 2, providing that an illegitimate child shall be construed as an heir of his mother, and shall inherit her estate, is used in its strict sense, as meaning immediate progeny, and does not

include grandchildren. *Curtis v. Hewins*, 52 Mass. (11 Metc.) 294.

"Children," as used in 9 Stat. 479, § 4, providing that the interest of a settler in a donation, in case of his death before patent, shall go to his devisee, or wife or children, or heirs, includes grandchildren, so that the children of a deceased child were entitled by right of representation to a child's part in the donation occupied by their grandparents, and, while Congress has not named grandchildren in the act, they are included in the equity of the statute. *Cutting v. Cutting* (U. S.) 6 Fed. 259, 265.

In the statute providing that the children of a deceased brother or sister shall take the share which their ancestors would have been entitled to had they survived, the word "children" does not include grandchildren. In all of the cases in which "children" have been held to include grandchildren, the construction was only to effectuate the intention of the donor, but they all show that this was a strange construction, and contrary to the proper import of the word. Certainly the meaning or general import of the word "children" is first descendants. *Gadsden v. Poang* (S. C.) 2 Bay, 293, 305.

"Child," as used in Act April 8, 1833, § 16, relating to advancements to any child of the intestate, should be construed to include a grandchild of the testator who inherits as next of kin. *Appeal of Storey*, 83 Pa. 89, 96; *Appeal of Eshleman*, 74 Pa. (24 P. F. Smith) 42, 46.

Under an act declaring that the surviving widow shall have and enjoy the use of money received from the husband's succession during her widowhood, and that such money shall afterwards vest in and belong to other descendants of said deceased, the term "children" should be construed in its broadest sense as including grandchildren and other descendants. *Succession of Vives*, 35 La. Ann. 371, 374.

"Child," within a statute of descent providing that, if a husband and wife die leaving no child, the property shall go to the survivor, is equivalent to "children or their descendants." *Kyle v. Kyle*, 18 Ind. 108, 109. See, also, *Dunlap v. Shreve's Ex'rs*, 63 Ky. (2 Duv.) 334, 337.

"Children," as used in 2 Rev. St. p. 97, providing that, if any child of such deceased person shall have been advanced by the deceased by settlement or portion of real or personal estate, the value thereof shall be reckoned with that part of the surplus of the personal estate which shall remain to be distributed among the children, is used to designate all the descendants of the intestate who are entitled to share in the distribution of his estate, and cannot be construed in its popular sense as referring to the immediate

offspring of the intestate. *Beebe v. Estabrook*, 79 N. Y. 246, 250.

"Children alive," as used in an Indiana statute providing that if a man marry a second or other subsequent wife, and has by her no children, but has children alive by a previous wife, the land which at his death descends to such wife shall at her death descend to his children, should be construed to mean "children or their descendants alive." *Rushton v. Harvey*, 43 N. E. 300, 301, 144 Ind. 382 (citing *Scott v. Silvers*, 64 Ind. 76).

"Child," as used in Pub. St. Mass. c. 148, § 8, providing that the term "child" in a grant, trust, settlement, etc., shall be held to include a child adopted by the settler, grantor, testator, etc., unless the contrary plainly appears, is the equivalent of such words as "issue," "descendant," or "heir at law." *Wyeth v. Stone*, 11 N. E. 729, 144 Mass. 441.

#### Legitimate children.

"The rule cannot be stated too broadly that the description 'child,' 'son,' 'issue,' and every word of that description, must be taken prima facie to mean legitimate child, son, or issue." *Bell v. Bumstead*, 14 N. Y. Supp. 697, 698, 60 Hun, 580; *Miller v. Miller*, 30 N. Y. Supp. 116, 117, 79 Hun, 197; *Gates v. Seibert*, 57 S. W. 1065, 1068, 157 Mo. 254, 80 Am. St. Rep. 625.

In the absence of some qualifying expression, the word "child" in legislative enactments, as in legal parlance, generally means only and exclusively a legitimate child. *Overseers of Poor of Forest City v. Overseers of Poor of Damascus Tp.*, 34 Atl. 351, 176 Pa. 116.

The term "child," in the statute authorizing a child to sue for the wrongful death of its parent, cannot be limited to mean a legitimate child only. *Marshall v. Wabash R. Co.*, 25 S. W. 179, 180, 120 Mo. 275. Contra, see *Harkins v. Philadelphia & R. R. Co.* (Pa.) 15 Phila. 286; *Good v. Towns*, 56 Vt. 410, 414, 48 Am. Rep. 799; *Dickinson v. The Northeastern R. R. Co.*, 2 Hurl. & C. 735.

The word "child" or "children," when used in a statute or a will, means legitimate child or children only, and does not include those who are illegitimate, and hence a bastard is not a child within the meaning of Rev. St. Ind. 1894, § 267 (Rev. St. 1881, § 266), providing that a father may maintain an action for the death of a child. *McDonald v. Pittsburgh, C., C. & St. L. Ry. Co.*, 43 N. E. 447, 448, 144 Ind. 459, 32 L. R. A. 309, 55 Am. St. Rep. 185.

In an order removing a widow and four of her children to her maiden settlement, "children" means legitimate children, and an illegitimate child, though specifically mentioned therein by his name, will be deemed

to have been misdescribed, and the order as to him void. *Regina v. Parish of Birmingham*, 8 Adol. & E. (N. S.) 410.

"Children," as used in the statute regulating the descent of intestate estates, is used synonymously with "lawful issue," and hence does not embrace illegitimate children. *Cooley v. Dewey*, 21 Mass. (4 Pick.) 93, 95, 16 Am. Dec. 326; *Heath v. White*, 5 Conn. 228, 232; *Orthwein v. Thomas* (Ill.) 13 N. E. 564, 565; *Blacklaws v. Milne*, 82 Ill. 505, 507, 15 Am. Rep. 339. But it will include a child made legitimate by the marriage of its parents and acknowledgment by the father after its birth. *Ross v. Ross*, 129 Mass. 243, 267, 37 Am. Rep. 321. The word "child" or "children," as applied to statutes of inheritance, embraces only legitimate children, unless otherwise specified. *Orthwein v. Thomas*, 21 N. E. 430, 431, 127 Ill. 554, 4 L. R. A. 434, 11 Am. St. Rep. 159. The word "child," within the meaning of the English statute with reference to the subject of succession, has been limited to legitimates. *Heath v. White*, 5 Conn. 228, 232.

"Children," as used in the statute of descent and distribution, include all such children and issue as are by law capable of inheriting, and are not necessarily confined to children and issue born in lawful wedlock. *Drain v. Violet*, 65 Ky. (2 Bush) 155, 157; *Appeal of Dickinson*, 42 Conn. 491, 506, 19 Am. Rep. 553; *Power v. Hafley*, 4 S. W. 683, 685, 85 Ky. 671; *Ross v. Ross*, 129 Mass. 243, 267, 37 Am. Rep. 321.

"Child," as used in Code, § 2664, providing that "the exclusive possession by a child of lands belonging originally to the father, without payment of rent for the space of seven years, shall create conclusive presumption of a gift and convey title to the child," does not include an illegitimate child, but refers only to legitimate children, such being the well-established meaning of the word at common law. *Floyd v. Floyd*, 24 S. E. 451, 452, 97 Ga. 124.

As used in the statute of wills (1 Gross, St. p. 807, § 66), providing that, in case an illegitimate person leaving no widow, surviving husband, or descendant shall die, the property of such person shall descend and vest in the mother and her children, the word "children" is to be construed as being used "in its proper signification, and means the offspring of the mother, whether legitimate or illegitimate." *Rogers v. Weller* (U. S.) 20 Fed. Cas. 1130, 1131.

The term "children," as used in a statute providing that, where a testator omits to provide for any of his children, such children shall be entitled to the same share in the estate as they would have received had the testator died intestate, unless it shall appear that the omission was intentional, means legitimate children, and does not en-

title an illegitimate child to share in the estate in the same manner as it would have taken had his parent died intestate. *Kent v. Barker*, 68 Mass. (2 Gray) 535, 536; *In re Wardell's Estate*, 57 Cal. 484, 491.

Prima facie, the words "child or children," when used in a statute, will, or deed, mean legitimate child or children. *Johnstone v. Tallafarro*, 107 Ga. 6, 32 S. E. 931, 45 L. R. A. 95. This definition will not be extended by implication so as to embrace other children, unless such construction be necessary to carry into effect the manifest intent of the testator. *Hicks v. Smith*, 94 Ga. 809, 22 S. E. 153. It was so held in *Dickinson v. Northeastern Ry. Co.*, 2 Hurl. & C. 735, in relation to Lord Campbell's act, which is a prototype of our statute as to wrongful homicide. To the same effect is *Clark v. Carlin Coal Co.* [1891] App. Cas. 412, *Harkins v. Philadelphia & R. R. Co.* (Pa.) 15 Phila. 286, as to the meaning of the word as used in Act April 26, 1855, providing that persons entitled to recover damages for any injury causing death shall be the husband, widow, child, or parents of the deceased, and no other relative. *Robinson v. Georgia R. & Banking Co.*, 43 S. E. 452, 453, 117 Ga. 168, 60 L. R. A. 555.

#### As minor child.

"Children," in its ordinary definition in relation to the father, are his sons and daughters, and, in an act providing that a homestead shall go to the widow and children of a deceased father, it means his sons and daughters, or either, and not minor children alone. *Vandiver v. Vandiver*, 20 Kan. 501, 503.

In Code, § 2920, providing that "a widow or if no widow, a child or children may recover for the homicide of the husband or parent," "children" means the minor children of the deceased father, and not an adult. *Coleman v. Hyer*, 38 S. E. 962, 963, 118 Ga. 420.

Within the provision of the statute of the United States that children of persons who have been or are citizens of the United States shall, though born out of the limits thereof, be considered as citizens thereof, the word "children" means minor and not adult children. *Dryden v. Swinburne*, 20 W. Va. 89, 131.

"Child," as used in Gen. St. 1878, c. 66, § 34, providing that a father, or, in case of his death or desertion of his family, the mother, may maintain an action for the injury of the child, means minor child. *Schmit v. Mitchell*, 61 N. W. 140, 59 Minn. 251 (citing *Gardner v. Kellogg*, 23 Minn. 463).

"Children," as used in Act 1883, No. 191, giving a right of action, against any person selling liquor to any children, in favor of any one injured in consequence of such

sale, means all minors. *Flower v. Witkovsky*, 37 N. W. 364, 366, 69 Mich. 371.

The word "child" in Pub. St. c. 164, relative to the adoption of children, means minor child. In *re Moore*, 14 R. I. 38.

"Child or children" when used in statutes exempting the homestead from sale during the time it shall be occupied by the widow or child or children of any deceased person, etc., means minor child or minor children. *Thomas v. Sybert*, 33 S. W. 1059, 1061, 61 Ark. 575; *Batley v. Barker*, 64 Pac. 79, 80, 62 Kan. 517, 56 L. R. A. 33; *Hoffman v. Neuhaus*, 30 Tex. 633, 636, 98 Am. Dec. 492; *Quattlebaum v. Triplett*, 61 S. W. 162, 163, 69 Ark. 91.

"Children," within the meaning of the statute providing that, whenever the widow or minor children of a deceased person shall be left in necessitous circumstances, the widow, or the legal representatives of the children, shall be entitled to demand and receive from the succession of their deceased father or husband \$1,000, and the surviving widow shall have and enjoy the usufruct of the money, etc., is to be construed as meaning minor children, and other descendants who are minors. *Succession of Durkin*, 30 La. Ann. 669, 670.

In a statute providing that the action for the death of a child must be brought by the father, etc., the word "child" is not to be construed as equivalent to the word "minor," but is limited in its application to one who occupies the position of a child to a parent, as depending upon him for protection, support, and education, and cannot be held to include one who, although a minor, has assumed the relations and responsibilities evolving upon the head of a family. Webster says the word is applied to infants from their birth, but that the time when they cease ordinarily to be so called is not defined by custom. The position occupied by a person should determine the question rather than the age alone. *Pittsburgh, Ft. W. & C. Ry. Co. v. Vining's Adm'r*, 27 Ind. 513, 519, 92 Am. Dec. 269.

"Children," under an act declaring that the surviving widow shall have and enjoy the use of money received from the succession during her widowhood, and that such money shall afterwards vest in and belong to other descendants of said deceased, termed "children," should be construed as meaning minor children. *Succession of Vives*, 35 La. Ann. 371, 374.

The expression "children," as used in the act relating to charities and charitable and reformatory institutions, means minor persons under the age of 14 years. *Gen. St. Kan.* 1901, § 6650.

The expression "child," as used in the article relating to factories, means a person

under the age of 14 years. *Rev. St. Mo.* 1899, § 10,104.

#### As referring to relationship.

In Pub. St. Mass. c. 100, § 24, giving a right of action to the child of a person in the habit of drinking liquor to excess against the person selling such liquor to the parent, "child" does not mean a minor child, but is used solely with reference to relationship. Neither does the question whether or not the child bringing the action is dependent on the parent for support have anything to do with the existence of the right of action, but the statute contemplates that the habitual drunkenness of the parent is a substantial injury and gives a right to recover damages, not only for any injury to the person or property, but for the shame and disgrace brought upon them. *Taylor v. Carroll*, 13 N. E. 348, 350, 145 Mass. 95.

The words "parents and children" in Act April 26, 1855, authorizing actions by parents or children for the wrongful death of the parents of the children or children of parents, are used to indicate the family relation in point of fact as the foundation of the right of action, without regard to age. The only condition to recovery in such case is the existence of the family relation, and a reasonable expectation, to the person bringing the action, of pecuniary advantage taken away by the death of the deceased. *Pennsylvania R. Co. v. Adams*, 55 Pa. (5 P. F. Smith) 499, 502.

*Rev. St. Mo.* § 968, providing for the adoption of children, uses the word "child" in the sense of its relation to the word "parent," and in the capacity of heir. It provides that, upon the execution of the deed of adoption, the child shall have the same rights in relation to the person adopting it as it would have in relation to its own parents. The intention of the statute is to enable a person to bestow upon the object of its favor the attribute that the law bestows on one's own offspring, and to establish as nearly as possible the relation of parent and child. The word "child," in relation to the word "parent," gives no suggestion as to age, and that is the sense in which it is used in the statute. The law has placed no limitation as to the age of the child to be adopted, and a person over the age of 21 years may be adopted as a child. In *re Moran's Estate*, 52 S. W. 377, 378, 151 Mo. 555.

#### Stepchildren.

The primary sense of "children" is offspring, and that is the sense in which it is ordinarily used when the question of relationship is involved. It is, indeed, often applied by elderly persons as a word of endearment or affection to one younger, where no relationship whatever exists. But it cannot be properly held, when found in a statute or



contract, to include stepchildren. *Tepper v. Supreme Council of Royal Arcanum*, 45 Atl. 111, 115, 59 N. J. Eq. 321. See, also, *Hussey v. Dillon*, Ambler, 603; *Cutter v. Doughty*, 23 Wend. 513, 521.

#### CHILD—CHILDREN (In Wills).

A power given by will to appoint to "children" cannot be construed to authorize an appointment to the mother of the children. *Salter v. Howell* (Pa.) 15 Serg. & R. 188, 190.

A will providing that the testator's executors should give certain property to the testator's "children," in certain specified amounts, does not show an intention to exclude the children of a deceased daughter of the testator, and such children were entitled to a full share of the estate as if the deceased had died intestate. In *re Utz's Estate*, 43 Cal. 200, 201.

#### Adopted children.

"Children," as used in a will, does not authorize one adopted, under the statute providing that a child may be adopted so as to be capable of inheriting, to take under its terms. *Russell v. Russell*, 3 South. 900, 84 Ala. 48.

An adopted child of M., she being dead, takes as a legatee within the description of "children," under a will giving property to testator's three sons and his daughter M., with provision that in case of the death of either of the four the share of such deceased should go to the children of such deceased, under *Burns' Rev. St. Ind. 1894*, § 838, *Horne's Rev. St. 1897*, § 826, providing that after adoption the adopted parent shall occupy the same position as a natural parent. *Bray v. Miles*, 54 N. E. 446, 448, 23 Ind. App. 432.

#### Adults.

In a will providing that testator's wife should receive annually a sufficient amount of money to support her and her children, the term "children" means all of his children, and not only such as constitute a part of the family, and includes those who by marriage had ceased to be members of the family. *Hollingsworth v. Hollingsworth's Ex'rs*, 65 Ala. 321, 334.

#### After-born children.

The term "children," in a bequest to A. and his children, if A. has no children at the time the will is made, or when it takes effect by the death of the testator, has never been held to create any interest in after-born children as purchasers. *Vanzant v. Morris*, 25 Ala. 285, 292; *Annable v. Patch*, 20 Mass. (3 Pick.) 360, 363.

A devise in general terms to the testator's "children" does not include a posthumous child. *Armistead v. Dangerfield* (Va.) 3

*Munf. 20*, 5 Am. Dec. 501; *Shotts v. Poe*, 47 Md. 513, 518, 28 Am. Rep. 485.

The general rule is that, where a bequest or devise is made in a will to "children," the word refers to those living at the date of the death of the testator; but where a will was executed disinheriting the children, a child born after the execution of the will will not be included in the term "children" so as to be disinherited. *Sutton v. Hancock*, 42 S. E. 214, 217, 115 Ga. 857.

Within the meaning of a bequest "to my grandchildren, the children of my son E.," a grandchild born after the death of the testator is included. *Swift v. Duffield* (Pa.) 5 Serg. & R. 38, 39.

There is a settled rule of construction that an immediate gift to "children" as a class includes only those who are in existence at the date of the testator's death, but that where a particular estate or interest is carried out, with a gift over, the limitation in remainder will embrace those living at the testator's death, as well as those who shall subsequently come into existence before the period fixed for distribution. In *re Landwehr's Estate*, 23 Atl. 348, 349, 147 Pa. 121.

A devise was to D. and her "children." D., at the date of the devise, had no children, but afterwards had one child. Held, that the devise manifested a clear intention that the children of D. should take as purchasers; but as there were no children in being at the time of such devise, the only rational deduction was that the testator intended to give a life estate to D., with a remainder to the children she might thereafter have. *Johnson v. Johnson*, 59 Ky. (2 Metc.) 331, 335.

#### Child by former marriage.

Where testator devised land to his wife for life, with remainder to his then living children, and also directed that a certain sum from the residue of his estate should be divided among the children surviving him, the word "children" meant only by the wife mentioned in the will, and children by a former wife were not included in the term. *Gelston v. Shields*, 78 N. Y. 275.

#### Child by future marriage.

"When a parent or ancestor, in disposing of property and in designating the object of her bounty, speaks of 'children,' we think it more reasonable to assume that she intended those in being, or those likely to be born of an existing marriage, rather than those who at some remote or indifferent time in the future might possibly be born of a marriage neither existing nor contemplated." *Webb v. Hitchins* (Pa.) 14 Wkly. Notes Cas. 434, 436.

A bequest of a life estate to the testator's wife, which directed that in case at

her death she left a child or children his estate was to descend in fee to such child or children, did not mean or contemplate a child born of the testator's widow by a second marriage, since a child not conceived at the death of the testator is as incapable of receiving a conditional legacy as he is of receiving a legacy without condition. *Sevier v. Douglas*, 10 South. 804, 44 La. Ann. 605.

"Child or children," as used in a will creating a trust for the benefit of testator's son, which in case of his death should be conveyed for the use and benefit of his wife and child or children until they should attain lawful age, means those in being, or likely to be born of an existing marriage, rather than those who at some remote or indefinite future time might possibly be born of a marriage neither existing nor in contemplation. In *re Sharpe's Estate* (Pa.) 15 Wkly. Notes Cas. 419, 421.

#### Child en ventre sa mere.

The words "youngest child," in a will creating a trust to continue to run until testator's youngest child shall attain the age of 21 years, are to be construed to include a child en ventre sa mere. In the famous case of *Thellusson v. Woodford*, 4 Ves. 227, Buller, J., at page 322 et seq., discusses the doctrine, comments upon the cases, and concludes: "Why should not children en ventre sa mere be considered generally in existence? They are entitled to all the privileges of other persons. In this case it is enough to say that such child is capable of having an estate given to him, and consequently to another person for his life." This decision is noticed by the chancellor in *Marsellis v. Thalhimer*, 2 Paige, 35, 21 Am. Dec. 66, where he says: "That it may be considered in existence in some cases for the benefit of others may perhaps be admitted, as in the case mentioned by Buller, J., in *Thellusson v. Woodford*, 4 Ves. 323, of an estate given to a third person for the life of an infant en ventre sa mere." In *Stedfast v. Nicoll*, 3 Johns. Cas. 18, Kent, J., notes "a late case" (*Doe v. Clarke*, 2 W. Bl. 400), where "the court go so far as to say that it is now settled that an infant en ventre sa mere shall be considered, generally speaking, as born, for all purposes for his own benefit. In that case Chief Justice Eyre observed 'that an infant en ventre sa mere comes clearly within the description of a child living at the time of his father's death.'" *Cooper v. Heatherton*, 73 N. Y. Supp. 14, 16, 65 App. Div. 561.

A will providing that, if the testator's son should at his death leave a child or children born in lawful wedlock, the remainder of certain real estate should go to and descend to such children, includes a child en ventre sa mere, and which was born after the son's decease, since in the construction of devises a child en ventre sa mere must be considered as a child in esse. *Barker v.*

*Pearce*, 30 Pa. (6 Casey) 173, 175, 72 Am. Dec. 691.

#### Children living.

The term "children," in a will devising property to the children of a person, means only those children living at the time of testator's death. *Du Bois v. Ray*, 35 N. Y. 162, 171; *Robinson v. McDiarmid*, 87 N. C. 455, 461; *Echols v. Jordan*, 39 Ala. 24, 29; *Appeal of Fairfax* (Pa.) 40 Leg. Int. 359. It is a general rule that, where the word "children" is used in a will as descriptive of persons who are to take an interest in the inheritance, it means children living and in being at the time the legacy vests. *Gillespie v. Schuman*, 62 Ga. 252, 256.

"Children," as used in a will devising a certain estate to the children of W., to be equally divided between them at W.'s decease, includes all the children living at the testator's death, and is not limited to such as should be living at the time of W.'s death, and the effect of the provision is merely to suspend the distribution of the estate until the decease of W. *Lombard v. Willis*, 16 N. E. 737, 739, 147 Mass. 13.

A "child," within a devise to "all the children of my sister and their heirs and assigns, including any and all of her children who may be living at her death," has no broader meaning than the primary signification of the word, and her children living at her death were the only class designated by the will. *Ward v. Cooper*, 13 South. 827, 69 Miss. 789.

A bequest to children as a class is to be construed as "only including those living at the date of the will, notwithstanding a provision in favor of issue in case of death, unless an intention to the contrary may be deduced from other clauses or phrases." *Stires v. Van Renssalaer* (N. Y.) 2 Bradf. Sur. 172, 174.

A trust was created so that in case husband and wife should at the death of the survivor leave any child or children, and such child or children attain 21, to convey to such child, if but one, and, if there should be more than one child who should live to attain 21, to convey to such children who should attain 21, according to the appointment of the father or the mother living, and, in default of appointment, equally. Held, that the words "child or children," as there used, included all the descendants lawfully begotten of both parents who attained 21, as well those who died in the life of one parent as those who survived both. *King v. Hake*, 9 Ves. 438, 444.

"Children," within the meaning of a devise to executors in trust for A. for life, and at her death to the use of her five children, and all she may hereafter have, and who may be then living, in fee simple, can-

not be construed to include a grandchild whose parent was one of A.'s children, but the term is limited to children living at the date of the death of A. *Shanks v. Mills*, 25 S. C. 358, 360; *Haywood's Heirs v. Moore*, 21 Tenn. (2 Humph.) 584, 586.

#### Collateral heirs.

In a will by which testator devised his estate to his widow for life, and on her death the remainder to "my children and their heirs respectively, to be divided in equal shares between them," and at the time of the execution of the will testator had four children living, and four children had deceased before that time leaving living children, and one child had died many years before in infancy, the term "to my children and their heirs respectively" should be understood and was intended to mean "to my children and the heirs of my children respectively, to be equally divided," and the word "heirs" was intended to include only children and descendants, and not collateral heirs. *Appeal of Bond*, 31 Conn. 183, 192.

#### Grandchildren and other descendants.

"Children," when used in a will bequeathing property to testator's children, means the "immediate progeny of the parent, and does not include grandchildren. As wills are to be construed to effectuate the intention of the testator, the words should be construed in their most known and usual signification. When referring to the family relations, terms are used in their common meaning and acceptance to designate the classes or degrees intended. Thus 'parent and child' mean either father or mother and son or daughter, and ordinarily, if any difference is meant, the appropriate term is used, as 'grandparent' and 'grandchildren.' A man, in speaking of or providing for his 'children,' will refer to the issue of his body direct, and not to the issue of his issue. Nature suggests and maintains the respective distinctions, and directs the thought or mind to the several successive degrees of relationship only when the distinctive appropriate terms are used." *Wharton v. Silliman's Ex'rs*, 22 La. Ann. 343, 344.

"Children," in a bequest to a trustee for the sole use and benefit of a daughter and her children, means the immediate offspring of the daughter beyond controversy; a child or children born to his daughter. The term "children" expresses the immediate offspring of the parent. Neither in its vulgar nor its legal sense is it expressive of remote descendants. To make it so mean, it must be coupled with other expressions, which will give to it such signification. *Turner v. Ivie*, 52 Tenn. (5 Helsk.) 223, 230.

The word "children," in a will, does not, ordinarily and properly speaking, comprehend grandchildren or issue generally. Their being included in that term is only

permitted in two cases, viz., from utter necessity, which occurs when the will would remain inoperative, unless the sense of the word "children" were extended beyond its natural import, and where a testator has clearly shown by his words that he did not intend to use the term "children" in the proper, actual meaning, but in a more extended sense. In re *Steinmetz's Estate*, 45 Atl. 663, 665, 194 Pa. 611; *Appeal of Provident Life & Trust Co., Id.*; In re *Hunt's Estate*, 19 Atl. 548, 549, 133 Pa. 260, 19 Am. St. Rep. 640; *Appeal of Barnitz*, 5 Pa. (5 Barr) 264, 265; *Horwitz v. Norris*, 49 Pa. (13 Wright) 218, 218; *Appeal of Castner*, 88 Pa. 478, 491; In re *Jarden's Estate (Pa.)* 3 Phila. 438, 439; *Appeal of Guthrie*, 37 Pa. (1 Wright) 9, 14; *Hallowell v. Phipps (Pa.)* 2 Whart. 376, 379; In re *Coates St. (Pa.)* 2 Ashm. 12, 23; *Dickinson v. Lee (Pa.)* 4 Watts, 82, 83, 26 Am. Dec. 684; In re *Elchelberger's Estate*, 5 Pa. (5 Barr) 264, 265; In re *Fisher's Estate (Pa.)* 13 Phila. 401; In re *Brown's Estate (N. Y.)* 29 Hun, 412, 417; In re *Sanders (N. Y.)* 4 Paige, 293, 296; *Shannon v. Pickell*, 8 N. Y. Supp. 584, 586, 55 Hun, 127; *Tier v. Pennell (N. Y.)* 1 Edw. Ch. 354, 355; *Jackson v. Staats (N. Y.)* 11 Johns. 337, 347, 6 Am. Dec. 376; *Marsh v. Hague (N. Y.)* 1 Edw. Ch. 174, 186; *Mowatt v. Carow (N. Y.)* 7 Paige, 328, 339, 32 Am. Dec. 641; *Prowitt v. Rodman*, 37 N. Y. 42, 55; In re *Potter's Estate*, 24 N. Y. Supp. 586, 590, 71 Hun, 77; *Low v. Harmony*, 72 N. Y. 408, 413; *Palmer v. Horn*, 84 N. Y. 516, 521; *Magaw v. Field*, 48 N. Y. 668; In re *Moore's Estate*, 35 N. Y. Supp. 782, 784, 90 Hun, 162; *Scott v. Nelson (Ala.)* 3 Port. 452, 455, 29 Am. Dec. 266; *Continental Life Ins. Co. v. Webb*, 54 Ala. 688, 699; *Brokaw v. Peterson*, 15 N. J. Eq. (1 McCart.) 194, 198; *Steward v. Knight*, 49 Atl. 535, 538, 62 N. J. Eq. 232; *Tipton v. Tipton*, 41 Tenn. (1 Cold.) 252, 255; *Denny v. Closse*, 39 N. C. 102, 105; *Reeves v. Brymer*, 4 Ves. 693, 697; *Williams v. Knight*, 27 Atl. 210, 211, 18 R. I. 333; *Tillinghast v. De Wolf*, 8 R. I. 69, 73; *Winsor v. Odd Fellows Beneficial Ass'n*, 18 R. I. 149, 150; In re *Reynolds*, 39 Atl. 896, 20 R. I. 429; *Annable v. Patch*, 20 Mass. (3 Pick.) 360, 363; *Willis v. Jenkins*, 30 Ga. 167, 168; *Waddell v. Leonard*, 53 Ga. 694, 697; *Hopson's Ex'r v. Commonwealth*, 70 Ky. (7 Bush) 644, 645; *Yeates v. Gill*, 48 Ky. (9 B. Mon.) 203, 204; *Churchill v. Churchill*, 59 Ky. (2 Metc.) 466, 469; *Chenault's Guardian v. Chenault's Ex'rs*, 11 S. W. 424, 88 Ky. 83; *Taylor v. Watson*, 35 Md. 519, 522; *Ingraham v. Meade (U. S.)* 13 Fed. Cas. 50, 53; *Heyward v. Hasell*, 2 S. C. (2 Rich.) 509, 510.

"Child" or "children," when used in a will, cannot be construed as including grandchild or grandchildren, unless there is a clear intention to the contrary expressed in the instrument itself. *Yates v. Shern*, 86 N. W. 1004, 1007, 84 Minn. 161; *Sheets v. Grubb's Ex'r*, 61 Ky. (4 Metc.) 339, 341; *Sloan v. Thornton*, 43 S. W. 415, 416, 102 Ky. 443; *Du-*

vall v. Goodson, 79 Ky. 224, 227; Vaughan v. Vaughan's Ex'r, 83 S. E. 605, 97 Va. 322; Walker v. Williamson, 25 Ga. 549, 554; White v. Rowland, 67 Ga. 546, 554, 44 Am. Rep. 731; Arnold v. Alden, 50 N. E. 704, 708, 173 Ill. 229; Douglas v. James, 28 Atl. 319, 320, 66 Vt. 21, 44 Am. St. Rep. 817; In re Sparks' Estate, 58 N. Y. Supp. 766, 767, 27 Misc. Rep. 350; Sanson v. Bushnell, 55 N. Y. Supp. 272, 275, 25 Misc. Rep. 268; Mowatt v. Carow (N. Y.) 7 Paige, 328, 339, 32 Am. Dec. 641; Adams v. Law, 58 U. S. (17 How.) 417, 421, 15 L. Ed. 149; Cromer v. Pinckney (N. Y.) 3 Barb. Ch. 466, 475; Gardner v. Heyer (N. Y.) 2 Paige, 11, 14; Stires v. Van Rensselaer (N. Y.) 2 Bradf. Sur. 172, 174; Bellstein v. Bellstein, 45 Atl. 73, 74, 194 Pa. 152, 75 Am. St. Rep. 692; McKeehan v. Wilson, 53 Pa. (3 P. F. Smith) 74, 78; Izard v. Izard's Ex'rs, 2 Desaus. 308, 309; Russell v. Wright, 13 South. 594, 595, 98 Ala. 652; Radcliffe v. Buckley, 10 Ves. 195; Earl of Orford v. Churchill, 3 Ves. & B. 69. Which intention is not indicated by the mere use of the word "children." Phillips' Devisees v. Beall, 39 Ky. (9 Dana) 1, 33 Am. Dec. 518.

"Children," as well as "issue," may stand in the collective sense for grandchildren, where the justice or reason of the case requires it." Prowitt v. Rodman, 37 N. Y. 42, 54; In re Paton, 18 N. E. 625, 627, 111 N. Y. 480; In re Logan, 80 N. E. 485, 486, 131 N. Y. 456.

The term "children" has often been construed to include grandchildren, but it is where succession is evidently intended by the use of the word "children" as equivalent to "issue." McKeehan v. Wilson, 53 Pa. (3 P. F. Smith) 74, 78. "Children," as used in a will, ordinarily does not extend further than to immediate descendants. Where, however, the testator uses the word "children" and the word "issue" indiscriminately, the meaning of the word "issue" may be given to the word "children," and thus include grandchildren. In re Goble's Will, 10 N. Y. Supp. 18, 19; Osgood v. Lovering, 33 Me. 464, 469; Heyward v. Hasell, 2 S. C. (2 Rich.) 509, 510; In re Fisher's Estate (Pa.) 13 Phila. 401.

In its technical legal import the word "children" concurs with its ordinary and popular signification, and does not include grandchildren, where there are any persons in existence at the date of the will, or when the bequest or legacy takes effect, answering such meaning of the term. In such case the word "children" will never denote or signify grandchildren. West v. Rassman, 34 N. E. 991, 996, 135 Ind. 278; Ward's Ex'rs v. Sutton, 40 N. C. 421. But the word will not be construed as including grandchildren when it is evident from a review of the will that testator knew perfectly well how to distinguish between his children and grandchildren in the several bequests of his will. Izard v. Izard's Ex'rs (S. C.) 2 Desaus. 306, 312; Scott

v. Nelson (Ala.) 3 Port. 452, 463, 29 Am. Dec. 286.

The word "children," in a will which, after various devises and bequests, containing, among others, a provision for a granddaughter, gives the testator's residuary estate to his wife and all his living "children," share and share alike, and which contains specific directions for the investment and management of the portions of testator's two daughters, is to be construed as being used in its primary signification, and not to include the granddaughter. Low v. Harmony, 72 N. Y. 408, 413.

The word "children," as used in a will, will not be construed to include grandchildren, "when there are persons to answer the description of children, unless there be some ambiguity in the language rendering it necessary, or unless the testator's intent, expressed in other parts of the will, could not be otherwise satisfied." Where the testator also uses the word "grandson" in the same connection as he uses the word "children," it is sufficient to show that he did not mean to include grandchildren by the use of the word "children." Tillinghast v. De Wolf, 8 R. I. 69, 73.

The term "children," in a devise of property, only includes grandchildren when there are no children in existence. Ewing's Heirs v. Handley's Ex'rs, 14 Ky. (4 Litt.) 346, 357, 14 Am. Dec. 140; In re Fisher's Estate (Pa.) 13 Phila. 401; Jackson v. Kip (U. S.) 13 Fed. Cas. 220, 224; Palmer v. Horn (N. Y.) 20 Hun, 70, 71.

"As ordinarily used in a will, 'children' is a word of description and limited to immediate offspring. Yet the cases are numerous where a more extended meaning has been given to carry out the presumed intention of the testator and prevent the disinheritance of grandchildren whose parents were not living. Where a clause is fairly susceptible of two constructions, that is to be preferred which inclines to the inheritance of the children of a deceased child." Bowker v. Bowker, 19 N. E. 213, 215, 148 Mass. 198.

"Children," as used in a will directing testator's estate to be divided into parts and set apart for the use of each of his children for life, should be construed in its primary signification, as referring to the testator's immediate descendants, and not to grandchildren. In re Truslow, 35 N. E. 955, 956, 140 N. Y. 599; Tayloe v. Mosher, 29 Md. 443, 458.

"Child," as used in a will giving a certain sum of money to the child of a certain person, should be construed to include grandchildren, though it is but a truism to say that the word "child" does not ordinarily include grandchildren. In almost all the cases in which judges have held that the word "child" cannot be construed to mean grand-

children, an exception has been noted as possible to arise out of the necessity of the case. *Dunn v. Cory*, 39 Atl. 368, 369, 56 N. J. Eq. 507.

Where testator's will directed that after the decease of the wife, and after the youngest child should arrive at the age of 21, all his property should be sold, and the proceeds equally divided among the children he may then have, the word "children" included grandchildren. *In re Paton* (N. Y.) 41 Hun, 497, 500.

The word "children," as used in a will devising a life estate to the testator's children, and providing that upon their death the estate was to go to his grandchildren then living, cannot be construed to mean grandchildren, so that the word "grandchildren" may be interpreted to mean great-grandchildren. *Bragg v. Carter*, 50 N. E. 640, 171 Mass. 324.

"Children," as used in a will providing that, if a certain devisee should die without issue, then and in that event the devise should go to the children of H., must be taken in its primary signification, and cannot include H.'s grandchildren whose parents were dead at the time the will was executed. *Pugh v. Pugh*, 5 N. E. 673, 674, 105 Ind. 552.

In a clause in a will providing that "all the before-mentioned legacies bequeathed to my children I give unto them and their heirs, forever, according to the way they are stated," the term "children" does not include grandchildren; it being clear that the word "heirs" is not used in the sense of heirs general, but heirs special, of their bodies. *Graham v. Graham*, 4 W. Va. 820, 823.

In a devise to the widow of testator's son, for "the benefit of her children, until the estate be settled," cannot be held to extend to grandchildren. *Taylor v. Mosher*, 29 Md. 443, 458.

Where testator gives his entire estate to his children, share and share alike, and at the time the will was made he had living ten children and one grandchild, the daughter of a deceased daughter, with whom he was on friendly terms, cannot be construed to include the granddaughter. *Culp v. Culp*, 41 N. E. 863, 864, 142 Ind. 159.

In a will directing that the interest on a certain fund be paid to testator's daughter during her life, and after the death of the daughter to be given to her children, the word "children" is to be construed as not including grandchildren of the daughter. *Felt's Ex'rs v. Vanatta*, 21 N. J. Eq. (6 C. E. Green) 84, 85.

The technical and legal meaning of the words "child or children" is immediate offspring, and does not include grandchildren; and where a will devised property to the testatrix's sister, "and, if she be dead, to her

children," and a sister and a child of hers died thereafter, but before the testatrix, the children of the deceased child, who were living when the testatrix died, did not take under the will. *Grant v. Mosely* (Tenn.) 52 S. W. 508.

The term "children," used to designate the remaindermen in a will devising an estate to A. for life, and at his death to and among the children and issue of the said A. in such shares and proportions and for such estates as he by will or other appointment in writing shall direct, and giving the remainder to the children of A., or the children of any deceased child, does not include a grandchild of A., whose parent was living at the time of the death of A. *Wickersham v. Savage*, 58 Pa. (8 P. F. Smith) 365, 370.

A will recited that the testator, knowing that his wife would ever continue the same kind, devoted mother to her children which she had always proven herself, gave all his property to his wife, expressly excluding said children. Held, that the word "children" was used in an enlarged sense, which includes descendants of the second as well as the first degree, and therefore included grandchildren as well as children. *Rhoton v. Blevin*, 34 Pac. 513, 514, 99 Cal. 645. Thus grandchildren are not entitled to take under a will by which testator bequeaths to his wife a certain slave for her life, and after her death the proceeds of the sale of the slave to be equally divided among testator's children then living. *Denny v. Closse*, 39 N. C. 102, 105.

The word "children," in a will devising a fund to a trustee for the support and maintenance of a lunatic daughter during life, and directing that after her death her share should be equally divided among testator's children, or, if they or any of them be dead, to their legal representatives, share and share alike, cannot be construed to include grandsons of testator, who are children of a daughter who was deceased at the time the will was made, and for whom he had otherwise provided in his will. *Herr's Estate*, 28 Pa. (4 Casey) 467, 470.

In a bequest to children, grandchildren will not take, even where by statute lapse is provided against in the case of children dying in the lifetime of the testator; but in a gift to children and heirs, grandchildren and great-grandchildren and descendants to the remotest degree are entitled to take, and the persons so entitled may change from day to day after the execution of the will and in the lifetime of the testator, both in name and degree of relationship, so that the devise will be held to be per stirpes, and not per capita. *In re Ashburner's Estate*, 28 Atl. 361, 159 Pa. 545.

In *Hussey v. Dillon*, Amb. 603, it is held that "children" means those in the degree of

relationship in the first descent, while the word "grandchildren" takes in those of the second descent, and even the third, viz., great-grandchildren; for these are still grandchildren, though of a more remote degree. "This," says the Lord Chancellor, "accords with the common parlance, which is the true way of interpreting words in a will." *Cutter v. Doughty* (N. Y.) 23 Wend. 513, 521.

The primary meaning of the word "children," when used in a devise of property to a certain person, with remainder to children, is descendants of the first taker. *Harrison v. McAdam*, 76 N. Y. Supp. 701, 703, 38 Misc. Rep. 13.

The word "children" has several ordinary and popular significations. One includes all descendants. Another is limited to descendants of the first degree. As used in a will providing that, when the youngest of the children of testator's daughter should arrive at a certain age, all of his estate should be theirs, should be construed in its limited sense. The youngest of all future generations was not the individual named for the purpose of fixing the time of distribution. The general and substantially universal understanding that, as a description of legatees and devisees, "children" includes the issue of those who die after the will is made, is sufficient evidence that the devise to children expresses an intent to include such issue. *Edgerly v. Barker*, 31 Atl. 900, 903, 66 N. H. 434, 28 L. R. A. 328.

"There can be no dispute that the term 'children' is not a technical word of limitation, but is ordinarily a word of purchase. 'Children,' in its primary and ordinary sense, means the legitimate descendants of the first generation of the person named; and, where there is nothing to show in a will that the donor intended to use the term in a different sense, it will not include illegitimate offspring, or stepchildren, or grandchildren, or more remote descendants. Remoter descendants are sometimes permitted to take under an enlarged sense of the term 'children,' in support of the intention of the testator, where the will would be otherwise inoperative, or where the context, by the employment of the term 'issue' or 'descendants' promiscuously with 'children,' exhibits the intention of testator to use the term 'children' in a secondary and liberal sense. Such liberal construction of the term 'children' is never made, except for the benefit of the issue of children, or from the force of the context. It is not made when persons exist who accurately fulfill the terms of the description." *Matthis v. Hammond* (S. C.) 6 Rich. Eq. 399, 401.

The word "children," as it is ordinarily used in a will, means immediate descendants; that is, of the first generation. It does not include grandchildren, unless it is necessary to give it that meaning in order

to give effect to the will, or unless the testator has clearly shown by other language in his will that he does not use the word in its ordinary sense, but intends it to have a more extended signification. *Tiffany v. Emmet*, 53 Atl. 281, 282, 24 R. I. 411 (citing *Williams v. Knight*, 18 R. I. 833, 338, 27 Atl. 210; *Tillinghast v. De Wolf*, 8 R. I. 69; *Winsor v. Odd Fellows' Beneficial Ass'n*, 13 R. I. 149, 159).

Where testatrix provided for the distribution of her estate among her "children," of whom she had seven living at her death, the use of the word was free from ambiguity, and the uniform current of authority in this and other courts sustains the proposition that it will not be construed to include grandchildren, unless from necessity, which occurs when the will would be inoperative unless the sense of the word "children" were extended beyond its natural import, and when the testator has clearly shown by other words that he did not use the term "children" in the ordinary, actual meaning of the word, but in a more extensive sense, that this construction can only arise from a clear intention or necessary implication, as where there are no children, but are grandchildren, or where the term "children" is further explained by a limitation over in default of issue. *Denny v. Closse*, 39 N. C. 102. The gifts being to children, the general rule is that, where there are persons who answer that description, grandchildren cannot take. *Lee v. Baird*, 44 S. E. 605, 607, 132 N. C. 755 (citing *Ward's Ex'rs v. Sutton*, 40 N. C. 421).

The word "child," as used in a will giving to each of testator's children, and his or her heirs, a separate tract of land, providing that, if any of his (testator's) heirs died leaving no child or children, then the share of the one so dying was to go to the survivors, will be construed to include a grandchild. *Miller v. Carlisle*, 14 S. W. 75, 76, 90 Ky. 205.

Under the name of "children," as used in the title on wills, are included descendants, of whatever degree they may be; it being understood they are only counted for the child they represent. *Rev. St. Tex. 1895*, art. 5346.

#### Same—In powers of appointment.

"Children" ordinarily and properly does not include grandchildren; but it has been so construed in the case of wills, where it appeared from the context that such was the intention of the testator. A power to appoint an estate to the use of children has been held not to include grandchildren; but Chancellor Kent, while admitting this to be the settled rule in the construction of powers, does not hesitate to characterize it as a very strict and harsh one. *Cutting v. Cutting* (U. S.) 6 Fed. 259, 263. See, also, *Horwitz v. Norris*, 49 Pa. (13 Wright) 213, 218; *Carson v. Carson*, 62 N. C. 57, 58; *Jarnagin v. Conway*,

21 Tenn. (2 Humph.) 50, 51; *Cruse v. McKee*, 39 Tenn. (2 Head) 1, 4, 73 Am. Dec. 186.

Where a power of appointment was given among such of the children of certain persons in such proportions as the donee of the power might appoint, this includes grandchildren, though they were not specifically mentioned, but it being provided that issue of children were provided for in default of appointment, for such must have been the donor's intention. "It is undoubtedly a general rule, in the construction both of wills and deeds of settlement, that, while the word 'issue' will be construed to include grandchildren, the word 'child' or 'children' will not receive such construction. Hence it has been laid down as an established rule that a power of appointment to children will not authorize an appointment to grandchildren. Neither will a legacy or devise to children be construed to include grandchildren. When there is nothing in the deed or will to show that the testator or donor did not use these words in a different sense, this rule of construction should not be departed from." *Ingraham v. Meade* (U. S.) 13 Fed. Cas. 50, 54.

"Children," as first used in a power to appoint to the children of certain persons, or to the issue of such children as may have died previously leaving issue, cannot be construed to include grandchildren, and therefore an appointment cannot be made to grandchildren, unless their parents are dead, when such appointment is authorized by the latter clause of the power. In re *Fotterall's Estate*, 12 Pa. Co. Ct. R. 548, 549.

The term "children," in a power in a will giving testator's wife the right to dispose of his property among all testator's children, does not include grandchildren, and therefore the widow has no power to partially dispose of the estate among testator's grandchildren. *Little v. Bennett*, 58 N. C. 156, 161.

#### Heirs.

In the construction of wills, the words "heirs," "issue," and "children" may be construed interchangeably to effectuate the clear intent of the testator. *Butler v. Huestis*, 68 Ill. 594, 602, 18 Am. Rep. 589; *Graham v. Graham*, 4 W. Va. 320, 323.

In a devise to them and their children, forever, the word "children" is used in the sense of heirs or heirs of the body. *Lachland's Heirs v. Downing's Ex'rs*, 50 Ky. (11 B. Mon.) 32, 33.

"Child" and "heir," in common speech, are often used as synonymous. *Smith v. Sheehan*, 39 Atl. 332, 333, 67 N. H. 344. The technical distinction between the terms is not to be resorted to in the construction of a will, except in nicely balanced cases. *Appeal of Lockwood*, 10 Atl. 517, 519, 55 Conn. 157.

In holding that the word "children" in a will should be construed as synonymous with "heirs," the courts say that it is true that the word "children" is not necessarily a word of purchase, and that, though this be its general character, it may nevertheless be controlled by other and repugnant words in the will. *Robert v. West*, 15 Ga. 122, 144.

A will providing that the portion of any devisee dying without "child or children" should go to and be equally divided among the survivors means immediate offspring, and not an indefinite line of heirs. *Bruce v. Goodbar*, 58 S. W. 282, 284, 104 Tenn. 638.

In a residuary clause of a will, providing that any property remaining after finally settling up the business of the estate, each heir being accountable for all personal property advanced to them, should be equally divided among the testator's children, "children" should be construed as synonymous with "heirs," and would include the grandchildren of the testator. *Hughes v. Hughes*, 51 Ky. (12 B. Mon.) 115.

"Children," as last used in a devise of real estate to a beneficiary and his children, and to their children thereafter, is to be construed to mean "heirs." *Schaefer v. Schaefer*, 31 N. E. 136, 141 Ill. 337.

Testator, after giving to each of his four sons in fee a tenth share of his estate, bequeathed to each of six daughters, naming them, the rent, interest, and income of one of the ten shares. The will then proceeded as follows: "And on the death of any or either of my said daughters I give and bequeath unto such child or children as my said daughters so dying shall have or leave living at their decease, and to the heirs and assigns of such child or children, one part or share of my said estate." Held, that the child of each daughter and her heirs, whether the immediate issue were living or not, should participate in the share of the daughter. In re *Brown's Estate*, 29 Hun. 412, 417.

A testator devised land to his wife during her widowhood, and provided that at her death it should go to his daughter and her children and to his son and his children. He also bequeathed to his daughter and her children and to his son and his children \$5,000; the money to be invested in bank stock until they were 25 years of age. Held, that as it was manifest that the word "children," as used in reference to the bequest of money, was used as equivalent to "heirs," the word as used in reference to land should be taken in the same sense. *Childers v. Logan* (Ky.) 65 S. W. 124, 125.

Testator, who died childless, gave by his will two-sevenths of his residual estate "to the children of B., my deceased sister; her granddaughter D., wife of Col. D., to take the share which her father, W. B., would take, if living." Held, that the word "children"

was used synonymously with the word "issue," "heirs," or "descendants." *Dunlap v. Shreve's Ex'rs*, 63 Ky. (2 Duv.) 834, 337.

The term "children," or "heirs," in a will, means heirs of the grantee of the life estate; the word "heirs" being used as a synonym, to enlarge and explain the preceding word, which otherwise might fail of its real intentment. *Shapley v. Diehl*, 53 Atl. 374, 875, 208 Pa. 568.

#### Heirs of body.

The word "children" embraces only immediate descendants, and, when used in a will, is not sufficient to create an estate tail, while the words "heirs begotten of the body" embrace descendants of every period, and are the correct and technical terms to be used in the creation of an estate tail. *Johnson v. Johnson*, 59 Ky. (2 Metc.) 331, 335.

The term "children," as used in a will bequeathing certain property to the testator's daughter, to have and to hold the same to her and her "children," cannot be construed as synonymous with "heirs" or "heirs of the body," so as to give an absolute estate to the legatee. *Bowers v. Bowers*, 51 Tenn. (4 Heisk.) 293, 295; *Burns v. Weesner*, 34 N. E. 10, 134 Ind. 442.

"Children," as used by a testator in providing that, if any of testator's children died leaving a "child or children," such child or children should inherit the property to which its parent was entitled, did not mean heirs of the body, but was a word of purchase without limitation, and the first taker did not take a fee absolute or a fee defeasible, but only a life estate. *Robert v. Ellis*, 37 S. E. 250, 258, 59 S. C. 137.

A will giving property to a certain person and to the heirs of her body, but, if she should die and leave no "child or children," the property given to her should be sold and equally divided among others named, should be construed in their legal sense, and not to explain the meaning of the words "heirs of her body." The happening of the contingency—the death of the first taker, leaving no child or children—was to abridge the estate, and make effectual the devise over to the other legatees and their heirs. The executory estate was limited, and was to take effect after a definite failure of issue of the first taker. *Ralston v. Truesdell*, 35 Atl. 813, 814, 178 Pa. 429.

Where there was a devise in trust for the use of S. during his natural life, and testator directed that after decease of S. the property devised should be held for the children of S. until the oldest arrive at age, when it should be conveyed to such children, the word "children" meant the immediate offspring, and was not synonymous with "heirs of the body." *Smith v. Smith*, 24 S. C. 304, 314.

The words "children" and "issue" may be interpreted to mean "heirs of the body," when this is the evident intent of the testator. *Dodson v. Ball*, 60 Pa. (10 P. F. Smith) 492, 500, 100 Am. Dec. 588.

#### Issue.

The word "children," in its natural sense, only embraces the immediate descendants of the person named or described, and does not include descendants of a more remote degree. *Hone v. Van Schaick* (N. Y.) 3 Barb. Ch. 488, 505; *Stump v. Jordan*, 54 Md. 619, 628.

In the ordinary and proper sense of the word, "children" means the immediate descendants of a person, as distinguished from "issue"; but in its legal signification, as applied to testamentary instruments, unless the manifest intention requires a different construction, it is extended to all the descendants, whether mediate or immediate, of the ancestor. *Wiley v. Smith*, 3 Ga. (3 Kelley) 551, 563.

The word "children," in its ordinary legal signification, comprehends only the immediate offspring, unless a clear intention to use it in a larger sense can be fairly collected from the instrument in which it was employed. *Russell v. Russell*, 64 Ala. 500; *Kirk v. Cashman* (N. Y.) 3 Dem. Sur. 242, 244; *Cummings v. Plummer*, 94 Ind. 403, 404, 48 Am. Rep. 167; *Mefford v. Dougherty*, 11 S. W. 716, 89 Ky. 58, 25 Am. St. Rep. 521.

Though the primary sense of the word "children" is merely a descriptio personarum, it will be construed as meaning issue or heirs of the body, when the term is used in a will and such construction is necessary to carry out the intention of the testator. It was construed in such sense in the case of a devise to a certain beneficiary and the children of such beneficiary, when the beneficiary at the time of the making of the will had no children. *Parkman v. Bowdoin* (U. S.) 18 Fed. Cas. 1213, 1215; *Smith v. Webber*, 1 Barn. & Ald. 714, 720 (citing *Wild's Case*, 6 Coke, 17; *Royle v. Hamilton*, 4 Ves. 437; *Doe v. Cavendish*, 4 Term R. 741; *Radcliffe v. Buckley*, 10 Ves. Jr. 201); *Moore v. Gary*, 48 N. E. 630, 631, 149 Ind. 51; *Butler v. Ralston*, 69 Ga. 485, 489; *Bowers v. Bowers*, 51 Tenn. (4 Heisk.) 293, 295; *In re Schedel*, 15 Pac. 297, 298, 73 Cal. 594; *Palmer v. Horn*, 84 N. Y. 516, 518; *In re Robinson's Estate*, 10 N. Y. Supp. 692, 693, 57 Hun. 395; *McLeod v. Dell*, 9 Fla. 427, 443; *Smith v. Fox's Adm'r*, 82 Va. 763, 767, 1 S. E. 200; *In re Kennedy's Estate*, 42 Atl. 459, 460, 190 Pa. 79; *Cummings v. Plummer*, 94 Ind. 403, 404, 48 Am. Rep. 167; *Butler v. Huestis*, 68 Ill. 594, 602, 18 Am. Rep. 589; *Dunlap v. Shreve's Ex'rs*, 63 Ky. (2 Duv.) 334, 337.

The word "children" has a definite legal signification, and, where no other words are



joined with it, it has, in general, no other meaning but issue in the first degree. In order that it may be construed to mean lineal descendants of a more remote degree, there must be something on the face of the will to show that it was so intended, for no rule is better settled than that technical words are presumed to be used technically, and that words of a definite legal signification are to be understood as used in their definite legal sense, unless the contrary appears on the face of the instrument. *Brett v. Donaghe's Guardian* (Va.) 45 S. E. 324, 325.

The word "children" is ordinarily a word of personal description, while the word "issue" indicates succession. Appeal of Bedford, 40 Pa. (4 Wright) 18, 21; *In re Kennedy's Estate*, 42 Atl. 459, 460, 190 Pa. 79. "Doubtless the word 'children' may be construed to mean 'issue' when the context of the will affirmatively shows that the testator intended to use it in that sense. More frequently, however, the indiscriminate use of the words 'children' and 'issue' has the effect of causing them both to be held as words of purchase." Thus, in a case where the word "children" was used, and the word "issue" was not used, it was held that "children" was to be given its ordinary meaning; there being nothing to indicate an intention to use it in any other sense. Appeal of Bedford, 40 Pa. (4 Wright) 18, 21.

As used in a will, directing that testator's property be equally divided among his children, the word "children" is a designation for the immediate offspring of the testator, as it only includes a wider range of objects when it is used synonymously with a word of larger import, as "issue." The word indicates a class of persons, and not a line of indefinite descent, like "issue," or "heirs of the body." *Bannister v. Bull*, 16 S. C. 220, 227; *Waring v. Waring*, 32 S. E. 150, 151, 96 Va. 641. Thus, where a testator devised certain real estate to each of his beneficiaries, who were without issue, and to their heirs and assigns, forever, but a subsequent clause directed that, if either should die without child or children, the survivor or survivors should inherit the deceased one's portion. Held, that the words "child or children," in the latter clause, meant issue, and it refers to an indefinite failure of issue, so that each beneficiary took an estate tail in the property devised to him. *Caulk's Lessee v. Caulk* (Del.) 52 Atl. 340, 3 Pennewill, 528; *Fahrney v. Holsinger*, 65 Pa. (15 P. F. Smith) 388, 393; *Thomason v. Anderson* (Va.) 4 Leigh 118, 122; *Booker v. Booker*, 24 Tenn. (5 Humph.) 505, 510.

The word "children," as used in a will, will not include issue more remote, including grandchildren and great-grandchildren, where it is clearly shown that testator understood the distinction between them, and it does not appear that the testator intended to

use the term, not in its proper actual meaning, but in a more extensive sense. *Boylan v. Boylan*, 62 N. C. 160.

In a will providing that property willed to certain daughters should be held in trust for the separate use of them and their children, free from the control of their husbands, and in no manner liable for their husbands' debts, "children" may be construed to mean "issue," in order to effectuate the testator's intention, and would vest a fee. *Smith v. Fox's Adm'r*, 1 S. E. 200, 201, 82 Va. 763.

A testator, who died childless, gave by his will two-sevenths of his residuary estate to "the children of B.; B.'s granddaughter, D., to take the share which her father, W. B., would take if living." Three of B.'s children were living at the time the will was published; and two others had died before the publication, one of whom died leaving an only child, the granddaughter mentioned in the will, and the other, M., who also left an only child, the plaintiff, who claimed under the will the share that her mother would have taken if living. Held, that the word "children," as used in the will, was synonymous with "issue," "heirs," or "descendants," and hence that the plaintiff was entitled to the share claimed. *Dunlap v. Shreve's Ex'rs*, 63 Ky. (2 Duv.) 334, 337.

The words "legal heirs," as used in the phrase "his children or legal heirs," are equivalent to descendants, and the entire phrase has the force of the word "issue." *Sheeley v. Neidhammer*, 37 Atl. 939, 940, 182 Pa. 163.

#### Same—In Limitations over.

The term "children" is not equivalent to "issue." The latter extends to the whole line of descendants. The former has not been extended beyond grandchildren, and it is only received in its extended meaning when used in a will to prevent exclusion, so that the manifest intention may be carried out. A limitation over on the failure of children is a limitation which must take effect within the life of the tenant for life and 21 years and 9 months after. *Brummet v. Barber* (S. C.) 2 Hill, Law, 543, 552.

The term "children," in a will devising property to a certain beneficiary for life, then to his children, but, in the absence of children, to a third beneficiary, in its proper sense includes only the next generation to the first taker, and, to make it include more, there must be something in the will to show that it is used in a broader sense. *Burton v. Black*, 30 Ga. 638, 641.

"Children," as used in a will providing that upon the death of certain devisees the lands devised to them should descend to their children, and, "if no children," to others, imports an indefinite failure of issue, where the word "children" is used in the sense of

"heirs of the body" or "issue." *Potts v. Kline*, 34 Atl. 191, 192, 174 Pa. 513 (citing *Armstrong v. Michener*, 160 Pa. 21, 23, 28 Atl. 447); *In re Campbell's Estate*, 51 Atl. 1099, 1100, 202 Pa. 459. "Child or children," as used in a will providing that, should testator's daughter die without issue, or if her "child or children" surviving her should die before arriving at the age of 21 years, the estate devised should revert to testator's other children and their heirs, is synonymous with "issue." *Jordan v. Roach*, 32 Miss. 481, 604. In a will giving a life estate to one, and at her death to the children who might be the surviving heirs of her body, "children" is synonymous with issue and includes descendants of every degree. *Houghton v. Kendall*, 89 Mass. (7 Allen) 72, 75; *Wiley v. Smith*, 3 Ga. (3 Kelly) 551, 563. Thus, where D., being seised in fee, devises to his niece E. for her life only, and, should she marry and have "issue," then to go to her "children," or, if she have no "issue," then to go to W., the words "children" and "issue" were synonymous. *Voller v. Carter*, 4 Bl. & Bl. 178, 179, 28 Eng. Law & Eq. 267, 269.

Where a testator bequeathed property to his nephew for life, and after his decease to the child or children of the nephew, whether sons or daughters, they, if more than one, to take as tenants in common, and for want of such issue to his own right heirs, forever, the words "child or children" were not equivalent to "issue"; but the words "such issue" must be confined to the previous words "child or children," and the nephew took only an estate for life, and after his death his children took only an estate for life as tenants in common. *Liversage v. Vaughan*, 5 Barn. & Ald. 464.

In a will providing that a certain sum of money should be divided into as many shares as there should be lawful issue of testator's deceased nephew, the interest and income of each of such shares to be applied to the use of each of the children, respectively, "children" is not synonymous with "issue." *Palmer v. Horn*, 84 N. Y. 516, 518.

The words "child" and "children," as used in a will, designate descendants in the first degree, and have not the technical force of the word "issue" in a limitation over. When used in a devise of a life estate to a beneficiary, with a limitation over in case the beneficiary dies without child or children, the terms mean child or children at the time of the death of the life tenant. *Sherman v. Sherman* (N. Y.) 3 Barb. 385, 387.

In a will lending a certain tract of land to the testator's daughter during her natural life and the natural life or widowhood of any husband she may have, and providing that at her death and the death or future marriage of her husband the land should be equally divided among her children, if she has any, "children" means issue in the first

degree, and in general the word "children" can have no other meaning, unless there be other words in the will to extend its application; and, in order to construe the word as embracing grandchildren or other descendants or issue indefinitely, it must appear from the will that such was the testator's intention. *Moon v. Stone's Ex'r* (Va.) 19 Grat. 130, 328.

Where a testator left a money legacy and devise of land to his granddaughter, and, in case she should die and leave no child or children, or the descendants of any of her children, to survive her, then this legacy and devise to her should revert to testator's children, the words "child or children, or the descendants of any of her children," meant issue. *In re Gormley's Estate*, 25 Atl. 814, 815, 154 Pa. 378.

#### Legitimate children.

A devise to children generally means lawful children, and an illegitimate child cannot take thereunder. *Cartwright v. Vawdry*, 5 Ves. Jr. 530, 534; *Harris v. Lloyd*, 1 Turn. & R. 310; *In re Overhill's Trusts*, 17 Eng. Law & Eq. 323; *Thompson v. McDonald*, 22 N. C. 463, 480; *Flora v. Anderson* (U. S.) 67 Fed. 182, 185; *Adams v. Adams*, 28 N. E. 260, 261, 154 Mass. 290, 13 L. R. A. 275; *In re Scholl's Estate*, 76 N. W. 616, 618, 100 Wis. 650; *Collins v. Hoxie* (N. Y.) 9 Paige, 81, 88.

"Children" will not be extended by implication to embrace children other than legitimate children, unless such construction be necessary to carry into effect the manifest purpose of the testator. *Hicks v. Smith*, 22 S. E. 153, 156, 94 Ga. 309; *Gelston v. Shields* (N. Y.) 16 Hun, 143, 151; *Cromer v. Pinckney* (N. Y.) 3 Barb. Ch. 466; *Shearman v. Angel* (S. C.) Bailey, Eq. 351, 356, 23 Am. Dec. 166; *Heater v. Van Auken*, 14 N. J. Eq. (1 McCart.) 159, 164; *Appeal of Byers*, 98 Pa. 479, 481; *Wettach v. Horn*, 50 Atl. 1001, 1002, 201 Pa. 201; *Lyon v. Lyon*, 88 Me. 395, 405, 34 Atl. 180.

The word "children," as used in a will, must be legally construed to mean only legitimate children, and hence a contingency of dying unmarried and without children cannot properly be said to mean anything more than the latter event, as legally speaking there can be no children without marriage. *Bell v. Phyn*, 7 Ves. 453, 455.

The words "my children," in a will, will ordinarily be construed to mean testator's legitimate children. "But when it is plain, from the surrounding circumstances, that he used the words in a different sense, they cannot be given that meaning. *Elliott v. Elliott*, 20 N. E. 264, 266, 117 Ind. 380, 10 Am. St. Rep. 54.

"Children," within a bequest to the children of testator's sister, includes her natural

children, where she has no other, in order to prevent the gift from failing for want of a donee or recipient. *Howell v. Tyler*, 91 N. C. 207, 210.

"Children," as used in a will devising property to testatrix's daughter during her life, "and at her death to all the children of her body," includes the two illegitimate children then living, and other children born, both before and after the will was made, by the man with whom she was living when the will was made. *Sullivan v. Parker*, 113 N. C. 301, 303, 18 S. E. 347.

Where a testator has legitimate children living, the term "children," as used in his will, will not be construed to include illegitimate children. *Crosby v. Lewis* (N. Y.) 2 Edm. Sel. Cas. 26, 27. But, where the only children of testator are natural children, parol evidence is admissible to show the situation of testator's family, to enable the court to ascertain testator's intention. *Gardner v. Heyer* (N. Y.) 2 Paige, 11, 14.

The word "children," when used in a will of a bachelor, will be construed to mean illegitimate children, as he could have no other. *Bray v. Miles*, 54 N. E. 446, 448, 23 Ind. App. 432 (citing *Clifton v. Goodbun*, L. R. 6 Eq. 278).

Where a testator bequeathed an estate "to such child, or children, if more than one, as A. may happen to be enceinte by me," a natural child of which she was then pregnant was not entitled to take under the bequest, since the language of the bequest must be construed to mean legitimate children only. *Earle v. Wilson*, 17 Ves. 528.

#### Representatives.

The word "children," as used in a will, may be interpreted as including representatives of the deceased child, if such appears to be the intention of the testator from the context. *In re Paine*, 57 N. E. 346, 347, 176 Mass. 242.

#### Sons and daughters.

The term "children," as used in a will providing that testator's estate should be equally divided among his "children," has a legal significance, extending, as the case may be, to grandchildren, and even illegitimate children, and includes both sons and daughters; there being nothing in the will to indicate that the testator meant thereby only his sons, and not his daughters. *Weatherhead's Lessee v. Baskerville*, 52 U. S. (11 How.) 329, 358, 13 L. Ed. 717.

#### Stepchildren.

The word "child" does not mean stepchild, even when the same is used in wills, where the rules of construction are not so strict as those governing statutes. *Thornburg v. American Strawboard Co.*, 40 N. E.

1062, 1063, 141 Ind. 443, 50 Am. St. Rep. 334; *Barnes v. Greenzebach* (N. Y.) 1 Edw. Ch. 41, 43.

A will providing that, in case of the death of any of testator's children or his stepdaughter without lawful issue, the share which by the will would have gone to such issue should be divided equally among the "survivors of my children" cannot be construed to include the testator's stepdaughter. *In re Hallet* (N. Y.) 8 Paige 375, 378.

"Children," as used in a will giving a cash legacy to each "of my daughters, and also my stepdaughter Elizabeth, and the remainder of my property to be equally divided among my eleven children," is to be construed as synonymous with "daughters," as there used, and not to include the stepdaughter. *Lawrence v. Hebbard* (N. Y.) 1 Bradf. Sur. 252, 255.

Testator gave legacies to his stepchildren, which he designated as children "which came to me by marriage with my wife," as well as to his own children and wife, and then provided that the "second division" should go to his wife and "children." Held, that the word "children" as last used, meant his children by his wife. *In re Kurtz's Estate*, 23 Atl. 322, 145 Pa. 637.

The word "children," in common parlance, does not include stepchildren or grandchildren, or any other than the immediate descendants in the first degree of the person named as the ancestor, but will be held to include stepchildren, where it is clear from the whole will that such was the testator's intention. *Outter v. Doughty*, 7 Hill, 305, 310.

Where a will provided that the testator left all his property to his nieces and nephew, "children of the late W. S.," the words quoted were construed not to include a stepchild of the late W. S., though such stepchild was also a niece of the testator. *Sydnor v. Palmer*, 29 Wis. 226, 244.

#### As creating tenancy in common.

"Children," as used in a will by which testator bequeathed his personal estate, after several legacies, to his brother J. and his "children" and the child of his sister, to be equally divided among them and their heirs and assigns, forever, should be construed as a word of purchase, and not of limitation, and made J. and the children tenants in common of the personalty. *Armstrong v. Moran* (N. Y.) 1 Bradf. Sur. 314, 315.

"Children," as used in a will devising certain property to the testator's daughter and her "children," entitled the children to share in the devise, and it passes to the daughter and her children in common. *In re Utz's Estate*, 43 Cal. 200, 204.

Where lands are devised to a woman and her children, she having children living at the time of the devise, the word "children" is to be construed as a word of purchase, and the children take a joint estate with the mother. *Jones' Ex'rs v. Jones*, 13 N. J. Eq. (2 Beas.) 236, 239. As used in a will providing that the testator's daughter and her children should have 50 acres of land in equal parts, it is a term of purchase, and not of limitation, and imports that the testator's daughter and her children are to take equal shares as tenants in common. *Turner v. Patterson*, 85 Ky. (5 Dana) 292, 296.

Whether a devise is to a class is a matter that must always be determined by the particular language of the will in which the devise is contained. The learned judge in *Re Russell*, 168 N. Y. 169, 174, 61 N. E. 166, 167, says: "Whether a devise or bequest in a will is to a class, or to the infants as tenants in common, must depend upon the language employed by the testator in making the gift. All the provisions of the will may be consulted, and sometimes aid may be sought from the situation and relation of the parties. I have not been able to find in any of the adjudged cases any attempt to define or formulate with much accuracy the language or circumstances necessary to constitute a gift to a class." And where a devise is made to testator's son for life, and at his death "to his children," the children took distributively as tenants in common, and not as a class. *Manhattan Real Estate & Building Ass'n v. Cudlipp*, 80 N. Y. Supp. 993, 996, 80 App. Div. 532.

#### As word of description.

In law the word "children" has and has had a well-defined meaning, which is found to run through the text-books and reports, and upon the proper adherence to which the stability and very existence of many titles in the commonwealth depend. Defining it from a positive standpoint, it is a word of personal description, it points to individual acquisition, and, so far as designation goes, it differs in no way from a mention of individuals by name. Defining it negatively, it is not a word of limitation. It does not point to hereditary succession. It is employed in contradistinction to the term "issue" and "heirs of the body." These are used in the creation of estates tail, and point to a contingent, hereditary succession, while the term "children" is one of personal description and individual acquisition. *Crawford v. Forest Oil Co.* (U. S.) 77 Fed. 534, 536.

"Children" is ordinarily used as a word of description, limited to persons standing in the same relation, and has the same effect as if all their names had been given; but the word "heirs," in the absence of controlling or explanatory words, includes more re-

mote descendants. *Balcom v. Haynes*, 96 Mass. (14 Allen) 204, 205.

"Child," as used in a will giving the rents and profits of certain land to a certain person until his youngest child should become of age, upon the happening of which event such person took a fee simple to himself and heirs, is not descriptive of the object of the testatrix's bounty, but is simply used as marking the time when the devisee's estate shall ripen into an absolute fee simple. *Shimer v. Mann*, 99 Ind. 190, 191, 50 Am. Rep. 82.

While "children" is sometimes held to mean "heirs," such a construction is not permissible where certain specified children of the grantee in a deed are named in the deed as the persons to whom the title should pass, thus clearly excluding the inference that it was the purpose of the parties that the property should go to the persons who might be his heirs at his death. As used in such a case, the word "children" is merely descriptive, being employed for the purpose of identifying the particular persons named in the deed as remaindermen. *Rupert v. Penner*, 53 N. W. 598, 599, 603, 35 Neb. 537, 17 L. R. A. 824.

#### As word of inheritance.

In a will devising to A. during life, and then to B., not to be subject to sale or mortgage, but to descend to his children free and unincumbered, the words "to his children" are not to be construed in their strict legal meaning, implying that the children were to take by inheritance, but are to be construed with regard to the intention, and vest a remainder in fee. *Leavitt v. Logan* (U. S.) 15 Fed. Cas. 131, 132.

#### As word of limitation.

The word "children" is a very flexible expression, "and according to a correct use of the English language has more meanings than one. Authoritative writers, as well as the habits of educated society, show that an accurate speaker may, without impropriety, use the term 'children' for the purpose of indicating offspring, or descendants, or posterity, in whatever degree. It is agreed that the word 'children,' when used in a will for the purpose of indicating relationship and not age, must generally or universally, in the absence of an explanatory context or extraneous evidence showing facts rendering it impossible, or at least very highly improbable, that it could have been used as what lawyers call a 'word of purchase,' or as indicating offspring only in the first degree, be construed as a word of purchase, and to mean only offspring in the first degree." *Earl of Tyrone v. Marquis of Waterford*, 1 De Gex, F. & J. 637 (cited in *Frowitt v. Rodman*, 37 N. Y. 42, 55).

"Children" is not, like "heirs," or "heirs of the body," a word of limitation, imparting by its own force a fee-simple estate. Nevertheless it has often been found necessary, in order to effectuate the intent of the testator, made manifest by considering the whole will, to give it a different meaning from its legal, and perhaps popular, signification. Accordingly it has in some instances been held to indicate a life estate, and in others a joint estate, and in others courts have not hesitated to interpret it in the sense of heirs, and allowing it the same effect. *Williams v. Duncan*, 17 S. W. 330, 331, 92 Ky. 125.

The word "children," in its primary or natural sense, is always a word of purchase, and not a word of limitation. *Schoonmaker v. Sheely* (N. Y.) 3 Denio, 485, 490; *Tayloe v. Gould* (N. Y.) 10 Barb. 388, 395; *Nelson v. Davis*, 35 Ind. 474, 478; *Shimer v. Mann*, 99 Ind. 190, 192, 50 Am. Rep. 82. The word "children" is a word of purchase, and not of limitation. *Shannon v. Bonham*, 60 N. E. 951, 953, 27 Ind. App. 369; *Ridgeway v. Lanphear*, 99 Ind. 251, 255; *Taylor v. Taylor*, 63 Pa. (13 P. F. Smith) 481, 3 Am. Rep. 565; *Crandell v. Barker*, 78 N. W. 347, 348, 8 N. D. 263.

The word "children," in a devise to a certain person and his "children," is a word either of limitation or of purchase, according to the intent of the testator. *Appeal of Yarnall*, 70 Pa. 335, 341.

The word "children" is usually a word of purchase, requiring strong language to change it into a word of limitation. *Beecher v. Hicks*, 75 Tenn. (7 Lea) 207, 213; *Hubbard v. Selser*, 44 Miss. 705, 717; *Lancaster v. Flowers*, 48 Atl. 896, 897, 198 Pa. 614.

The word "children" in a will is strictly a word of purchase, and must be so construed, unless it clearly appears that it was intended to be a word of limitation; and as a general rule such intention must be gathered from the instrument itself. *Williams v. Sneed*, 43 Tenn. (3 Cold.) 533, 538; *Kay v. Connor*, 27 Tenn. (8 Humph.) 624, 633, 49 Am. Dec. 690; *Chapin v. Crow*, 35 N. E. 536, 538, 147 Ill. 219, 37 Am. St. Rep. 213; *In re Sanders* (N. Y.) 4 Paige, 293, 296; *Lytle v. Beveridge*, 58 N. Y. 592, 604; *Collins v. Williams*, 41 S. W. 1056, 1057, 98 Tenn. 525; *Steward v. Knight*, 49 Atl. 535, 537, 62 N. J. Eq. 232; *Stokes v. Tilly*, 9 N. J. Eq. (1 Stockt.) 180, 186; *Potts v. Kline*, 34 Atl. 191, 174 Pa. 513; *May v. Ritchie*, 65 Ala. 602, 604. The word "children," when used in its ordinary sense, is a word of purchase, and not of limitation. Its meaning may be qualified by other parts of the will and be shown to be used in the sense of "heirs" or "issue" to effect the intention of the testator, and when so used it is a word of limitation, but not otherwise. *In re Smith's Estate* (Pa.) 9 Phila. 348, 349; *Aunable v. Patch*, 20 Mass. (3 Pick.) 360, 363.

In its ordinary and popular signification, the word "children" means immediate offspring, and such in general is its legal construction. When used in a will, it is a word of purchase, and not of limitation, unless the context clearly shows it to be otherwise intended. The case in which it has a broader signification, and where it has been held synonymous with "heirs," or "issue," or "descendants," are well illustrated by the resolutions in *Wild's Case*, 6 Rep. 16. In that case, says Lord Coke, "it was resolved for good law that if A. devises his land to B. and his children or issues, and if he hath any issue at the time of the devise, the same is an estate tail; for the intent of the testator is manifest and certain that his children or issues should take, and as immediate devisees they cannot take because they are not *rerum natura*, and by way of remainder they cannot take, for that was not his intent, for the gift is immediate. Therefore such words shall be taken as words of limitation *scilicet* as much as children or issues of his body. But it was resolved that if a man devises land to husband and wife, and after their decease to their children, or the remainder to their children, in this case, although they have not any child at the time, yet every child which they shall have after may take by way of remainder, according to the rule of the law; for his intent appears that their children should not take immediately, but after the decease of the husband and wife." *Stump v. Jordan*, 54 Md. 619, 628 (citing *Parkman v. Bowdoin* (U. S.) 18 Fed. Cas. 1213; *Nightingale v. Burrell*, 32 Mass. [15 Pick.] 104; *Broadhurst v. Morris*, 2 Barn. & Adol. 1).

In determining the construction of any instrument of entailment, the word "children" is rarely held synonymous with "heirs" or "heirs of the body." The principal cases in which it is so held are the instances restricting the rule announced in *Wild's Case*—that is to say, where there is an immediate grant or devise to a man and his children, and the grantee is without children; it being manifested in such case that the intent was to pass an estate in present, and that being impossible by reason of the nonexistence of a portion of those named, in order to effectuate the intentions, the word "children" must be construed as a word of limitation, and not of purchase, because otherwise there would be a grant or devise of a life estate only, and the fee would remain in the heirs of the deviser or in the person of the grantor as the case might be. *Cannon v. Barry*, 59 Miss. 289, 300.

Where the word "child" or "children" is used in a will devising property to certain beneficiaries and their children, and it clearly appears that these words are used in the sense of "issue" or "heirs of the body," they are to be treated as words of limitation, describing lineal succession to an entail, and

not as words of purchase, in their usual sense. *Haldeman v. Haldeman*, 40 Pa. (4 Wright) 29, 35.

"Children" is considered a word of limitation in one class of cases only; that is, where there is a present devise to one and his children, when he has no children at the time. There, if the word should be interpreted as a word of purchase, future children could not take at all, and in order that the will of the testator may operate favorably to them, and not confine the gift to the parent for life, "children" is then deemed a word of limitation. *Chrystie v. Phyfe*, 19 N. Y. 344, 354; *Vanzant v. Morris*, 25 Ala. 285, 292; *Addison v. Addison* (S. C.) 9 Rich. Eq. 58, 67; *Nightingale v. Burrell*, 32 Mass. (15 Pick.) 104, 114; *Wood v. Baron*, 1 East, 259; *Davis v. Stevens*, 1 Doug. 321.

#### As word of purchase.

The word "child" and "children," when used in a will, are never words of limitation, but are words of purchase, indicating a new stock, and are properly descriptive of a particular class or generation of issue. They point not at heritable succession, but to individual acquisition. *Appeal of Guthrie*, 37 Pa. (1 Wright) 9, 14; *Gernet v. Lynn*, 31 Pa. (7 Casey) 94, 98; *Mason v. Ammon*, 11 Atl. 449, 450, 117 Pa. 127 (citing *Hayes*, 35).

The word "children," when used in a will giving a devise to one and his "children," is generally a word of purchase, and not of limitation. *Tate v. Townsend*, 61 Miss. 316, 319; *In re McIntosh's Estate*, 27 Atl. 1044, 1047, 158 Pa. 528; *Downes v. Long*, 29 Atl. 827, 828, 79 Md. 382; *Bonner v. Bonner*, 62 N. E. 497, 499, 28 Ind. App. 147; *Appeal of Huber*, 80 Pa. (30 P. F. Smith) 348, 355. The presumption that it is used in the sense of a word of purchase is strengthened by the fact that the testator in other paragraphs of his will uses the word "heirs," as it indicates an extending of a distinction in meaning between the words. *Kay v. Connor*, 27 Tenn. (8 Humph.) 624, 633, 49 Am. Dec. 690. But whenever the words "children," "heirs," and "heirs of the body" are indiscriminately used to designate remaindermen, they have been regarded as words of purchase, designating a class of persons who were to take on the expiration of the particular estate, not from the tenant of that estate, but from the donor; a different intention not being clearly indicated. *May v. Richie*, 65 Ala. 602, 604. Testator devised and bequeathed to his daughter M., wife of T., and "such heir, child, or children as shall at her decease be living, and shall thereafter attain the age of 21 years, the residue of his estate." Held, that the words "and such heir, child, or children," etc., were words of purchase, and not of limitation, and hence Mrs. T. took only a life estate, with remainder to such of her children as satisfied the

condition of the devise. *Taylor v. Gould* (N. Y.) 10 Barb. 388. The word "children" in a devise of land to testator's son and daughter, and after their decease to their children, the heirs of their bodies, forever, was construed, in connection with the other language of the will, to have been used as a word of limitation, and it was held that the son and daughter only took a life estate, and that their children took the remainder in fee. *Patterson v. Jackman*, 5 Ind. 283, 285. A devise to one for life, with remainder to his children, their heirs, executors, and administrators, as tenants in common, creates only a life estate in the first taker; the remaindermen taking as purchasers. *Appeal of Chew*, 37 Pa. (1 Wright) 23, 27; *Murphy v. Harvey* (N. Y.) 4 Edw. Ch. 131, 132; *Appeal of Keim*, 17 Atl. 463, 464, 125 Pa. 480.

The word "children," in a devise of property to a beneficiary, and at the beneficiary's death to his children, is a word of purchase, and not of limitation, giving the beneficiary a life estate. *Johnson v. Robertson* (Ky.) 45 S. W. 523, 524; *Affolter v. May*, 8 Atl. 20, 22, 115 Pa. 54, 19 Wkly. Notes Cas. 44; *In re Giffin's Estate*, 188 Pa. 827, 22 Atl. 91; *Bonner v. Bonner*, 62 N. E. 497, 498, 28 Ind. App. 147; *Stubbs v. Stubbs*, 30 Tenn. (11 Humph.) 43, 44; *In re Fetherman's Estate*, 37 Atl. 516, 517, 181 Pa. 349; *Echols v. Jordan*, 39 Ala. 24, 32; *Daley v. Koons*, 90 Pa. 246, 249.

In construing a bequest "to my daughter Maria for life, and at her death to her heirs or children," the court in *Dunn v. Davis*, 12 Ala. 135, held that the term "children" explained what the testator meant by heirs, and that no estate tail was created, but that the children took vested remainders. *Ewing v. Standefer*, 18 Ala. 400, 404.

In holding that a will devising a tract of land to D. and her children passed an estate for life to D. and the remainder over to her child, although it was not born at the time of the devise, the courts say "that in general the word 'children' is a word of purchase, and not of limitation, and as it was acknowledged by the jurists of England that the word in its present connection manifested a certain intent on the part of the testator that the children should take under the devise, and as they would do so there, if the word was construed to be a word of limitation and not a word of purchase, it was natural and easy for the English judges to make an exception to the general acceptance of the words, and so construe it as to render the estate devised an estate tail; and, as this was a convenient mode of giving effect to the intention of the testator, the courts of England adopted it, without, perhaps, bestowing much consideration on the question whether the testator might not have intended to give a life estate to the person in esse, remainder to the children, which might equally have ef-

fectuated his intention. However this may be, it is clear that they adopted their rule of construction to promote the intention of the testator; and, our law having converted estates tail into absolute fee simple estates, it is equally clear that, if we adopt the same rule of construction, the acknowledged intention will be frustrated and defeated, as the children could then take nothing under the devise. In order, therefore, to effectuate the acknowledged and manifest intent of the testator, it is obvious that a different rule of construction must be resorted to in this state. *Carr v. Estill*, 55 Ky. (16 B. Mon.) 309, 313, 63 Am. Dec. 548.

A will devising land to testator's son, to hold the same to him during his life, and after his decease to his children, must be construed to give a life estate to the son and a vested remainder in fee to his children in being at the death of the testator. Such a construction is not contrary to the rule in *Shelley's Case*, which is that when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited mediately or immediately to his heirs in fee simple or in fee tail, there the words "his heirs" are words of limitation, and not of purchase; its object being to fix the legal meaning of the word "heirs" when used in the connection set forth in the rule. The rule only operates on the word "issue" when it appears to have been used to mean an indefinite succession of lineal descendants, in which case it is synonymous with the term "heirs of the body." When "issue" is used as synonymous with "children," it is not within the meaning of the rule. It is therefore very clear that when the term "children" is used to designate the object of the testator's bounty, and some of them are in esse at the date of the will and when it takes effect, neither the policy nor the words of the rule apply. In such a case the remainder neither hangs in abeyance nor vests in the life estate to await the coming of claimants. *Gernet v. Lynn*, 31 Pa. (7 Casey) 94, 97.

In a devise to parent and children, if there are any children living at the time the will is executed, the term "children" is *prima facie* not a word of limitation, but of purchase. *Gordon v. Jackson*, 43 Atl. 98, 99, 58 N. J. Eq. 166.

The word "children," in a devise of property to a certain beneficiary, with remainder to the children, "is a word of purchase, and makes the person to take as certain as if the names of the remaindermen had been given. It is otherwise when the word 'heirs' is used, unless it can properly be construed to mean children." *Johnson v. Robertson* (Ky.) 45 S. W. 523, 524.

A testator, in devising his estate, gave his wife a life estate in the property, and provided that on her death the whole estate

should be equally divided between his six children, "to wit, my five daughters and my son; my effects thus coming into the hands of my daughters not to be subject to the control of any husband, but the same to belong to my said daughters and their children." It was held that the word "children," in the clause "the same to belong to my said daughters and their children," was a word of purchase, and not of limitation, so that the daughters and their children were tenants in common of the property. *Sumpter v. Carter*, 42 S. E. 324, 326, 115 Ga. 893, 60 L. R. A. 274.

The words "child" and "children," as used in a will providing that at the death of testator's wife the property shall be equally divided among the children, and "that, in all cases where I speak of dividing my property among my children, I mean to give to the child or children of such of them as may be dead that portion of my estate that the parent of such child or children would have taken, had he or she been living," are words of purchase, and not of inheritance. Sometimes courts hold that, when a testator uses the word "child," he uses it in the sense of "heir"; but there is nothing in this will to show that it is used in any other than its usual legal sense, which is a word of purchase. *Aultman Co. v. Gibson's Guardian* (Ky.) 67 S. W. 57, 58.

The word "children," in a will where testator bequeathed a farm to his son, with a clause providing that, in case he should be spared to have a family, the estate should go to the use of his children, was a word of purchase, and not of limitation. "The word 'children,' when used in a will, is primarily and generally a word of purchase, and, while it may be used to signify 'heirs' or 'heirs of the body,' it will not be so construed, unless the testator has employed other words indicative of an intention to use it as a word of limitation." *Oyster v. Knull*, 20 Atl. 624, 137 Pa. 448, 21 Am. St. Rep. 890.

Testator's will declared: "I give and bequeath to my son S. my farm, \* \* \* for his support and estate, to be and remain bequeathed to his children during their natural lives." Held that, the context not indicating any contrary intention, the word "children" was employed as a word of purchase, and hence testator's son took but a life estate. *Oyster v. Oyster*, 100 Pa. 538, 541, 45 Am. Rep. 388.

In a will devising certain lands to trustees for the use and benefit of the testator's wife and her heirs, forever; that is, the children, if any, begotten by the testator—"children" was not a word of limitation, but of purchase, and therefore entitled the wife to a life estate, with a remainder in fee to the children begotten by the testator as a class. *Wolford v. Morgenthal*, 91 Pa. 30, 45.

**CHILDREN FOREVER.**

Where testator bequeaths property to his daughter and her children, forever, the phrase "children, forever," is to be construed as "heirs" of inheritance, and used in the sense of "heirs" or "heirs of the body." *Moran v. Dillehay*, 71 Ky. (8 Bush) 434, 440; *Lachland's Heirs v. Downing's Ex'rs*, 50 Ky. (11 B. Mon.) 32, 33.

"Children," as used in a will by which testator gave property to his daughter, to her and her children, forever, should be construed as synonymous with "issue"; it being necessary to effectuate the manifest intention of the testator. *Merryman v. Merryman* (Va.) 5 Munf. 440, 441.

**CHILDREN OF THE POOR.**

A will directing that the interest of a certain fund should be expended by his executors in the education of the "children of the poor in the village of H." refers to a class of persons who come into existence from time to time, not by inheritance, or in any order of succession defined by law, but who are to be ascertained only by their answering the description mentioned. Such a line of succession is not known or recognized by the ordinary rules of law, and cannot be made the channel for the perpetual transmission of the legal or beneficial ownership of property. *Williams v. Williams*, 8 N. Y. (4 Seld.) 525, 540.

**CHILDISH.**

"Childish" refers to simplicity or weakness of mind, and certainly expresses a degree of reason or intelligence. A person who is childish is not non compos mentis, for one non compos mentis, as defined by Lord Coke, "is a person who was of good and sound memory, and by the visitation of God had lost it, or he that by sickness, grief, or other accident wholly loseth his understanding." Lord Hardwicke says: "Non compos, of unsound mind, imports a total deprivation of sense. Now weakness does not carry this idea along with it." These terms mean, in respect to the condition of the mind of a person, a total want of understanding. *Mulloy v. Ingalls*, 4 Neb. 115, 120.

**CHINA.**

The words "chinaware and porcelain-ware," in the tariff act fixing a duty on such ware, does not include porcelain on which pictures have been painted, the porcelain being manufactured and used only for the purpose of being used for such purpose, but such articles are only dutiable as "paintings not otherwise provided for." *Arthur v. Jacoby*, 103 U. S. 677, 678, 28 L. Ed. 454.

**CHINESE.**

As white persons, see "White Person."

"Chinese person," as used in Act July 5, 1884, c. 220, 23 Stat. 115 [U. S. Comp. St. 1901, p. 1305], requiring every Chinese person other than a laborer to procure a certificate in order to thereafter return to this country after leaving it, meant every Chinese person whatsoever, and included the wife or minor child of a Chinese man. In *re Ah Quan* (U. S.) 21 Fed. 182, 186.

**CHINESE LABORER.**

The words "Chinese laborers," as used in an act providing for the exclusion of Chinese, shall be construed to mean both skilled and unskilled laborers, and Chinese employed in mining. U. S. Comp. St. 1901, pp. 1311, 1313.

"Chinese laborers," as used in Act Nov. 3, 1893, c. 14, § 1, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1322], relating to certificates of residence, refer not only to those actually engaged in manual labor at the date of the passage of that act, but were intended to include all Chinese persons dependent upon their manual labor as a means of securing an honest livelihood and self-support, and those who are not "officers, teachers, students, merchants or travelers for curiosity," within the meaning of the treaty of November 17, 1880, between the United States and China. *United States v. Chung Ki Foon* (U. S.) 83 Fed. 143, 144.

"Chinese laborers," as used in Act Cong. May 6, 1882, c. 126, 22 Stat. 58 [U. S. Comp. St. 1901, p. 1305], making it a misdemeanor for the master of any vessel to knowingly bring within the United States on such vessel, and to land or permit to be landed, any "Chinese laborers" from any foreign port or place, must be construed as having the same signification as used in the supplementary treaty of November 17, 1880, between China and the United States, article 1 of which provides that when the coming of "Chinese laborers" to the United States, or their residence therein, affects the interests of that country, the government of the United States may regulate, limit, or suspend such coming; but it shall be reasonable, and apply only to Chinese who go to the United States as laborers, and means the subjects of the government of China, and cannot be construed as applying to persons of the Chinese race who are not and never were subjects or residents within the Chinese Empire. *United States v. Douglas* (U. S.) 17 Fed. 634.

A Chinese laborer born on the Island of Hong Kong after its cession to Great Britain is within the provisions of Act Cong. May 6, 1882, c. 126, 22 Stat. 58 [U. S. Comp. St. 1901, p. 1305], restricting the migration of



Chinese laborers to the United States. The purpose of the act was to exclude laborers coming from China subject to the stipulations of the treaty of 1880, and to exclude laborers of the Chinese race coming from any other part of the world. In re Ah Lung (U. S.) 18 Fed. 28, 29.

The words "laborer" and "laborers," as used in an act providing for the exclusion of Chinese, shall be construed to mean both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling, laundrymen, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation. U. S. Comp. St. 1901, p. 1322.

#### **Actor or performer.**

"Laborers," as used in the treaty with China of November 17, 1880, and the act in aid thereof of May 6, 1882, c. 126, 22 Stat. 58 [U. S. Comp. St. 1901, p. 1305], providing that Chinese laborers shall not be permitted to come and reside in the United States, etc., is used in its popular sense, meaning only those persons whose occupation involves physical toil and who work for wages. The term does not include a Chinese actor or theatrical performer. In re Ho King (U. S.) 14 Fed. 724, 725.

#### **Gamblers and highbinders.**

Act May 5, 1892, c. 60, § 6, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1320], prohibits the coming of Chinese laborers to the United States, etc. The treaty with China of 1880 (22 Stat. 826) provides that no Chinese shall be entitled to come to this country except those who come for purposes of teaching, studying, mercantile transactions, travel, or curiosity. Held, that the words "Chinese laborers" should be construed to include Chinese gamblers and highbinders. The words "Chinese laborers" should not be confined to those engaged in hard manual work, but to include all those not included in the exception contained in the treaty. United States v. Ah Fawn (U. S.) 57 Fed. 591, 596.

#### **Laundryman.**

A Chinaman whose chief occupation was that of a laundryman, but who was an active, voluntary, unpaid teacher in a Sunday school, and actively conversed with his countrymen upon religious subjects, is a laborer, and not a Christian missionary, within the meaning of the registration and deportation acts of May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], and of November 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1322]. In re Leung (U. S.) 86 Fed. 303, 304, 30 C. C. A. 69.

#### **Member of mercantile firm.**

A Chinaman who is a member of a firm of Chinese merchants engaged in buying and

selling merchandise at a fixed place of business, and who is sent out by such firm as an employé to take charge of another mercantile establishment in which said firm owns a one-half interest, is a merchant, and not a "laborer," within the meaning of Act Nov. 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1322], and is not liable to deportation while thus employed. In re Chu Poy (U. S.) 81 Fed. 826, 828.

A Chinaman who owns an interest in a mercantile firm, but is not actively engaged in the conduct of business, and who works as head cook in a restaurant of which he is part proprietor, is a "laborer," and not a merchant, within the terms of Act Nov. 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1322], which defines a merchant as a person engaged in buying and selling merchandise at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant does not engage in the performance of any manual labor except such as is necessary in the conduct of his business as merchant, and he is therefore entitled only to such rights and privileges as pertain to Chinese persons of his class. Mar Bing Guey v. United States (U. S.) 97 Fed. 576, 579.

A Chinaman who was a peddler at the time of the passage of Act May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], relating to registration of Chinese laborers, but who ceased peddling and became a member of a trading firm prior to the passage of Act Nov. 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1322], which includes Chinese peddlers, etc., in the term "laborers," is not a laborer and liable to deportation for want of registration. United States v. Mark Ying (U. S.) 76 Fed. 450, 451.

The fact that a Chinese member of a trading firm who lives at the store with several other members of the firm does the housework for them does not constitute him a "laborer" within the meaning of the registration and deportation Acts of May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], and of November 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1322]. In the Standard Dictionary the definition of "laborer" excludes domestic service. United States v. Sun (U. S.) 76 Fed. 450.

A Chinaman came to the United States for the first time in June, 1897. From that time until his arrest on September 9, 1897, under the statute relative to Chinese emigration, he worked in a laundry in Missouri. He testified that he had an interest of \$1,000 in the Chinese grocery business conducted under the name of One Lung, 43 Mott street, New York City. Held, that this did not constitute him a merchant under Act Nov. 3, 1893, c. 14, 28 Stat. 7 [U. S. Comp. St. 1901, p. 1322], but that he was a laborer. United States v. Yong Yew (U. S.) 83 Fed. 832.

**Physician.**

A Chinese physician is not a laborer within the Chinese exclusion act. *United States v. Chin Fee* (U. S.) 94 Fed. 828, 829.

**Prisoner at hard labor.**

"Laborer," as used in Act May 5, 1892, c. 60, § 6, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1320], prohibiting the coming of Chinese persons into the United States, and exempting Chinese merchants from such rule, includes a Chinaman serving a term of imprisonment at hard labor. *United States v. Wong Ah Hung* (U. S.) 62 Fed. 1005, 1006.

**Prostitute.**

The term "Chinese laborers" as used in Act Cong. May 5, 1892, c. 60, 27 Stat. 25 [U. S. Comp. St. 1901, p. 1319], entitled "An act to prohibit the coming of Chinese persons into the United States," and the act of November 3, 1893, amendatory thereof, includes a Chinese prostitute. *Lee Ah Yin v. United States* (U. S.) 116 Fed. 614, 54 C. C. A. 70.

**Restaurant keeper.**

The term "laborer," as used in the statutes describing the class of Chinese who are not privileged to enter the United States, includes master mechanics and tradesmen, such as blacksmiths, cabinetmakers, tailors, and shoemakers, who receive orders, and cut and make up materials in such forms and of such dimensions as their customers require, and it also includes a restaurant keeper. *In re Ah Yow* (U. S.) 59 Fed. 561, 562.

**Seaman.**

"Chinese laborers," as used in the treaty of 1894 with the empire of China and the acts of Congress of Sept. 13, 1888, c. 1015, 25 Stat. 476 [U. S. Comp. St. 1901, p. 1312], and 1894, excluding "Chinese laborers" from coming into the United States, do not include a Chinese seaman who ships as steward bound for a port in the United States, and who lands with the intention and desire to reship as soon as possible. *In re Jam* (U. S.) 101 Fed. 989.

The Chinese members of a crew of a boat entering a port of the United States are not "laborers" within the meaning of Act May 6, 1882, c. 126, § 2, 22 Stat. 59 [U. S. Comp. St. 1901, p. 1306], making it a misdemeanor punishable by fine and imprisonment for the master of any vessel to knowingly bring within the United States on such vessel, and land or permit to be landed, any Chinese laborers from any foreign port or place. True, the vocation of such Chinese is labor, but they are not brought to this country to remain and enter into competition with the labor and inhabitants of the country. They labor upon the high seas in the navigation of a vessel engaged in the ex-

change of commodities between this country and other ports of the world. *In re Moncan* (U. S.) 14 Fed. 44, 47.

The phrase "Chinese laborers," in the treaty of 1890, art. 1, providing that the suspension shall apply only to Chinese who may come to the United States as laborers, has no reference to seamen, in the ordinary pursuit of navigation in the high seas, who may touch on the shores and land temporarily for the purpose of obtaining a chance to ship on some other foreign voyage. *In re Ah Kee* (U. S.) 22 Fed. 519, 520.

**CHINESE MARRIAGE.**

According to the *Encyclopedia Britannica* a "marriage in China" is an arrangement with which the parties most concerned have nothing to do. The duty of filial piety is said to be the final object of Chinese religious teaching, and, under its influence, parental will is a supreme authority, from which there is no appeal. Marriage, therefore, is not the result of acquaintanceship. "The bridegroom rarely sees his betrothed until she has become his wife." The preliminaries are entirely arranged by professional go-betweens with the parents and families of the respective parties. The correspondence between the two, thus conducted, is in writing, and is of the briefest character. If the arrangements proceed satisfactorily, the particulars of the engagement are committed to writing upon duplicate cards. These are sewn together, and the ceremony is complete. The bride journeys to the home of her husband, who may then see her for the first time. *In re Lum Lin Ying* (U. S.) 59 Fed. 682, 683.

**CHINESE SUBJECTS.**

The Burlingame treaty of July 28, 1868, between the United States and China, art. 6, providing that "Chinese subjects visiting or residing in the United States" shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as may be enjoyed by citizens or subjects of the most favored nation, refers to those traveling for instruction or from curiosity, or engaging in some legitimate avocation, and whose ingress may not lawfully be prohibited by reason of some objection personal to themselves and dependent on their nationality. *Ex parte Ah Fook*, 49 Cal. 402, 406.

**CHIP HAT.**

"A chip hat is a hat made of the ligneous strips of a tree." *United States v. Goodwin* (U. S.) 25 Fed. Cas. 1362, 1363.

**CHLOROFORM.**

Chloroform is an oily liquid of an aromatic ethereal odor, consisting of carbon,

hydrogen, and chlorine. *State v. Baldwin*, 12 Pac. 318, 323, 36 Kan. 1 (citing *Webst. Dict.*).

## CHOCOLATE.

Chocolate is a cocoa bean roasted, cracked, shelled, crushed, ground, and molded in cakes. It contains no sugar, and is in general use in families. Sweetened chocolate is manufactured in the same way, but the paste is mixed with sugar, and is used by confectioners in making chocolate confections. In *re Schilling* (U. S.) 53 Fed. 81, 82, 3 C. C. A. 440.

"Chocolate," as used in 17 Stat. 234, imposing a duty of five cents per pound on "chocolate" and various higher duties on confectionery, means any article composed of chocolate, in whatever form manufactured, though it be in a form ordinarily sold as confectionery. *Arthur v. Stephani*, 96 U. S. 125, 126, 24 L. Ed. 771.

## CHOICE.

See, also, "Choose."

"Choice" or "selection" means the power to determine between two or more. No choice or selection can be made when there is no alternative. *People v. Mosher*, 61 N. Y. Supp. 452, 454, 45 App. Div. 68.

The word "choice," in a bequest of five head of horses, one yoke of oxen, etc., of the choice of the beneficiary, operates to render the bequest specific. *Everitt v. Lane*, 37 N. C. 548, 551.

Where a testator in his will gives to his son the "choice" of one of two tracts of land, and provides that the other tract shall be sold by his executors and the proceeds distributed among his daughters, though there are no words of inheritance in the devise to the son, the intent to give him an absolute estate in one of the tracts of which he gives him the choice seems manifest where testator professes in a preliminary clause to dispose of his entire estate, and it is evident that he did not intend to place his son on a worse footing than his daughters, but rather on a better. *Clark v. Mikell* (S. C.) 3 Desaus. 168.

## CHOKER.

To "choke" is to prevent or interfere with the passage of air through the windpipe, either by internal or external pressure. To choke a person is, in other words, to fill his mouth or throat with a towel or other substance, or to seize and compress his throat so as to obstruct his breathing, and an indictment charging murder by "choking" is not indefinite in its description of the manner

of the killing. *Hicks v. State*, 81 S. E. 579, 580, 105 Ga. 627.

"Choked" means rendered unable to breath by filling, pressing upon, or squeezing the windpipe; suffocated; stifled; strangled. As used in the term "mortally choked, suffocated and drowned" it means dead. *United States v. Barber*, 20 D. C. 79, 93.

## CHOOSE.

See, also, "Choice."

Mutually chosen, see "Mutually."

The term "choose" includes "elect" and "appoint." *Laws N. Y. 1892, c. 677, § 17.*

"Choose," as used in a will giving testator's widow a life estate in his property, with power to sell and convey any property she may choose for her comfort and support, is synonymous with "wish" or "desire," rather than implying a mere right of selection. *Cain v. Cain*, 29 South. 846, 847, 127 Ala. 440.

The word "choose," when used by the appointing power appointing a person to office, is equivalent to the word "appoint." *People v. Fitzsimmons*, 68 N. Y. 514, 519.

A person is chosen to an office, within the statute providing for the filling of vacancies, although he dies, after the votes are cast, though before they are counted. *State v. Hunt*, 54 N. H. 481, 482.

## CHOSE.

Bouvier defines "chose" as personal property. *Vawter v. Griffin*, 40 Ind. 593, 601.

## CHOSE IN ACTION.

Other chose in action, see "Other."

The term "chose in action" includes all debts, and all claims for damages, for breach of contract, or for torts connected with contract, which cannot be enforced without action. *Bushnell v. Kennedy*, 76 U. S. (9 Wall.) 387, 390, 19 L. Ed. 736; *Sellers v. Arie*, 68 N. W. 814, 815, 99 Iowa, 515; *Denning v. Nelson*, 10 West. Law J. 215, 218, 1 Ohio Dec. 503; *Magee v. Toland* (Ala.) 8 Port. 36, 40; *Pitts v. Curtis*, 4 Ala. 350, 351; *Streever v. Birch*, 17 N. Y. Supp. 195, 197, 62 Hun, 298; *Campbell v. Perry*, 9 N. Y. Supp. 330, 333, 56 Hun, 639.

A thing or chose in action is defined in 2 Bl. Comm. 16, to be where a man hath not the occupation, but merely the right to occupy the thing in question, the possession of which may be recovered by a suit or action at law. *Turner v. State*, 1 Ohio St. 422, 426.

A "thing in action" "is a term in contradistinction to a chose or thing in possession, and is applicable to cases where the title to the money or property is in one person and

the possession is in another, which by contract he is bound to deliver to the owner." *Ayres v. Western R. Corp.* (N. Y.) 48 Barb. 132, 135.

"The term 'chose in action' is one of comprehensive import. It includes the infinite variety of contracts, covenants, and promises which confer on one party a right to recover a personal chattel or a sum of money from another by action." *Sheldon v. Sill*, 49 U. S. (8 How.) 441, 449, 12 L. Ed. 1147; *Coler v. Grainger County* (U. S.) 74 Fed. 16, 21, 20 C. C. A. 267; *Simons v. Ypsilanti Paper Co.* (U. S.) 33 Fed. 193, 194; *Mexican Nat. R. Co. v. Davidson*, 15 Sup. Ct. 563, 564, 157 U. S. 201, 39 L. Ed. 672; *Kirkman v. Kirkman*, 49 N. Y. Supp. 683, 685, 686, 26 App. Div. 395.

"Chose in action," taken in its broadest sense, comprehends not only a demand arising on contract, but also on wrong or injury to the property or person. But for the purposes of any sort of assignment, legal or equitable, I can nowhere find that the term has ever been carried beyond a claim due either on contract, or such whereby some special damage has arisen to the estate of the assignor. *People v. Tioga Common Pleas* (N. Y.) 19 Wend. 73, 75.

Personalty to which the owner has a right of possession in fact, or a right of immediate possession wrongfully withheld, is termed by law a "chose in action." Civ. Code Ga. 1895, § 3072.

A chose in action is a right not reduced to possession, or a right under a contract which, in case of nonperformance, can only be reduced to beneficial possession by an action or suit. *Haskell v. Blair*, 57 Mass. (3 Cush.) 534, 546 (citing *Chit. Bills* [10th Am. Ed.] 6).

"As defined by Burrill, a 'chose in action' is a thing which a man has not the actual possession of, but which he has a right to demand by action; as a debt or demand due from another." *Ramsey v. Gould* (N. Y.) 57 Barb. 398, 408.

By the provisions of Civ. Code Cal. § 953, a "thing in action" is a right to recover money or other personal property by a judicial proceeding. *Henderson v. Henshall* (U. S.) 54 Fed. 320, 331, 4 C. C. A. 357; *Haskins v. Jordan*, 55 Pac. 786, 787, 123 Cal. 157.

A "chose in action," used in its broadest sense, means all demands, whether arising from contract, or from wrong or injury to the property or person, but for purposes of any sort of assignment the term does not include anything beyond claims due either on contract or where some special damage has arisen to the estate of the assignor. *People v. Tioga Common Pleas* (N. Y.) 19 Wend. 73, 75.

"Chose in action" is generally used to mean the right to bring an action to recover a debt or redress a wrong, and "includes all rights to personal property, not in possession, which may be enforced by action; demands arising out of torts as well as contracts." *Sterling v. Sims*, 72 Ga. 51, 53.

A chose in action is said to be a thing not in occupation or enjoyment, but merely a bare right to be recovered by an action; hence its name. *United States v. Moulton* (U. S.) 27 Fed. Cas. 11, 12.

A thing in action is the right to recover money or other personal property by a judicial proceeding. Civ. Code Cal. 1903, § 953; Rev. Codes N. D. 1899, § 3466; Civ. Code S. D. 1903, § 383; Rev. St. Okl. 1903, § 4162; Civ. Code Mont. 1895, § 1350.

#### Action of review.

An action of review is a "chose in action," within the meaning of a statute providing that all the bankrupt's choses in actions shall at once vest in his assignee. The assignee of a bankrupt is alone competent to prosecute the action, though commenced before the bankruptcy. *Zollar v. Janvrin*, 49 N. H. 114, 115, 118, 6 Am. Rep. 469.

#### As anything recoverable by assumpsit.

The term "chose in action," as used in Civ. Code Prac. § 439, providing that the plaintiff, in an execution returned "No property found," may institute an equitable action for the discovery of any money, chose in action, equitable or legal interest, and all other property to which the defendant is entitled, should be construed to include any claim of the debtor against another on which an action of assumpsit would lie at common law. *Merriwether v. Bell*, 58 S. W. 987, 988, 22 Ky. Law Rep. 844.

#### Bill of lading.

A bill of lading is a chose in action, and an assignee thereof cannot maintain thereon a suit in his own name. *Knight v. St. Louis, I. M. & S. Ry. Co.*, 40 Ill. App. 471, 473.

#### Breach of contract.

The term "chose in action," as used in Act March 3, 1875, c. 137, 18 Stat. 470 [U. S. Comp. St. 1901, p. 507], providing that no Circuit or District Court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless such suit might have been prosecuted in such court if no assignment had been made, includes actions for damage growing out of rights of action founded on contracts which contain within themselves such promises or duties to be performed. *Goldman v. Furness, Withy & Co.* (U. S.) 101 Fed. 467, 468.

An action to recover damages for a refusal to accept and pay for merchandise purchased under an oral contract is a suit to recover the contents of a chose in action. *Simons v. Ypsilanti Paper Co.* (U. S.) 83 Fed. 193, 194.

#### As chattels or effects.

See "Chattel"; "Effects."

#### Claim for money.

A chose in action is assignable in Iowa, so that a claim for the recovery of money paid for intoxicating liquors, under Code, § 1550, providing that all such payments shall be deemed to have been received upon a valid promise and agreement to repay the same on demand, is a chose in action and assignable. *Sellers v. Arle*, 68 N. W. 814, 815, 99 Iowa, 515.

A claim founded on contract to recover a sum of money out of a fund in the hands of a railroad company is a chose in action, within the meaning of the provision which denies to the assignee of a chose in action the right to sue in the federal courts if no action could have been maintained there in the absence of an assignment. *Mexican Nat. R. Co. v. Davidson*, 15 Sup. Ct. 563, 564, 157 U. S. 201, 39 L. Ed. 672.

The statute, by "chooses in action," refers to a species of property recognized by the law, and which, upon the death of the owner, would be inventoried as such by his legal representatives. *Dry Dock Bank v. American Life Ins. & Trust Co.*, 3 N. Y. (3 Comst.) 344, 356. The claim for compensation by an owner of land acquired by the city of New York is a thing in action within the meaning of the tax law, and is subject to taxation. *People v. Halsted*, 49 N. Y. Supp. 685, 686, 26 App. Div. 316.

In *People v. Tioga Common Pleas* (N. Y.) 19 Wend. 73, 75, Cowen, J., defines a "chose in action" as "a demand arising on contract, but also for a wrong or injury to the property or person." It is also defined as a right of proceeding in a court of law to procure the payment of a sum of money. Under such definition the right of one having a liquor tax certificate to have its surrender value returned on discontinuing the traffic, as provided by Laws 1896, c. 112, § 25, is in the nature of a chose in action. *Niles v. Mathusa*, 47 N. Y. Supp. 38, 41, 20 App. Div. 483.

#### Claim for overcharge in freight.

The term "chose in action," as used in Removal Act Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], will not be construed to include a claim against a railroad company for overcharges in freight. *Conn v. Chicago, B. & Q. R. Co.* (U. S.) 48 Fed. 177, 178.

#### Credits.

The term "chooses in action" means a particular species of property recognized by law, and which, on the death of the owner, would be inventoried as such by his legal representatives, and does not include credit, and, though credit may be a benefit to the possessor as a means of procuring property, it is not in itself recognized in law as property. *Dry Dock Bank v. American Life Ins. & Trust Co.*, 3 N. Y. (3 Comst.) 344, 356.

Choses in action are not credits within the statutes relating to trustee process. *Perry v. Coates*, 9 Mass. 537; *Lupton v. Cutter*, 25 Mass. (8 Pick.) 298, 300.

#### Debt distinguished.

The terms or phrases "chose in action" and "debt" are used by courts to represent the same thing when viewed from opposite sides. "Chose in action" is the right of a creditor to be paid, while "debt" is the personal obligation of the debtor to pay. *Smead v. Chandler*, 76 S. W. 1066, 1068, 71 Ark. 505.

#### Evidences of indebtedness.

An evidence of indebtedness, under whatever name it may be termed, whether note, bond, bill of exchange, or other instrument, and however secured, is a mere chattel personal included within the term "chose in action." *Easton v. Board of Review of Peoria County*, 55 N. E. 716, 717, 183 Ill. 255.

#### Goods.

See "Goods."

#### As intangible or incorporeal.

"Choses in action correspond substantially to, or at least are included within, the civil-law definitions of 'incorporeal rights.'" *Gordon v. Muchler*, 84 La. Ann. 604, 608.

Debts and choses in action are a species of intangible property that, for purposes of taxation, are generally held to be situated at the domicile of the owner. *Scripps v. Fulton County Board of Review*, 55 N. E. 700, 701, 183 Ill. 278.

A "chose in action" is defined by Kent as a personal right not reduced into possession, but recoverable by a suit at law. Money due on bond, note, or other contract, damages due for the breach of contract for the detention of chattels, or for torts, are included under this general head or title of things in action. A chose in action is a mere right of action due, a personal chattel not in actual possession. Such being the definition of "chose in action," a certificate of stock which is a chose in action is not within Code, § 2414, declaring that no gift of goods and chattels shall be valid unless by deed or will, or unless the donee have actual possession, the words "goods and chattels" relating pure-

ly to tangible and movable things. First Nat. Bank v. Holland, 39 S. E. 126, 129, 99 Va. 495, 55 L. R. A. 155, 86 Am. St. Rep. 898.

#### **Judgment.**

A judgment is a mere chose in action. It passes to an assignee charged with all the equities which can be asserted against it in the hands of an assignor. *Tiffany v. Stewart*, 14 N. W. 241, 243, 60 Iowa, 207.

The words "chose in action," as used in 2 Rev. St. (2d Ed.) p. 274, § 5, enacting that an assignee for a valuable consideration of any bond, note, or other chose in action which has been or may hereafter be assigned, etc., comprehends a judgment. *Murphy v. Cochran* (N. Y.) 1 Hill, 839, 842.

#### **Life insurance policy.**

A policy of life insurance is a chose in action. *Prudential Ins. Co. v. Hunn*, 52 N. E. 772, 774, 21 Ind. App. 525, 69 Am. St. Rep. 380.

A policy of life insurance is, after the death of the insured, unquestionably a chose in action, it then being simply a promise to pay money. It has been held in numerous cases that a policy of life insurance, even before the death of the insured, is a chose in action. *Steele v. Gatlin*, 42 S. E. 253, 254, 115 Ga. 929, 59 L. R. A. 129.

#### **Loss of services.**

Loss of services by the injury of one who was bound to serve plaintiff in consideration of his support and maintenance is not a chose in action. *Streever v. Birch*, 17 N. Y. Supp. 195, 197, 62 Hun, 293.

#### **Mortgage.**

The term "chose in action," in 1 Stat. 78, includes a mortgage. Chief Justice Marshall in *Sere v. Pilot*, 10 U. S. (6 Cranch) 332, 3 L. Ed. 240, remarks: "Without doubt, assignable paper, being the chose in action most usually transferred, was in the mind of the Legislature when the law was formed, and the words of the provision are therefore best adapted to that class of assignments; but there is no reason to believe that the Legislature were not equally disposed to except from the jurisdiction of the federal courts those who could sue in virtue of legal assignments." *Hill v. Winne* (U. S.) 12 Fed. Cas. 185, 186.

A chose in action is a thing in action, a right of action, a thing recoverable in action, a debt, a demand, a promissory note, a right to recover damages. A chose in action was originally a right of action not assignable at law. It was a cause of suit for a debt due or a wrong done. Therefore, while a bond with a mortgage securing it may be a chose in action so far as the debt is concerned, the estate conveyed by the mortgage cannot be said to be a chose in action, since it is real

estate conveyed to the mortgagee which in law is absolute and perfect; and hence a mortgage is not a chose in action within the act of Congress restraining the Circuit Court from taking cognizance of any suit to recover the contents of a chose in action by an assignee when the original holder could not have maintained the suit in a federal court. *Sheldon v. Sill*, 49 U. S. (8 How.) 441, 447, 12 L. Ed. 1147.

A real estate mortgage is a chose in action, as it is now a lien upon and not a title to or in land, but a mere security for debt. *Hall v. Bartlett* (N. Y.) 9 Barb. 297, 299.

#### **Personal injury.**

The term "chose in action," in its broadest sense, includes a right of action for a personal injury. *Bennett v. Bennett*, 23 N. E. 17, 21, 116 N. Y. 584, 6 L. R. A. 553.

#### **As personal property.**

See "Personal Property."

#### **As confined to personality.**

"Choses in action" are said to be things wherein a man is not possessed, but is put to his action for the recovery of them. 1 Lill. Ab. 378. And a "chose" has been defined to mean the legal interest possessed by a party in a contract or a right, which, in case of opposition, cannot be reduced into beneficial enjoyment without an action or suit. 5 Petersd. Ab. 404. But it is not confined to claims to personality. A condition and power of re-entry into land upon a feoffment, gift, or grant, before the performance of the condition, is of the nature of a chose in action. *Hall v. Bartlett* (N. Y.) 9 Barb. 297, 299, 300 (citing Tom. Dict. "Chose").

The term "chose in action" "is applied exclusively to property in chattels personal, of which there are choses in possession and choses in action, the latter being those of which a man has only the bare right, without any occupation or enjoyment. All property in action depends entirely upon contracts, either express or implied, which are the only regular means of acquiring a chose in action." *Van Wicklen v. Paulson* (N. Y.) 14 Barb. 654, 656 (citing 2 Bl. Comm. 389).

#### **As requiring present right of action.**

A chose in action does not require a present right of action. Thus a note payable on time is a chose in action as soon as it is made. So a note payable in work is assignable as a chose in action, though the performance of the work has not been demanded. *Haskell v. Blair*, 57 Mass. (3 Cush.) 534, 536.

#### **Promissory note distinguished.**

See "Promissory Note."

One who transfers a promissory note or bill by indorsement or delivery is not an as-

signor of a thing in action, so as to be precluded from testifying in an action thereon under a statute prohibiting such an assignor from testifying in certain cases. *McHose v. Cain*, 22 Wis. 486.

#### **As property.**

See "Property."

#### **Rent not due.**

Rent not yet due is not a chose in action; it is a part of the realty, and passes as such with the estate. *Van Wicklen v. Paulson* (N. Y.) 14 Barb. 654, 655.

#### **Right in bailment for remainder to slave.**

A right to the remainder in a slave devised to another for a period of years is not a chose in action. *Pitts v. Curtis*, 4 Ala. 350, 351.

A slave held by a bailee for hire from the wife is not a chose in action, but a thing in possession. *Magee v. Toland* (Ala.) 8 Port. 36, 40.

#### **Right to recover possession.**

A thing or chose in action is defined in 2 Bl. Comm. 16, to be where a man hath not the occupation, but merely the right to occupy the thing in question, the possession of which may be recovered by a suit or action at law. *Turner v. State*, 1 Ohio St. 422, 426; *Magee v. Poland* (Ala.) 8 Port. 36, 40.

A right of action for the conversion of personal property is a chose in action. *Gillet v. Fairchild* (N. Y.) 4 Denio, 80, 82; *Denning v. Nelson*, 10 West. Law J. 215, 218, 1 Ohio Dec. 503.

"Chose in action," as used in Bankr. Law 1867 (14 Stat. 517) § 14, declaring that all of the property conveyed by the bankrupt in fraud of his creditors, all rights in equity or "chooses in action," etc., shall be vested in the assignee, means rights of action for real or personal property, for the unlawful taking or detention of property, or for injuries thereto, and does not embrace causes of action for merely personal injuries. *Noonan v. Orton*, 34 Wis. 259, 264, 17 Am. Rep. 441.

The term "chose in action" is sometimes used as a right of bringing the action. Thus the right to have the interest of an heir in an estate in the hands of his administrator is a chose in action. *Sterling v. Sims*, 72 Ga. 51, 53.

#### **Specific performance of contract.**

"Chose in action," as used in Rev. St. § 629 [U. S. Comp. St. 1901, p. 503], declaring that no Circuit Court shall have cognizance of any suit to recover the contents of any chose in action in favor of an assignee, unless a suit might have been prosecuted in

such court to recover the said contents if no assignment had been made, etc., includes a suit to enforce the performance of a contract, such suit being one to recover the contents of a "chose in action." *Shoecraft v. Trustees of Internal Imp. Fund*, 8 Sup. Ct. 686, 689, 124 U. S. 730, 31 L. Ed. 574.

#### **Stock.**

The purchase of stock in a corporation is not the purchase of a "chose in action," within the meaning of an instrument forbidding such purchase. *Ramsey v. Gould* (N. Y.) 57 Barb. 398, 408.

#### **Stock subscription.**

The term "chose in action" includes unpaid subscriptions to the capital stock of a corporation, and therefore an action at law may be maintained thereon by a receiver of the corporation on its insolvency. *Barkalow v. Totten*, 32 Atl. 2, 3, 53 N. J. Eq. (8 Dick.) 573; *Coler v. Grainger County* (U. S.) 74 Fed. 16, 21, 20 C. C. A. 267.

#### **Torts.**

"While a 'chose in action' is ordinarily understood as a right of action for money arising under contract, the term is undoubtedly of much broader signification, and includes the right to recover pecuniary damages for a wrong inflicted either on the person or property. It embraces demands arising out of tort, as well as causes of action originating in the breach of the contract." *City of Cincinnati v. Hafer*, 30 N. E. 197, 198, 49 Ohio St. 60.

Chose in action "includes all rights to personal property not in possession which may be enforced by action, and it makes no difference whether the owner has been deprived of his property by the tortious act of another, or by his breach of a contract express or implied. In both cases the debt or damages of the owner is a thing in action." *Gillet v. Fairchild* (N. Y.) 4 Denio, 80, 82.

#### **CHOSE IN POSSESSION.**

Choses in possession are personal things of which one has possession. *Vawter v. Griffin*, 40 Ind. 593, 601.

A chose in possession is a chose which the person has not only the right to enjoy, but also the actual enjoyment thereof. *Sterling v. Sims*, 72 Ga. 51, 53.

#### **CHOUSE.**

To "chouse" means to cheat, trick, or defraud—followed by "of" or "out of," as "to chouse one of his money." *Southern Kansas Ry. Co. v. Isaacs*, 49 S. W. 690, 691, 20 Tex. Civ. App. 468.

## CHRIST.

Where a petition alleged the making of a note sued on by Christopher McElhenon, and the note was signed "Christy" or "Christ." McElhenon, there was no material variance or misnomer, the given name attached to the note being abbreviations of the name alleged. *Weaver v. McElhenon*, 13 Mo. 89, 90.

## CHRISTIAN.

"Christian," as applied to the doctrine of Christian Science, means Christlike; the teachings of Jesus understood and followed; science; truth understood. *State v. Buswell*, 58 N. W. 728, 730, 40 Neb. 158, 24 L. R. A. 68.

New Hampshire Bill of Rights, art. 6, says that every denomination of "Christians" demeaning themselves quietly and as good subjects of the state shall be equally under the protection of the law, and no subordination of any one sect or denomination to another shall ever be established by law. In construing the Bill of Rights the court said: "The *Encyclopædia of Religious Knowledge* says the term 'Christian,' when used in its more strict scriptural and theological sense, denotes one who really believes the Gospel, imbibes the spirit, is influenced by the grace and obedient to the will of Christ, and this it calls the 'sacred and proper' use of the word. It mentions another use of the word, which it calls the 'political or conventional' use, which denotes one who assents to the doctrines of the religion of Christ, and who, being born of Christian parents or in a Christian country, does not profess any other religion or belong to any other of the divisions of men, such as Jews, Mohammedans, deists, pagans, and atheists; or, as is said in another part of the article, Christians may be considered as nominal and real." In the opinion the court uses the term "Christian" in its political and conventional sense, as above stated, that being the sense in which it is ordinarily used in constitutions and statutes and legal documents. As used in the Bill of Rights, the word is not used in a sense having no reference to Christianity as a system of religious doctrines, or in some indefinite sense which would include all good men who behave well without regard to their religious belief. It is the belief in the Christian religion, and in Jesus Christ as its author and as the true Messiah, that makes a Christian. A man may be a Christian, in the political or conventional sense in which we use the word, if he assents to the truth of the Christian system. If he lives an upright life it makes him a good, or, as might be said, a consistent, Christian. But any amount of good living will not make a pagan a Christian until he believes the Christian faith. There is and can be no doubt as to what the word "Christian" means in its com-

mon use and acceptation, and as it is generally understood. It is to be presumed that the framers of the Constitution, when they used the word in the Bill of Rights, used it in its common and ordinary sense. Such is the ordinary and universal rule, unless something appears to restrict or qualify such ordinary meaning. *Hale v. Everett*, 53 N. H. 2, 53, 16 Am. Rep. 82.

## CHRISTIAN NAME.

Where a statute provides that a writ be indorsed with the "Christian and sur name" of the attorney, it is sufficiently complied with by indorsing the surname and the initials of the Christian name. *Stratton v. Foster*, 11 Me. (2 Fair.) 467.

The term "Christian name" is used in the sense of "given name," and includes the name given to a corporation by the Legislature. *Johnson v. Central R. R.*, 74 Ga. 397.

## CHRISTIAN SCIENCE.

As medicine, see "Medicine."

"The adherents of 'Christian Science' believe that matter has no existence except as a manifestation of mind; that the divine mind is all-controlling; that the human mind, by becoming clean and purified, can, to a degree, realize and employ the powers of the divine mind; that all sickness and bodily ills are merely a species of sin, error, or evil, and exist only in the apprehension of the human mind, and are in no wise phenomena of matter; that the divine mind has the same power to relieve one of such sin or error, manifested in the form of disease, as it has to expel any other unclean or evil thought; and that the human mind, if it can only so perfect itself as to partake in a sufficient degree of the omnipotence of the divine mind, also will be able to throw off and rid itself of disease. These beliefs are embodied in a book called 'Science and Health,' which purports to derive them from the teachings of the Bible. Demonstrations of these teachings are attempted by Christian Scientists, who are known as 'healers,' and who treat disease without the use of any material means whatever; the treatment, as one of them testified, being always a prayer. They do not claim to cure all bodily ills, but they attribute their failures, not to the nature of the illness, but to the imperfect realization by the healer of the divine mind, since to them the possibilities of Christian Science are infinite. It is their belief, on the other hand, that, when a patient does recover, the healer has realized sufficiently the truths as taught by 'Science and Health' and the Bible, and has, by his understanding of the power of God, as thus demonstrated by Christian Science, been able to remove the imperfections of which the disease was the result. It is therefore evident that, how-



ever opposed these teachings may be to the beliefs or notions of others, they are founded on the religious convictions of those professing them. This being so, the court cannot say that those persons are mentally unsound. The truth or falsity of a religious belief is beyond the scope of a judicial inquiry." Thus it was held that the fact that a testator believed in Christian Science did not show that she was lacking in testamentary capacity. *In re Brush's Will*, 72 N. Y. Supp. 421, 425, 35 Misc. Rep. 689.

### CHRISTIANITY.

Christianity "is the religion that is revealed and taught in the Bible." *People v. Ruggles* (N. Y.) 8 Johns. 290, 297, 5 Am. Dec. 835.

Christianity "is the religion of those who believe that Jesus Christ is the true Messiah and Savior of men, and who receive the Holy Scriptures of the Old and New Testaments as the Word of God. The grand subdivisions among Christians are, first, the Greek or Eastern Church; second, the Roman Catholics, who acknowledge the authority of the Pope; third, the Protestant or Reformed Churches, or sects who reject the authority of the Pope." *Hale v. Everett*, 53 N. H. 954, 16 Am. Rep. 82.

#### As part of common law.

The maxim that Christianity is a part of the common law is liable to misconstruction and to be misunderstood, and the declarations of Lord Hale, Lord Raymond, and others who pronounced Christianity to be a parcel of the common law are all to be taken in reference to the cases of blasphemy before them, and, for the purpose of punishing such blasphemy as they condemned, they noticed that Christianity was the religion of England, and in this sense a part of the common law, and, while the ecclesiastical courts punished blasphemy as a spiritual offense *pro salute animæ*, the common law only punished it when it tended to create a riot or break the peace, or subvert the very foundation on which civil society rested. It took cognizance of and gave faith and credit to the religion of Christ as the religion of the common people, and acknowledged their right voluntarily to prefer that religion and to be protected in the enjoyment of it, and it carried that protection to the full length of punishing any man who outraged the feelings of the people and insulted civil society by wantonly and maliciously reviling and ridiculing the religion which they had freely preferred. *State v. Chandler* (Del.) 2 Har. 553, 563.

The assertion that Christianity is a part of the common law of the country, lying behind and above the constitutions, can hardly be a serious one. If Christianity is a law of the state, it must have a sanction. Ade-

quate penalties must be provided to enforce obedience to its requirements and its precepts. The only foundation for the proposition that Christianity is a part of the law of the country is the fact that it is a Christian country, and that its constitution and laws are made by a Christian people. *Board of Education of City of Cincinnati v. Miner*, 28 Ohio St. 211, 242, 18 Am. Rep. 233.

It is said, and truly, that the Christian religion is a part of the common law of Pennsylvania. But this proposition is to be received with its appropriate qualifications, and in connection with the Bill of Rights of that state, as found in its Constitution of government. Although Christianity be a part of the common law of the state, yet it is so in this qualified sense that its divine origin and truth are admitted, and therefore it is not to be maliciously and openly reviled and blasphemed against, to the annoyance of believers or the injury of the public. *Vidal v. Girard's Ex'rs*, 43 U. S. (2 How.) 127, 198, 11 L. Ed. 205; *Specht v. Commonwealth*, 8 Pa. 312, 322, 49 Am. Dec. 518; *Harvey v. Boies* (Pa.) 1 Pen. & W. 1213. By the term "Christianity," as part of the common law, is not intended a doctrine of worship of any particular church or sect, but Christianity with liberty of conscience to all men. *Updegraph v. Commonwealth* (Pa.) 11 Serg. & R. 391, 408; *Sparhawk v. Union Pass. Ry. Co.*, 54 Pa. (4 P. F. Smith) 401, 432.

The declaration that Christianity is part of the law of the land is a summary description of an existing and very obvious condition of our institutions. We are Christian people in so far as we have entered into the spirit of Christian institutions and become imbued with the sentiments and principles of Christianity, and we cannot be imbued with them and yet prevent them from entering into and influencing, more or less, all our social institutions, customs, and relations, as well as all our individual modes of thinking and acting. *Mohney v. Cook*, 26 Pa. (2 Casey) 342, 347, 67 Am. Dec. 419.

Christianity is not the legal religion of the state as established by law. If it were, it would be a civil or political institution, which it is not; but this is not inconsistent with the idea that it is in fact and ever has been the religion of the people. This fact is everywhere prominent in our civil and political history, and has been from the first recognized and acted upon by the people as well as by constitutional conventions, legislatures, and courts of justice. It is a part of the common law of England. It may be conceded to be the established religion to the qualified extent mentioned, while perfect civil and political equality, with freedom of conscience and religious preference, is secured to individuals of every other creed and profession. *Lindenmuller v. People* (N. Y.) 33 Barb. 548, 561.

Ours is a Christian country, but Christianity is not established by law, and the genius of our institution requires that the church and state should be kept separate. *Melvin v. Easley*, 52 N. C. 356, 360.

Christianity is a part of the common law, and to write against it in general is an offense punishable in the temporal courts. *Rex v. Woolston*, 2 Strange, 834.

Under the Constitution of Ohio declaring that all men should have a natural right to worship God according to the dictates of conscience, with which right no human authority can interfere, and that no preference shall ever be given to any religious society or mode of worship, neither Christianity nor any other system of religion is a part of the law of the land of Ohio. *Bloom v. Richards*, 2 Ohio St. 387, 390.

The system of religion is recognized as constituting a part and parcel of the common law, and as such all of the institutions growing out of it or in any way connected with it, in case they shall not be found to interfere with the rights of conscience, are entitled to the most profound respect, and can originally claim the protection of the law-making powers of the state. *Shover v. State*, 10 Ark. (5 Eng.) 259, 263.

Christianity lies at the foundation of that provision of the Constitution of South Carolina declaring that free exercise of religious worship shall forever be allowed in the state, and that liberty of conscience shall not be so construed so as to justify practices inconsistent with the peace of the state, and upon such religion are based many of the principles and usages constantly acknowledged and enforced in the courts of justice. In the courts Christianity is daily acknowledged as the most solemn part of the administration of justice. *City Council of Charleston v. Benjamin* (S. C.) 2 Strob. 508, 521, 49 Am. Dec. 606.

It has been frequently said that Christianity is a part of the law of the land, and while, in a certain sense and for certain purposes, it may be true in those states which adopted and have retained the common law, it must be remembered that that system never prevailed nor had any lodgment in this state, save the brief period between the acquisition of this country by the United States and the act of 1805, when the criminal part of that system was in force. And it has been said by another court that Christianity was never considered a part of the common law, so far as that for a violation of its injunctions, independent of the established laws of man, and without the sanction of any positive act of the Parliament of England made to enforce those injunctions, any man could be drawn to answer in a common-law court. *State v. Bott*, 31 La. Ann. 663,

665, 33 Am. Rep. 224 (citing *State v. Chandler* [Del.] 2 Har. 553, 555).

Christianity is a part of the common law of the state of Nevada, as it is of the United States, in the qualified sense that its defined origin and truth are admitted. *State v. Hallock*, 16 Nev. 373, 374.

## CHRISTMAS.

As legal holiday, see "Legal Holidays."

## CHROMATE OF IRON.

Where land is sold, reserving to the grantor all mineral or magnesia of any kind, it entitles the grantor to chromate of iron afterwards found. *Gibson v. Tyseon* (Pa.) 5 Watts, 34, 38.

## CHROME TANNING.

"Chrome tanning," is contradistinguished from other tanning, characterizes itself by making use of mineral salts in the tanning process, rather than vegetable matter. As is well known, the older method of obtaining leather was to immerse the hide or skin in some liquid containing tannic acid, which was commonly obtained from oak or hemlock bark. *Tannage Patent Co. v. Zahn* (U. S.) 66 Fed. 983, 983.

## CHROMO.

In Rev. St. § 4956 U. S. Comp. St. 1901, p. 3407], providing for the copyright, among other things, of a chromo, it is apparent that Congress used the word with its dictionary meaning, viz., an abbreviation of "chromolithograph," and that it understood the word "lithograph," to cover a print made from a drawing or drawings on stone. *Hills & Co. v. Austrich* (U. S.) 120 Fed. 862, 863.

## CHRONIC.

In order to distinguish a disease as "chronic," it is necessary that it should have been of long standing as applied to diseases of a body. "Chronic" and "acute" are the antithesis of each other. An acute disease is one usually attended with violent symptoms, while a chronic disease is deep-seated and obstinate, threatening a long continuance. *Jones v. Yarborough*, 2 Ala. 524, 525.

"Chronic" is defined as in effect meaning "persistent," so that, as used in a question in an application for an insurance policy as to whether applicant ever had "chronic" and "persistent" hoarseness, the two words were intended in the same sense. *Blumenthal v. Berkshire Life Ins. Co.* (Mich.) 96 N. W. 17, 18.

## CHUCK-A-LUCK.

The courts cannot be supposed to judicially know the appellatives of gamblers, nor to know what kind of a game chuck-a-luck is, and therefore a description, in an indictment for gaming, that accused played a game of chance, is sufficiently definite without using the word "chuck-a-luck," which does not of itself identify to the accused, the court, or the world any one game of chance, or necessarily import that what is thus characterized was a game of chance. *Montee v. Commonwealth*, 26 Ky. (3 J. J. Marsh.) 132, 134.

## CHURCH.

See "Congregational Church"; "Parish Church."

Building exclusively occupied as a church, see "Exclusively Used."

The terms "church" and "society" are popularly used to express the same thing, viz., a religious body organized to sustain public worship. *Church & Congregational Soc. v. Hatch*, 48 N. H. 393, 396; *Josey v. Union Loan & Trust Co.*, 32 S. E. 628, 629, 160 Ga. 608.

In Baptist polity, as it exists in this state, there is no distinction between a "church" and a "religious society." These terms, as commonly used in our law, are interchangeable. *Riffe v. Proctor*, 74 S. W. 409, 410, 99 Mo. App. 601.

The term "church" imports an organization for religious purposes. *McAllister v. Burgess*, 37 N. E. 173, 161 Mass. 269, 24 L. R. A. 158 (quoting *Baker v. Fales*, 16 Mass. 488, 495).

As far as all questions of property are concerned, the term "church" means "the body of communicants gathered into church order, according to the established usage in any town, parish, precinct, or religious society established according to the law, and actually connected and associated therewith for religious purposes." *Stebbins v. Jennings*, 27 Mass. (10 Pick.) 172, 193.

A church is a voluntary association of Christians united for discipline and worship, connected with and forming a part of some religious society having a legal existence. *Anderson v. Brock*, 3 Me. (8 Greenl.) 243, 247.

In the constitution of the body of Christians known as "Presbyterians," we find that "church," as therein defined, consists of those persons in every nation, together with their children, who make profession of the holy religion of Christ, and of submission to his laws. But as this multitude could not meet together in one place, it is declared that they should be divided into particular churches, which last is defined as follows: "A particular church consists of a number of

professing Christians voluntarily associated together for divine worship, or actually living agreeably to the Holy Scriptures, and submitting to a certain form of government." The pastor and the ruling elders of a congregation compose what is called the "church session," who, representing the congregation, are the official governing body of the church in the administration of its affairs. *Tate v. Lawrence*, 58 Tenn. (11 Helsk.) 503, 531; *Wilson v. Perry*, 1 S. E. 302, 304, 314, 29 W. Va. 169.

### All creeds.

A "church" has been defined to be a building consecrated to the honor of God and religion (*Robertson v. Bullions* [N. Y.] 9 Barb. 64, 95); or persons who profess the Christian religion, and the place where such persons regularly assemble for worship; and as used in Laws 1896, c. 112, § 24, providing that traffic in liquors shall not be permitted within 200 feet of any building occupied as a church, includes all the multifarious denominations or societies of those professing a Christian faith, no matter what their varying shades of belief or doctrine may be, and no matter with what ceremony or absence of ceremonies their faith may be evinced; and the fact that such building is occupied by two or more societies does not deprive it of its standing as a "church." *In re Zinzow*, 43 N. Y. Supp. 714, 719, 18 Misc. Rep. 653.

Within an act authorizing the incorporation of churches, the word "churches" is not restricted to individual churches or societies singly, the design of the Legislature being to secure to every Christian association by their own action the rights and privileges which before the act it was usual to acquire by the separate action of the Legislature upon each case as presented to them. And, under the definition, every church, society, and congregation, of whatever denomination, may unite and form one society or congregation within the meaning of the act. That every Christian church may assert the privilege does not necessarily imply that two may not unite that differ in principles of discipline or doctrine. *Neale v. Vestry of St. Paul's Church (Md.)* 8 Gill, 116, 118.

"Church or chapel," as used in 7 & 8 Geo. IV, c. 29, § 10, relating to the breaking and entering a church or chapel, does not refer to or include a Wesleyan chapel, but only chapels of the Church of England. *Rex v. Nixon*, 7 Car. & P. 442, 443.

### As the building.

As building, see "Building (In Lien Laws)."

As public building, see "Public Building."

Correctly speaking, it is a body of people or worshipers associated together for religious purposes that constitutes a church.

and it is equally protected by the statute against disturbance though assembled at a camp ground, or in the open air, or in a private house. But under a statute punishing the disturbing of any congregation assembled in any church or other place, applying to private families as well as to congregations assembled, it must be construed in reference to localities, and in this sense the word "church" means the building or house used on the occasion of the disturbance alleged, and, if the disturbance was in a church or in some other place, the description of that place must be set out. *Stratton v. State*, 13 Ark. 688, 691.

A church is a building within the mechanic's lien law. A building is defined by Webster to be "an edifice erected for use and convenience, such as a house or church." All churches are spoken of in common parlance as "buildings," and travelers speak of the magnificent building of St. Peter's at Rome, and St. Paul's in London. *Presbyterian Church v. Allison*, 10 Pa. (10 Barr) 413, 416.

The grant of a church at San Antonio, Goliad, and Victoria clearly means the edifices, and cannot be a lot on which there is no edifice of any kind whatever, and which was not connected with any such edifice. *Blair v. Odin*, 3 Tex. 288, 301.

#### As congregation.

See, also, "Congregation."

In a decision of the proper tribunal of a religious organization that certain members have withdrawn from the church, the word "church" is used for "congregation." *Gaff v. Greer*, 88 Ind. 122, 131, 45 Am. Rep. 449.

The word "church" may mean either a temple or building consecrated to the honor of God and religion, or an assembly of persons, united by the profession of the same Christian faith, met together for religious worship. In the New York statutes relating to the incorporation of religious societies, churches, congregations, etc., the word is used in the sense of the latter definition. *Robertson v. Bullions*, 9 Barb. 64, 67. And the latter meaning is contemplated by Civ. Code, § 2361, providing that where a church has incurred a valid debt, in the absence of other property the church edifice and site are liable to sale for its payment. *Josey v. Union Loan & Trust Co.*, 32 S. E. 628, 629, 106 Ga. 608.

As used in Gen St. Conn. § 3820, providing that buildings or portions of buildings exclusively "occupied as a church" shall be exempt from taxation, means occupied as a church building is usually occupied, or as a church building may properly be occupied, because that is the ordinary meaning of the words. A building belonging to a church so-

cietly, regularly and statedly occupied for religious worship, is "occupied as a church" within the meaning of the statute, though it is rented for entertainments, and at times for political conventions. *First Unitarian Soc. v. Town of Hartford*, 34 Atl. 89, 90, 66 Conn. 368.

#### As parish.

'The 'church' consists of an indefinite number of persons, of one or both sexes, who have made a public profession of religion, and who are associated together by a covenant of church fellowship for the purpose of celebrating the sacrament and watching over the spiritual welfare of each other. But a religious association or congregation is what is usually denominated a 'poll parish.' It consists of a voluntary association of individuals or families uniting for the purpose of having a common place of worship, and to provide a proper teacher to instruct them in religious doctrines and duties, and to administer the ordinances of baptism, etc. Though a church or body of professing Christians is almost uniformly connected with such an association or congregation, the members of the church have no other or greater rights than any other members of the society who statedly attend with them for the purpose of divine worship. Over the church, as such, the legal or temporal tribunals of this state do not profess to have any jurisdiction whatever, except so far as is necessary to protect the civil rights of others and to preserve the public peace. All questions relating to the faith and practice of the church and its members belong to the church judicatories to which they have voluntarily subjected themselves. But as a general principle these ecclesiastical judicatories cannot interfere with the temporal concerns of the congregation or society with which the church or the members thereof are connected." *Baptist Church in Hartford v. Witherell* (N. Y.) 3 Paige, 296, 301, 24 Am. Dec. 223.

"Before the migration of our ancestors to this country, it is believed a congregational church was, as it was in the earliest times of Christianity, an assembly of Christians meeting together in the same place for the public worship of God under the same minister or ministers. Mr. Wise, a writer on this subject, defines a particular church to be 'a society of Christians meeting together in one place under their proper pastors, for the performance of religious worship and the exercising of Christian discipline, united by covenant,' as most of those undoubtedly were who composed that society. 'Parochia, or parish,' he says, 'signifies in a large sense a competent number of persons dwelling near and having one bishop, pastor, etc., or somebody set over them.' Therefore 'parish' in this sense is the same as a particular church or congregation, and this, he observes, is plainly agreeable with the sense, custom, and

platform of the New England churches. A whole diocese is one parish, it not exceeding in ancient times the bounds of a parish, or a small town, or a part of a town. All the people of a diocese did every Sunday meet together at one place to celebrate divine service. The bishop had but one altar or communion table in his diocese, at which his whole flock received the sacrament from him. The whole diocese met together on Sunday, when he gave them the eucharist. All the people were present at church censures. None were restored without the knowledge and consent of the whole diocese. They might plead their cause before the whole people. When a bishop died, all the people met together in one place to choose a new bishop. The whole diocese met together to manage church affairs. Such was the church in the early times of Christianity, and such, it is presumed, was the church as understood by our ancestors in the first settlement of this country. From this account of the ancient state of things, it may well be conceived that a person intending to give property to pious uses, and particularly for the support and maintenance of public worship, within the first half century after the migration of our ancestors would denominate the donees, the 'church,' meaning the whole society of worshipping Christians, and, if this donation should be afterward applied to the use of a few Christians who had constituted themselves the church instead of the whole society, his bounty would be perverted. Any number of the members of a church who disagree with their brethren, or with the minister, or with the parish, may withdraw from fellowship with them, and act as a church in a religious point of view, having the ordinances administered and other religious offices performed. As to all civil purposes, the secession of the whole from the parish would be an extinction of the church, and it is competent for the members of the parish to institute a new church, or to ingraft one upon the old stock if any of it remain. No particular number is necessary to constitute a church, nor is there any established quorum which would have a right to manage the concerns of the body. According to the Cambridge Platform, c. 3, § 4, the number is to be no larger than can conveniently meet together in one place, nor ordinarily fewer than may conveniently carry on church work. A diminution of its numbers will not affect its identity. A church may exist in an ecclesiastical sense without any officers, and, without doubt, in the same sense, a church may be composed only of females covert and minors having no civil capacity. The only circumstance which gives a church any legal character is its connection with some regularly constituted society, and those who withdraw from the society cease to be members of that particular church, and the remaining members continue to be the identical church." *Baker v. Fales*, 16 Mass. 488, 498.

#### As religious corporation.

"The term 'church' is one of very comprehensive signification. It anciently signified any public meeting convened to consult upon the common welfare of the state, was afterward used to designate the place of sacred or religious meetings, and again it is applied to religious congregations, assemblies, or associations; but at the present time, and under our institutions and laws, it must be understood to express a spiritual or religious corporation." *Trustees of Baptist Soc. v. Fisher*, 18 N. J. Law (3 Har.) 354, 357.

A church is a separate body formed within a parish or religious society, whose rights and usages are well known, and to a great extent defined and established by law. It is not a "religious society" in the legal sense of that term, for, though the term "religious society" may with propriety be applied in a certain sense to a church, as that of "religious association," "religious union," or the like, yet, as commonly used in our law, it is synonymous with "parish," "precinct," etc., and designates an incorporated society created and maintained for the support and maintenance of public worship. A church is an aggregate body, so far vested with legal powers that they may sue by a committee, and are not bound to sue in the names of all the members. *Weld v. May*, 68 Mass. (9 Cush.) 181, 188.

A church is a body of persons associated together for the purpose of maintaining Christian worship and ordinances. A church and society are often united in maintaining worship, and in such cases the society commonly owns the property and makes the pecuniary contract with the minister, but in many cases societies exist without a church, and churches without a society. Churches are not corporate bodies, and commonly have no occasion for the exercise of corporate powers. *Silsby v. Barlow*, 82 Mass. (16 Gray) 329, 330.

"Church," in one sense, is understood to mean a number of Christian people, agreeing in their faith, usually assembling together at one place for purposes of worship, submitting to its ordinances, and receiving its sacraments. This is entirely distinct from the meaning of the word "church" as applied to a corporation. In the former sense many persons are usually members of the church, and most commonly a large community, who neither are nor can be members of the corporation—married women, infants, and slaves. When persons are incorporated by the name of "church," this can be regarded only as a name or designation, or, at least, as indicating, when property is given to them, the trust upon which it is given. This does not constitute the corporation a "church" in what I consider the proper sense of the word, no more than if they were called by any other name. Nor do I think a corporation

for the managing of church funds can properly be called an "ecclesiastical corporation," any more than if the property were given to a society for the support of a minister of the church. In other words, they are merely trustees of the entire body of worshippers, and they are a civil institution for the management of property. *Wilson v. Presbyterian Church* (S. C.) 2 Rich. Eq. 192, 198.

#### **As a place for worship only.**

A deed granting land on condition that it be continually used as a site for a "meeting house and church" means a house to meet in for religious worship, but does not require that it should be constantly used for that purpose. It must, however, be kept for that use, and not put to any other use substantially inconsistent with that. *Howe v. School Dist. No. 3*, 43 Vt. 282, 288.

Within a statute exempting all churches, meetinghouses, or other places of stated religious worship from taxation, the term "churches" includes all places suited to regular stated religious worship, without exception of any kind; so that property leased by a religious congregation for stated religious worship is by such act exempt from taxation, where it was built for church purposes, and in its present condition can be used only for church purposes. *Howell v. City of Philadelphia* (Pa.) 8 Phila. 280, 281.

A building, the first floor of which is used for religious meetings, the rest being used as offices for directors and physicians, dormitories, and storerooms, the whole constituting a mission for reformation purposes, but not connected with any church, and with which no clergyman is associated, is not a "church" within a law forbidding the issuance of a license to sell liquors within a certain distance of a building used as a church. *People v. Dalton*, 30 N. Y. Supp. 407, 408, 9 Misc. Rep. 249.

"Church," as used in the statute declaring it to be a misdemeanor to sell spirituous liquors within half a mile of any church, did not apply to a building which was intended by its donor to be used for the purpose of an academy and for the convenience of preaching, and which had for a number of years been used as a schoolhouse and a place for public worship. The distinction between "church" and "places of public worship" is known to our law, and has been many times recognized in our statutes, as, for instance, in the act of 1846 it is declared to be a misdemeanor to injure or deface any "church," inhabited house, etc., and by the act of 1875 it is forbidden to obstruct the way leading to any place of public worship, while the act of 1807 makes it an offense for a person to be intoxicated at a "church" or "place appointed for divine worship." *State v. Midgett*, 85 N. C. 538, 540.

The terms "church, meetinghouse, or other place of religious worship," within the meaning of a statute exempting such places from taxation, do not include a parsonage belonging to an Episcopal church, if it is not actually annexed to the church edifice or its curtilage. *Dauphin County Treasurer v. St. Stephen's Church* (Pa.) 3 Phila. 189, 190.

A "church" or "meetinghouse," within the meaning of Act May 14, 1874, which provides that all churches, meetinghouses, or other regular places of stated worship, with the grounds thereto annexed necessary for the occupancy of the same, shall be exempt from taxation, is confined to churches which, in the language of the law, are regular places of stated worship. A mere foundation or partly erected walls might by a forced construction be called an unfinished church or "meetinghouse," but it cannot by any construction be made a regular place of stated worship. *Erie County Com'rs v. Bishop* (Pa.) 13 Phila. 509, 510.

#### **CHURCH LOTS.**

The words "church lots" were written on a plat of the city of W., filed by the persons laying out the town, and the dedication written out on a plat and duly acknowledged, recited that the lots were dedicated to church purposes. On the records of the company appeared a resolution that the lots "should be, and the same are, hereby appropriated as church lots." Held that, whether this was a statutory dedication or not, it was good as an appropriation for pious uses, which would be enforced at the instance of any church proving its right to be regarded as a personal beneficiary. *Com'rs of Wyandotte County v. First Presbyterian Church of Wyandotte*, 1 Pac. 109, 115, 30 Kan. 620.

#### **CHURCH MEMBER.**

To constitute one a "church member," two points at least are essential, without meaning to say that others are not so—a profession of its faith, and a submission to its government. Simply holding the same faith, without submitting to the government and discipline of a church, cannot make or keep a man a member of that church. If a person without religious faith, or having the faith of one sect, becomes a convert to the spiritual usage of another denomination, he does not thereby become ipso facto a member of the latter. The members of the Reformed Dutch Church in the United States are not members of the Presbyterian Church, nor the Presbyterians members of the Reformed Dutch Church, although their faith is the same, the difference between them consisting in the form and mode of church government. *Day v. Bolton*, 12 N. J. Law (7 Hal.) 206, 214.

**CHURCH OF ENGLAND.**

"The phrase 'Church of England,' so familiar in our laws and judicial treatises, is nothing more than a compendious expression for the religious establishment of the realm, considered in the aggregate, under the superintendence of its spiritual head. In this sense the 'Church of England' is said to have peculiar rights and privileges, not as a corporation, but as an ecclesiastical institution under the patronage of the state." It is not a corporation. *Town of Pawlet v. Clark*, 13 U. S. (9 Cranch) 292, 325, 3 L. Ed. 735.

**CHURCH PROPERTY.**

In 2 Starr & C. Ann. St. c. 120, § 2, cl. 2, exempting from taxation all church property actually and exclusively used for public worship where the land is owned by the congregation, the term "church property" means the church building and a lot of reasonable size for its location, and does not include camp meeting grounds used by several congregations. *People v. Watseka Camp-Meeting Ass'n*, 43 N. E. 716, 717, 160 Ill. 576.

In the clause of Const. art. 9, § 3, providing that all churches, "church property used for religious purposes," and houses of worship shall by general laws be exempt from taxation, the words "church property used for religious purposes," if they refer to land and buildings, do not intend any except those whose primary use is for religious purposes. A rectory or parsonage belongs to a church, so, its primary use being for the residence of the pastor or minister and secular purposes, is not exempt because some part of it has been also used for religious services. *Ramsey County v. Church of the Good Shepherd*, 47 N. W. 783, 784, 45 Minn. 229, 11 L. R. A. 175.

**CHURCH PURPOSES.**

A dedication to "church purposes" is a dedication to public purposes, and the inhabitants of the town in which the dedication is made have an interest in the ground reserved for such use. We all know that is meant by the phrase. To deny that church purposes are public purposes is to argue that the maintenance, support, and propagation of the Christian religion is not a matter of public concern. Our laws, though they recognize no particular religious establishment, are not insensible to the advantages of Christianity, and extend their protection to all in that faith and mode of worship they may choose to adopt. *City of Hannibal v. Draper*, 15 Mo. 634, 635.

**CHURCH SQUARE.**

The words "church square," written on the plat, in laying out a town, which is des-

ignated as a "church square," are not sufficient to show a dedication and grant of the square to a certain church, although at the time of the laying out of the town it was the only church established in the town. *Christian Church at Pella v. Scholte*, 2 Iowa (2 Clarke) 27, 28.

**CHUTE.**

Pub. & Loc. Laws 1864, c. 84, as amended by Pub. & Loc. Laws 1866, c. 447, authorizes a company to improve the navigation of a certain river by removing obstructions, breaking jams, deepening, widening, and straightening the channel, and closing up the "chutes" and side cuts leading from such river into another river. Held, that the term "chute" means, in the common language of the river men, any opening in the banks of a stream where a part of its waters diverge from the main stream, irrespective of the question whether it flows out with a rapid or slow current. *Black River Imp. Co. v. La Crosse Booming & Transportation Co.*, 11 N. W. 443, 448, 54 Wis. 659, 41 Am. Rep. 66.

**CHYMOSIN.**

Chymosin is a fermenting and curdling agent found in the stomach of calves and hogs, and used on account of its coagulating properties, for curdling milk by cheesemakers. *Blumenthal v. Burrell* (U. S.) 43 Fed. 667.

**CIDER.**

See "Fermented Cider."

"Cider" is an equivocal term. It may apply to the juice when first pressed from the apple, or to the manufactured article when the whole process is complete, and in the construction of a contract the court must look both to the conditions and language of the parties to see what was meant. *Studdy v. Sanders*, 5 Barn. & C. 623, 639.

In construing the term "cider" in Rev. Laws, § 3800, cl. 6, prohibiting the sale of cider in certain places, the court said: "It is said that the juice of apples is not 'cider' until it is fermented. This is perhaps technically correct, but not in popular understanding. Apple juice, when it comes from the cider press, is immediately and universally called 'cider' by the people generally. The term should be construed according to such universal use and understanding. Presumably, no class of men understand better the difference between sweet and sour cider than our legislators, because they are mostly farmers who make the cider, and those who are not living in this cider-producing state could hardly claim ignorance on so familiar a subject, yet in their prohibitory

enactment they ignore all distinction and simply say 'cider.'" *State v. Spaulding*, 17 Atl. 844, 847, 61 Vt. 505.

As V. S. 4460, prohibits the sale of intoxicating liquor, and declares fermented cider such a liquor, the word "cider," as used in section 4463, declaring that the sale of cider is not prohibited, but that it shall not be sold in a public resort, relates to unfermented cider. *State v. Thorburn*, 52 Atl. 1039, 75 Vt. 18.

Laws 1898, p. 17, c. 5, § 13, requiring dealers in cider, except "pure apple cider" of domestic growth, to obtain a license, means pure unfermented juice of apples, and does not include any beverage, though made from the juice of apples, in which alcohol has developed by fermentation. *State v. Crawley*, 23 South. 625, 626, 75 Miss. 919.

#### **As a fermented liquor.**

Cider is an alcoholic beverage obtained by fermentation of the juice of apples. In a popular sense the term "cider" includes the pressed juice of apples, either fermented or unfermented, and hence the terms "sweet cider" and "hard cider" are in popular use to distinguish between the juice of the apple before and after fermentation. In strictness the juice of the apple before fermentation is simply apple juice, and it is only by fermentation that it becomes cider, and, when the word "cider" alone is used in the law or commerce, it is commonly understood to mean the fermented juice of apples. *Eureka Vinegar Co. v. Gazette Printing Co.* (U. S.) 35 Fed. 570, 571.

Cider is a fermented liquor made from the juice of apples. *State v. Schaefer*, 24 Pac. 92, 93, 44 Kan. 90.

"Hard cider" is cider excessively fermented, and therefore, presumptively, hard cider is not only a fermented liquor, but intoxicating. *State v. McLafferty*, 27 Pac. 843, 47 Kan. 140.

#### **As intoxicating or strong liquor.**

Cider is a strong drink, a beverage; in no sense a necessity more than is beer or wine. It is as distinctly a beverage as either beer or wine. It is not as intoxicating, but its classification as a beverage is as distinct as either of the others. Cider is an intoxicating liquor to such an extent that a city is authorized, in the exercise of its general police power, to impose a license tax on persons engaged in the occupation of selling cider. *Town of Pikeville v. Huffman*, 65 S. W. 794, 795, 112 Ky. 360.

Cider is not an intoxicating liquor within the meaning of St. 1869, c. 415, §§ 31, 36, prohibiting the keeping with intent to sell of any intoxicating liquor, unless it is shown to be actually intoxicating, as it is not included in section 30, enumerating the liquors

which shall be deemed to be intoxicating. *Commonwealth v. Chappel*, 116 Mass. 7. See, also, *Johnston v. State*, 23 Ohio St. 556, 558.

Unfermented cider is an intoxicating liquor within the meaning of a statute defining "intoxicating liquors" as including ale, cider, and wines. *Commonwealth v. Dean*, 80 Mass. (14 Gray) 99.

It is a question for the jury as to whether cider is an intoxicating liquor. *State v. Bidde*, 54 N. H. 379, 380; *State v. Page*, 66 Me. 418, 419; *Hewitt v. People*, 57 N. E. 1077, 1078, 186 Ill. 336.

#### **As spirituous or vinous liquor.**

Cider is not included within the term "spirituous liquor." It is neither produced by distillation nor by fermentation, and though liable to fermentation, and when subjected to distillation it is capable of producing a spirituous liquor, yet the ultimate product is no more like cider than rum is like the juice of sugar cane from which it is manufactured. *State v. Oliver*, 26 W. Va. 422, 426, 53 Am. Rep. 79.

In common acceptation "cider" is not understood to be either a vinous or spirituous beverage, yet when fermented it doubtless contains a percentage of alcohol sufficient to bring it within the fair meaning of the term "vinous," and, although not the product of distillation, it may, when mixed with spirituous liquor and sold in that condition under the name of "cider," be regarded as spirituous, within the meaning of a statute prohibiting the sale of vinous and spirituous liquors without a license. Whether it is a vinous or spirituous liquor is a question for the jury. *Commonwealth v. Reyburg*, 16 Atl. 351, 352, 122 Pa. 290, 2 L. R. A. 415.

Cider is never called a vinous liquor or wine, and for some period of time after the juice is pressed from the apple has no intoxicating principle in it at all, and is not within the spirit of an act forbidding the sale of "spirituous, vinous, and malt liquors." *Feldman v. City of Morrison*, 1 Ill. App. (1 Bradw.) 460, 463.

Fermented or hard cider, though an intoxicating liquor, is not a spirituous, vinous, or malt liquor. *Allred v. State*, 8 South. 56, 57, 89 Ala. 112.

#### **As wine.**

See "Wine."

#### **CIDER VINEGAR.**

The term "cider vinegar," as used in an act to prevent the manufacture and sale of adulterated cider vinegar, shall be understood to mean vinegar made exclusively of pure apple juice. *Code Supp. Va. 1898*, § 1898a.



**CIGAR.**

A cigar is a bunch of tobacco rolled together and put into shape for smoking, and intended for that use. *D'Estrinoz v. Gerker* (U. S.) 43 Fed. 285, 286.

Cigars are manufactured articles familiar to everybody. The materials of which they are composed are carefully prepared and put into form until they lose their original character as mere materials, and become articles of commerce known by a new name and adapted to a particular use. Cigars sold by a tobacconist in the ordinary way are not "drugs" or "medicines," within the meaning of those words as used in St. 1887, c. 391, § 2, permitting the retail sale of drugs and medicines on Sunday. *Commonwealth v. Marzynski*, 21 N. E. 228, 229, 149 Mass. 68.

**CIGAR MAKERS.**

"Cigar makers," as used in a complaint brought by the Cigar Makers' International Union of America claiming title to a trade-mark, indicated that the complainants were skilled workmen in the manufacture of cigars, and did not indicate that they set up title to the trade-mark as manufacturers or dealers in cigars. *Schneider v. Williams*, 14 Atl. 812, 816, 44 N. J. Eq. (17 Stew.) 391.

**CIPHER DISPATCH OR MESSAGE.**

A "cipher dispatch," as used in a condition limiting the liability of a telegraph company in such cases, is a message in which words are used to mean things entirely variant from their meaning in the language as they are ordinarily used, but do not include words which were mere abbreviations, and which had clear and well-defined meanings in the trade in which they were used. *Pepper v. Western Union Tel. Co.*, 87 Tenn. (3 Pickle) 554, 11 S. W. 788, 784, 4 L. R. A. 660, 10 Am. St. Rep. 699.

An enigmatical message is commonly called a "cipher message," or one which, though not such a message, is yet one so obscure that it is not intelligible to the telegraph operator. *Beatty Lumber Co. v. Western Union Tel. Co.*, 44 S. E. 309, 310, 52 W. Va. 410.

**CIRCUIT.**

A circuit is "a division of the country appointed for a particular judge to visit for trial of causes or administration of justice." Bouvier. "Circuits," as the term is used in England, may be otherwise defined to be the periodical progresses of the judges of the superior courts of the common law through the several counties of England and Wales for the purpose of administering civil and criminal justice. *Black, Law Dict.*

The word "circuit" means judicial circuit. Civ. Code Ala. 1896, § 2.

**CIRCUIT COURT.**

The words "circuit court," used in the act of 1875 in designating who should make the appointment of city commissioners, was intended by the Legislature to confer jurisdiction upon the person who held the office of circuit judge, and not upon the court as a court. In re Johnson, 12 Kan. 102. Hence such act is not unconstitutional as an attempt to confer executive power on the judiciary, as prohibited by the Constitution. *City of Terre Haute v. Evansville & T. H. R. Co.*, 46 N. E. 77, 78, 149 Ind. 174, 37 L. R. A. 189.

In all cases where the words "circuit court" are used, they shall be taken and construed to mean and intend "district court." Comp. Laws N. M. 1897, § 8803.

**CIRCUIT COURT COMMISSIONER.**

See "Commissioner of Circuit Court."

**CIRCUIT JUDGE.**

"The terms 'circuit judge' and 'judge of the circuit court' are convertible—they mean precisely the same thing—and if there is no circuit court there can be no circuit judge, or judge of the circuit court." *Crozier v. Lyons*, 34 N. W. 186, 188, 72 Iowa, 401.

**CIRCUIT JUSTICE.**

The words "circuit justice," when used in the title relating to the judiciary, shall be understood to designate the justice of the Supreme Court who is allotted to any circuit; but the word "judge," when applied generally to any circuit, shall be understood to include such justice. U. S. Comp. St. 1901, p. 486.

**CIRCULAR.**

See "Printed Circular."

A schedule setting out the prizes offered in a lottery, printed on the back of all lottery tickets sent out for a particular drawing, is a "circular" within the meaning of Rev. St. § 3894 [U. S. Comp. St. 1901, p. 2659], forbidding the mailing of any letter or circular concerning lotteries. *United States v. Clark* (U. S.) 22 Fed. 708, 710.

**Letters distinguished.**

In Rev. St. § 3894 [U. S. Comp. St. 1901, p. 2659], providing that no letter or "circular" concerning lotteries shall be carried in the mail, the term "circular" means a written or printed communication which is general and not personal in its character, and the

same paper may be both a letter and a circular. No doubt there are many circulars which are not letters, but a circular which is in the form of a letter may be well described as a "letter and a circular." *United States v. Noelke* (U. S.) 1 Fed. 426, 429; *United States v. Mason* (U. S.) 22 Fed. 707.

A sealed circular is, for all purposes affecting the postal offices, a letter. *United States v. Dauphin* (U. S.) 20 Fed. 625, 630.

A circular is not a letter within Act Cong. March 3, 1825, § 28, relating to the franking of letters. *In re Dewees* (U. S.) 7 Fed. Cas. 571.

## CIRCULATION.

See "General Circulation."

"A 'circulation' is an act by which a literary proprietor parts with possession of the original manuscript, or a written or printed copy, for any purpose not exclusively confidential." *Keene v. Wheatley* (U. S.) 14 Fed. Cas. 180, 192.

### Of banks.

The word "circulation," in its relation to finance, is defined by the lexicographers as "currency or circulating notes or bills current for coin," and its use in Act Cong. Feb. 8, 1875, § 19, imposing a tax on notes used for circulation, has no reference to the so-called "notes," issued by mercantile firms, to be redeemed in goods. *United States v. White* (U. S.) 19 Fed. 723, 724.

"Circulation," within Rev. St. § 3408, providing for the taxation of circulation of banks, etc., means certificates or bills intended to circulate as money, and did not include receiver's certificates not intended to so circulate, but simply to be evidences of indebtedness. *United States v. Wilson*, 106 U. S. 620, 2 Sup. Ct. 85, 27 L. Ed. 810.

## CIRCUMFERENCE.

"Circumference," as used in a grant of land consisting of five great flats or plains in circumference four English miles, is to be construed as meaning "the exterior line surrounding the flats. Nor does it convey any determinate idea as to shape, for in its common application, as to an island, which has some analogy to the present use, the most discerning mind could not, from the information that it was four miles in circumference, determine whether it was round, triangular, or square, for the term would be equally and properly used in all these cases for describing the extent of the line along the water board." *Van Gordon v. Jackson* (N. Y.) 5 Johns. 440, 451.

## CIRCUMSTANCE.

See "Extraordinary Circumstances"; "Failing Circumstances."

A circumstance is an event, a fact, a particular incident; and, as used in an instruction that in view of the law, the evidence, facts, and "circumstances" proved on the trial, and from all these circumstances, the jury should determine upon which side is the preponderance of the evidence, should not be construed as limiting the jury to the consideration of circumstances, without the consideration of evidence and facts as the basis for determining the preponderance of the evidence, since the word "circumstances" does not imply events, facts, and incidents arising outside of the evidence and disconnected from the trial. *Pfaffenback v. Lake Shore & M. S. Ry. Co.*, 41 N. E. 530, 531, 532, 142 Ind. 246.

An instruction that the jury must take into consideration all the "circumstances concerning the case" does not mean that the jury shall be at liberty to go outside of the case for circumstances on which to predicate their verdict, but refers to such circumstances as are to be gleaned from the pleadings and evidence, and which appear properly in the case, and not those outside of it. *Dufour v. Central Pac. R. Co.*, 7 Pac. 769, 772, 67 Cal. 319.

### As fact.

The word "circumstance" and the word "fact" are frequently used interchangeably. In 1 Bouv. Dict. 569, they are given as synonyms, and instances sometimes arise when it would puzzle a professional philologist which of the two words would more accurately characterize the given action or thing done. In cases where the conviction depends upon circumstantial evidence, it often happens that one or more of the ultimate or essential matters may very appropriately be called "circumstances." Whether spoken of as "circumstances" or as "facts," they must be established by the state beyond a reasonable doubt. *Clare v. People*, 10 Pac. 799, 800, 9 Colo. 122.

In an action for malicious prosecution, the expression "circumstances tending to show malice" includes such matters as the bad character of accused, and is broader than the word "facts," which might not be supposed to include such matters, though the bad character of the accused ought to be regarded as an existing fact. *Vinal v. Core*, 18 W. Va. 1, 38.

On a criminal prosecution the court charged that the state's witness was an accomplice under his own testimony; that a person cannot be convicted on an accomplice's testimony, unless corroborated by other evidence

connecting defendant with the offense; and that the corroboration is insufficient if it merely shows the commission of "the offense or circumstances thereof." This instruction was in the identical language of Code, § 4559, except that the word "the" was omitted immediately preceding the concluding words "circumstances thereof," and it was contended that the omission of the word "the" imported that less than all the circumstances would be sufficient corroboration, but the court held such not to be the case, and that the term "circumstances thereof" practically meant all the circumstances. *State v. Russell*, 58 N. W. 890, 90 Iowa, 493.

### CIRCUMSTANCED.

"Circumstanced," as used in a will providing, "By this I intend that the bequest to Kate S., circumstanced as above stated, shall pass to my son and daughter," etc., is equivalent to "under the circumstances, or upon the contingencies, above expressed," and the language serves to exclude the idea that other contingencies were to be added by legal construction or otherwise. *Beck v. Ennis*, 7 N. Y. Supp. 264, 265, 54 Hun, 126.

### CIRCUMSTANCES.

The phrase "circumstances of the testator," in a statute providing that wills shall only be revoked in certain manner, but expressly excepting any revocation implied by law from the changes in the circumstances of the testator, etc., relates only to new family ties, and not to changes in testator's property. In the case of a woman it was limited to the change produced by marriage, and in the case of a man it was limited by the change occasioned by new family ties, including birth as an essential ingredient. *Hoitt v. Hoitt*, 3 Atl. 604, 615, 63 N. H. 475, 56 Am. Rep. 530.

"Circumstances," as used in Code Civ. Proc. § 638, declaring that an objection against one appointed as an executor may be made on the ground that his circumstances are such that they do not afford adequate security to the creditors of the decedent, does not merely mean pecuniary responsibility, but includes thrift, integrity, good repute, and stability of character. *Martin v. Duke* (N. Y.) 5 Redf. Sur. 597, 599.

"Adequate security and circumstances," mentioned in Code Civ. Proc. § 2638, to be considered by the surrogate in issuing letters testamentary, do not relate primarily or exclusively to the pecuniary responsibility of the executor, but to his moral qualification. The question presented to the court is: Is it safe to put this estate in the hands of the person named as executor? Can he be trusted to administer it faithfully and honestly, as directed by the will? In *re Wischmann*, 80 N. Y. Supp. 789, 791, 80 App. Div. 520.

"Circumstances and condition in life," within the meaning of the rule that it is the duty of a husband to furnish his wife with a present comfortable support and maintenance in a manner corresponding with their circumstances and station in life, includes their social standing. "How could it be said that, in fixing the obligation of a husband for the support of his wife, her social position in society, which is the synonym of 'rank' or 'station,' should not be considered? Such is the rule in awarding alimony and in fixing the rights of a wife for separate support." *Thill v. Pohlman*, 41 N. W. 385, 386, 76 Iowa, 638.

"Circumstances," as used in a statute relating to bankrupts, providing that there should be exempt to the bankrupt the necessary household and kitchen furniture, and such other articles and necessities belonging to him as his assignee should designate and set apart, having reference in the amount to the family, condition, and circumstances of the bankrupt, but altogether not to exceed a certain specified sum, means "something antecedent, because the operative clause of the section has taken every vestige of property from him, leaving him as destitute in existing circumstances as if he had never been other than one of the most impoverished of the human family. In determining what he is entitled to, or what should be reserved for or delivered back to him, the court must consider under what circumstances of estate he had enjoyed that of which he has been deprived." In *re Ludlow*, 1 N. Y. Leg. Obs. 322, 323.

### CIRCUMSTANCES APPEARING ON THE TRIAL.

The use of the words "the surrounding circumstances appearing on the trial," in an instruction, cannot be considered erroneous on the ground that they do not limit the jury to the consideration of such matters as were directly connected with the testimony offered on the trial, but are equivalent to the words "circumstances shown on the trial." *Jessen v. Donahue* (Neb.) 96 N. W. 639, 640.

### CIRCUMSTANCES OF EVIDENCE.

Where any new fact has been brought in to a case involving a trust, it is sometimes spoken of as a "circumstance of evidence." *Walston v. Smith*, 39 Atl. 252, 253, 70 Vt. 19.

### CIRCUMSTANCES OF TERROR.

"Circumstances of terror," as used in Acts 1865-66, p. 768, § 1, denouncing all entries into premises at the time in the actual peaceable possession of another, if made with violence and strong hand, whether such entry be by the actual breaking into the house situated on the premises, or by any kind of violence or circumstances of terror,

should be construed to include an entry upon premises by the tearing down of a fence by a large number of men early in the morning shortly after daylight, erecting a shed or kind of a house thereon in the course of a few hours, and the firing of pistols during the erection. *Gray v. Collins*, 42 Cal. 152, 158.

#### CIRCUMSTANCES OF THE PARTIES.

The phrase "circumstances of the parties," as used in the statutory provisions in relation to alimony, is quite comprehensive, and relates not only to the pecuniary circumstances and requirements of the parties in view of the manner in which they had lived, but also a consideration of the conduct of each; and if the wife was to some extent responsible for the misconduct of her husband, or in fault, though this did not justify his acts, yet it might be considered in determining the amount of alimony. *Goodsell v. Goodsell*, 81 N. Y. Supp. 806, 808, 82 App. Div. 65.

#### CIRCUMSTANTIAL EVIDENCE.

See "Chain of Circumstances"; "Corroborating Circumstances."

Circumstantial evidence is of two kinds, namely, certain, that from which the conclusion must necessarily follow; and uncertain, or that from which the conclusion does not necessarily follow, but is probable only, and is obtained by process of reasoning. *Liverpool & L. & G. Ins. Co. v. Southern Pac. Co.*, 58 Pac. 55, 58, 125 Cal. 434 (citing *Greenleaf, Ev.*); *Gannon v. People*, 21 N. E. 525, 529, 127 Ill. 507, 11 Am. St. Rep. 147; *Ross v. City of New York*, 27 N. Y. Super. Ct. (4 Rob.) 49, 54; *People v. Morrow*, 60 Cal. 142, 143.

"Circumstantial evidence is the proof of certain facts and circumstances in a given case, from which a jury may infer other connected facts which usually and reasonably follow, according to the common experience of mankind." *State v. Avery* (Mo.) 21 S. W. 193, 197, 113 Mo. 475; *State v. Dickson*, 78 Mo. 438, 441; *State v. Tate*, 56 S. W. 1099, 1100, 156 Mo. 119; *Baird v. City of New York*, 96 N. Y. 567, 593; *State v. Kornstett* (Kan.) 61 Pac. 805, 808, 62 Kan. 221; *Ross v. City of New York*, 27 N. Y. Super. Ct. (4 Rob.) 49, 54.

"'Circumstantial evidence' is defined to be where the proof applies immediately to collateral facts supposed to have a connection near or remote with the fact in controversy." *United States Exp. Co. v. Jenkins*, 25 N. W. 549, 550, 64 Wis. 542; *Eberhardt v. Sanger*, 8 N. W. 111, 114, 51 Wis. 72.

Circumstantial evidence "is composed of circumstances or relative facts bearing indirectly on the fact at issue or which is sought

to be proved, and requiring in its application to such facts a process of special inference leading to the conclusion denied." *Howard v. State*, 34 Ark. 433, 440.

Circumstantial evidence is a recognized instrumentality of the law in the ascertainment of truth, and, when properly understood and applied, highly satisfactory in matters of grievous moment. *State v. Wilcox*, 44 S. E. 625, 631, 182 N. C. 1120.

Circumstantial or presumptive evidence is where, some facts being proved, another fact follows as a natural or very probable conclusion from the facts actually proved, so as readily to gain the assent of the mind from the mere probability of its actually having occurred. It is the inference of a fact from other facts proved, and the fact thus inferred and assented to by the mind is said to be "presumed"; that is to say, it is taken for granted until the contrary is proved. *State v. Evans* (Del.) 41 Atl. 136, 138, 1 Marv. 477.

Circumstantial evidence is the proof of such facts and circumstances connected with or surrounding the commission of the crime charged as to tend to show the guilt or innocence of the defendant. *Horn v. Territory*, 56 Pac. 846, 847, 8 Okl. 52. "Circumstantial evidence," as the term is commonly understood, is evidence which tends to prove the ultimate fact in issue. *Buel v. State*, 80 N. W. 78, 81, 104 Wis. 132.

Circumstantial evidence is evidence of facts of so conclusive a character as to warrant a firm belief of another fact which is in issue, which belief is as strong and certain as that on which discreet men are accustomed to act in relation to their most important concerns. *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 319, 52 Am. Dec. 711.

"It is not necessary or requisite that circumstantial evidence should have a direct relation to the immediate subject of inquiry, much less that the inference drawn from the circumstances should be absolutely certain or necessary. It is sufficient if the evidence be such as to produce a fair and reasonable presumption of the facts in issue, and if it has that tendency it ought to be received and left to the consideration of the jury, to whom alone it belongs to determine the precise force and effect of the circumstances produced." *Gardner v. Preston* (Conn.) 2 Day, 205, 208, 210, 2 Am. Dec. 91.

The term "circumstantial evidence" is used to designate testimony not based on actual and personal knowledge of the existence of the fact in controversy, but of other facts from which it is satisfactorily proved. The proof in such case rests not alone upon the faith in the veracity, impartiality, opportunity for observation, accuracy of memory, etc., of the witnesses, but also on the experience and connection between the collater-

al facts proved and the fact in controversy. *State v. Miller* (Del.) 82 Atl. 137, 141, 9 Houst. 564.

Indirect or circumstantial evidence is that which tends to establish the issue by proof of various facts sustaining by their consistency the hypothesis claimed. Civ. Code Ga. 1895, § 5143; Pen. Code Ga. 1895, § 983.

#### Compared to chain or cable.

Circumstantial evidence simply comprises the minor relative facts standing around (circumstantia) the principal fact to be proved. To use the expressive term of the Roman law, these facts are the "indicia of truth," serving to point out the object sought. This method of investigating truth by circumstances is often characterized as a "convergence of rays of light to a common focus or center," but more frequently as the formation of a chain out of a number of separate links. *State v. Richards*, 27 Atl. 122, 123, 85 Me. 252.

Circumstantial evidence may be of two kinds, consisting either of a number of consecutive links, each depending upon the other, or a number of independent circumstances all pointing in the same direction. In the former case it is said that each link must be complete in itself, and that the resulting chain cannot be stronger than its weakest link. In the latter case the individual circumstances are compared to the strands in a rope, where no one of them may be sufficient in itself, but all together may be strong enough, to prove the guilt of defendant beyond a reasonable doubt. But in either case every individual circumstance must in itself at least tend to prove defendant's guilt before it can be admitted as evidence. On a prosecution for larceny of money it was error for the court to refuse to charge that the finding of a sack of money in a public lot two days after the defendant's imprisonment was not a circumstance against the defendant, where it was not shown that the defendant had placed the money there or had any connection with it. *State v. Austin*, 40 S. E. 4, 5, 129 N. C. 534.

Circumstantial evidence, strictly speaking, consists of a number of disconnected and independent facts which converge toward the fact at issue as a common center. These concurrent and coincident facts are arranged in combination by a mental process of reasoning and inference, enlightened by common observation, experience, and knowledge. Where a presumption arises from a number of connected and dependent facts, every fact essential to the series must be proved. Such evidence is like a chain, of which no link must be missing or broken which destroys its continuity. Circumstantial evidence is like a wire cable, composed of many small associated but independent wires.

The strength of the cable depends upon the number of wires which are combined, but some of the wires may be broken, and yet the cable is sufficiently strong to uphold the structure. As no chain is stronger than its weakest link, a chain is less reliable when it has a great number of links, but a wire cable is strengthened by an increase in the number of its wires. When circumstantial evidence consists of a number of independent circumstances, coming from several witnesses and different sources, each of which is consistent and tends to the same conclusions, the probability of the truth of the fact in issue is increased in proportion to the number of such circumstances. *United States v. Searcy* (U. S.) 28 Fed. 435, 437.

#### Conclusiveness.

"The term 'circumstantial evidence' is merely a name for the application of reason to facts. It is convincing when different circumstances point to a single conclusion. It may be much more satisfactory than the fallible memories of any half dozen witnesses. It is the only kind of testimony which may bring to life the complicity of a principal who necessarily acts through agents, and hides himself from contact with those who execute the crime." *Voisin v. Commercial Mut. Ins. Co.*, 66 N. Y. Supp. 638, 643, 32 Misc. Rep. 393.

Circumstantial evidence is in the abstract nearly, although perhaps not altogether, as strong as positive evidence. In the concrete it may be infinitely stronger. Chief Justice Whitman, of Maine, in *State v. Thomas*, 6 Law Rep. 634, says that circumstantial evidence is often stronger and more satisfactory than direct, because it is not liable to delusion or fraud. Circumstantial evidence consists of a body of facts of so conclusive a character as to warrant a firm belief of the fact, quite as strong and certain as that on which discreet men are accustomed to act in relation to their most important concerns. It is of two kinds, certain and uncertain, or that from which the conclusion in question necessarily follows, and that from which it does not necessarily follow, but is probable only, and is obtained by a process of reasoning. *People v. Morrow*, 60 Cal. 142, 145.

"Circumstantial evidence consists in reasoning from facts which are known or proved to establish such as are conjectured to exist, but the process is fatally vicious if the circumstance from which we seek to deduce the conclusion depends itself upon conjecture." *People v. Kennedy*, 32 N. Y. 141, 146.

Starkie, Ev. 572, says: "It is always insufficient where, assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true, for it is the actual exclusion of every other hypothesis which invests mere circumstances with the

force of truth. Whenever, therefore, the evidence leaves it indifferent which of several hypotheses is true, or merely establishes some finite probability in favor of one hypothesis rather than another, such evidence cannot amount to proof, however great the probability may be." *Algheri v. State*, 25 Miss. (3 Cushm.) 584, 589.

In a prosecution for larceny of a mule, an instruction that "the jury may from circumstantial evidence alone find the defendant guilty when the facts established are inconsistent with any other theory than that of his guilt, but in order to find the defendant guilty upon circumstantial evidence the facts proven must be wholly inconsistent with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt," is a clear declaration of the law upon the subject. *State v. Hill*, 65 Mo. 84, 87. See, also, *State v. Evans* (Del.) 41 Atl. 136, 138, 1 Marv. 477; *State v. Avery*, 21 S. W. 193, 197, 113 Mo. 475; *State v. Tate*, 56 S. W. 1099, 1100, 156 Mo. 119; *Ross v. City of New York*, 27 N. Y. Super. Ct. (4 Rob.) 49, 54.

A conviction cannot be based on circumstantial evidence alone, unless the state has proven defendant's guilt from the evidence, beyond a reasonable doubt, by facts and circumstances all of which are consistent with each other and with his guilt, and absolutely inconsistent with any reasonable theory of innocence. *State v. Moxley*, 14 S. W. 969, 973, 102 Mo. 374 (citing *Burrill Circ. Ev. p. 181*; 2 *Best, Ev. § 451*; *People v. Cunningham*, 6 *Parker, Cr. R.* 398; *People v. Strong*, 30 *Cal.* 151; *Harrison v. State*, 6 *Tex. App.* 42).

#### Nature of facts constituting.

Circumstantial evidence is proof by testimony of a chain of circumstances pointing sufficiently strongly to the commission of the crime by the defendant. Such evidence may consist of admissions by the defendant, plans laid for the commission of the crime, such as putting himself in position to commit it; in short, any acts, declarations, or circumstances admitted in evidence tending to connect the defendant with the commission of the crime. *People v. Morrow*, 60 *Cal.* 142, 143.

The term "circumstantial evidence" may be correctly applied to evidence that stolen money was found on the person of defendant. *Commonwealth v. Connors*, 27 *Atl.* 366, 368, 156 *Pa.* 147.

Circumstantial evidence is proof of a minor fact which, by indirection, logically and rationally demonstrates the factum probandum. This is illustrated by proof of recent possession of stolen property. In such a case, resting alone upon such inculpatory evidence, the eye of no witness saw the thief in the act of taking the property stolen, but

the witness may testify directly to the fact of seeing the thief recently after the crime in possession of the stolen property, and that when his possession was challenged he either declined to explain, or gave an explanation which was false, from which circumstances of the possession, directly sworn to, and circumstances of a failure to explain or false explanation, the fact of the taking is inferred or deduced by the process of reasoning. *Beason v. State*, 67 *S. W.* 96, 98, 43 *Tex. Cr. R.* 442.

The term "circumstantial evidence" may be used to designate evidence that a scaffolding which fell and injured an employé did not conform with the statute as to the manner of constructing such scaffolding, as the omission of such duty, in the absence of other evidence, warrants the jury in believing that to have been the cause of the injury. *Stewart v. Ferguson*, 58 *N. E.* 662, 663, 164 *N. Y.* 553.

### CIRCUMVENTION.

Circumvention is nearly, if not quite, synonymous with fraud. It is any fraud whereby a person is induced by deceit to make a deed or other instrument. It must be borne in mind, however, that the fraud or circumvention must relate to the instrument itself, and not to the consideration on which it is based, nor can such fraud relate to the quality, quantity, value, or character of the consideration which moves the contract, but it is such a trick or device as induces the giving of one character of instrument under the belief that it is one of a different character. *Town of Oregon v. Jennings*, 7 *Sup. Ct.* 124, 130, 119 *U. S.* 74, 30 *L. Ed.* 323.

### CIRCUS.

A "circus," anciently, was an edifice or inclosure used for the exhibition of games and shows to the people; such was the *Circus Maximus*, which was nearly a mile in circumference. Now the word means a circular inclosure for the exhibitions of feats of horsemanship. *Rowland v. Kleber*, 1 *Pittsb. R.* 68, 71.

Every building, space, tent, or area where feats of horsemanship or acrobatic sports or theatrical performances are exhibited shall be regarded as a circus within the meaning of the war revenue act of 1898. *U. S. Comp. St.* 1901, p. 2237.

#### As theater.

The term "circus" is not synonymous with "theater." The dramatic performances which belong to a theater are those adapted to the stage. A "circus," on the other hand, has no stage, but a ring, and the performances are of a character that can take place in the circle in the absence of the stage and

its appurtenances. They may both be arranged under the general term "amusements," but differ from each other as one species differs from another under the same genus. *Jacko v. State*, 22 Ala. 73, 74.

## CITATION.

"In the civil law and in ecclesiastical courts, the term 'citation' means the original summons by which a defendant is notified to appear and answer in the action. In our practice it is often used to denote interlocutory notices issued during the pendency of a suit or proceeding. Thus, in probate proceedings, a judge may cite a person suspected of stealing the estate of the person deceased to appear and answer. The term 'citation' cannot be held to mean the original summons or process which issues upon a libel for a divorce." *Leavitt v. Leavitt*, 135 Mass. 191, 193.

Citation is a summons to appear, applied particularly to processes in the spiritual court, but adopted in civil procedure from the canon and civil law. *State v. McCann*, 67 Me. 372, 374 (citing *Jac. Law Dict.*).

A citation is an order from the court to the defendant to appear and answer, and this order can emanate only from the clerk and only under his signature. It is the clerk's signature that imparts legal life to the document called a "citation." Without the clerk's signature the document is nothing more than mere writing or print. *Schwartz v. Lake*, 34 South. 96, 109 La. 1081.

A citation in its general character is a summons. *Bacigalupo v. Superior Court of City and County of San Francisco*, 40 Pac. 1055, 108 Cal. 92.

A citation is a writ issued out of a court of competent jurisdiction, commanding the person therein named to appear on the day named and do something therein mentioned, or show cause why he should not. *Johns v. Phoenix Nat. Bank (Ariz.)* 56 Pac. 725, 726.

In case of a removal of a cause to any court by writ of error a citation "is simply notice to the opposite party that the record is transferred into another court, where he may appear, or decline to appear, as his judgment or inclination may determine. This notice is not a suit, nor has it the effect of process. If the party does not choose to appear, he cannot be brought into court, nor is his failure to appear considered as a default. Judgment cannot be given against him for his nonappearance, but the judgment is to be re-examined, and reversed or affirmed, in like manner as if the party had appeared and argued his cause." *Cohens v. Virginia*, 19 U. S. (6 Wheat.) 264, 410, 5 L. Ed. 257.

The citation is a matter separate and distinct from the sheriff's return. A cita-

tion may be thoroughly legal, while the return may fail in making the recitals the sheriff ought to make, and, on the other hand, the return may be beyond criticism, and yet the fact be that no legal citation has been made. The citation itself is the important legal fact upon which the validity of the judgment rests, while the return is simply evidence in respect to that fact. *Baham v. Stewart Bros. & Co.*, 34 South. 54, 56, 109 La. 999.

## CITIZEN.

See "Adopted Citizens"; "Foreign Citizen"; "Lawful Citizen"; "Native-Born Citizens"; "Natural Born Citizen."

"The word 'citizen' is derived from the Latin 'civis,' and meant in Rome one vested with the freedom and privileges of the city. Rees' Encyc. tit. 'Citizen.' Butler says: 'Citizens were the highest class of subjects at Rome to whom *jus civitatis* belonged, and those who had it possessed all rights and privileges, civil, political, religious.' Hora Judicine, 26, 27. Dictionnaire L'Academie les Citoyen defines it thus: 'In its strict and rigorous sense, an inhabitant of a state, who by right may vote in the public assembly, and is a part of the sovereign power.' Johnson defines it: 'A freeman of a city.' Webster: 'The native of a city, or an inhabitant who enjoys the freedom and privileges of a city in which he resides; a freeman of a city, distinguished from a foreigner, or one not entitled to franchises.' The word is never used by the people in a monarchy, since it involves an idea not enjoyed by subjects, to wit, the inherent right to partake in the government. The republics of the Old World were cities, and the word 'citizen' has been usually in human history only applied to inhabitants of cities. As, however, states have in modern times arisen, and republics have been established, in which the word 'subjects' could not be properly applied, the people of those republics have been called 'citizens,' for the simple and obvious reason that their relation to the state was such as was the relation of citizens to the city." And as used in Code, § 1648, providing that among the rights of citizens are the enjoyment of personal security, of personal liberty, of private property and the disposition thereof, the elective franchise, the right to hold office, to appeal to the courts, to testify as a witness, to perform all civil functions, and to keep and bear arms, the word means those persons who, unless it is otherwise expressly provided by law, are entitled to the rights mentioned. *White v. Clements*, 39 Ga. 232, 259.

"Citizens," as used in the United States Constitution, providing that the citizens of each state shall be entitled to all the priv-

ileges and immunities of citizens of the several states, mean those who are entitled, upon the terms prescribed by the institutions of the state, to all the rights and privileges conferred by those institutions upon the highest class of society. "Females and infants do not personally possess those rights and privileges in any state in the Union, but they are generally dependent upon adult males, through whom they enjoy the benefits of those rights and privileges; and it is a rule of common law, as well as of common sense, that females and infants should in this respect partake of the quality of those adult males who belong to the same class and condition in society, and, of course, they will or will not be citizens as the adult males of the same class are or are not so. Nor do we mean to say that it is necessary even for an adult male, to be a citizen, that he should be in the actual enjoyment of all those rights and privileges; but he may even not possess those qualifications of property, of age, or of residence which most of the states prescribe as requisites to the enjoyment of some of their highest privileges and immunities, and yet be a citizen. But to be a citizen it is necessary that he should be entitled to the enjoyment of those privileges and immunities upon the same terms upon which they are conferred upon other citizens, and, unless he is so entitled, he cannot, in the proper sense of the term, be a 'citizen.' In England, birth in the country was alone sufficient to make any one a subject. Even a villein or a slave born within the King's allegiance is according to the principles of the common law a subject, but it never can be admitted that he is a citizen. One may, no doubt, be a citizen by birth as well as a subject, but subject and citizen are evidently words of different import, and it indisputably requires something more to make a citizen than it does to make a subject. It is, in fact, not the place of a man's birth, but the rights and privileges he may be entitled to enjoy, which make him a citizen. The term 'citizen' is derived from the Latin word 'civis,' and its primary sense signifies one who is vested with the freedom and privileges of a city. At an early period after the subversion of the Roman Empire, when civilization had again begun to progress, the cities in every part of Europe, either by usurpation or concession from their sovereigns, obtained extraordinary privileges in addition to those which were common to the other subjects of their respective countries, and one who was invested with these extraordinary privileges, whether he was an inhabitant of the city or not, or whether he was born in it or not, was deemed a citizen. In England a citizen is not only entitled to all the local privileges of the city to which he belongs, but he has also the right of electing and being elected to Parliament, which is itself rather an extraordinary privilege, since it does not belong to every class of subjects. If we go

back to Rome, whence the term 'citizen' has its origin, we shall find in the illustrious period of her republic that citizens were the highest class of subjects to whom the *jus civitatis* belonged, and that the *jus civitatis* conferred upon those who were in possession of it all rights and privileges, civil, political, and religious. When the term came to be applied to the inhabitants of the state, it necessarily carried with it the same signification with reference to the privileges of the state which had been implied by it with reference to the privileges of a city when it was applied to the inhabitants of the city, and it is in this sense that the term 'citizen' is believed to be generally, if not universally, understood in the United States." *Amy v. Smith*, 11 Ky. (1 Litt.) 326, 331.

The term "citizen" has come to us from antiquity, and was used in the Roman government to designate a person who had the freedom of the city and the right to exercise all political and civil privileges of the government. *Thomasson v. State*, 15 Ind. 449, 451 (citing *Adams' Roman Antiquities*, pp. 44, 60; 2 Kent, Comm. p. 76, note).

A "citizen" is defined by Webster to be "a person, native or naturalized, who has the privilege of voting for public officers and who is qualified to fill public offices in the gift of the people; also either native-born or naturalized person, of either sex, who is entitled to full protection in the exercise and enjoyment of so-called private rights." Bouvier gives the definition of a citizen in American law as one who under the Constitution and law of the United States has a right to vote for Representatives in Congress and other public officers, and who is qualified to fill offices in the gift of the people. All persons born or naturalized, in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. Abbott defines it thus: "A person who owes allegiance to and may claim reciprocal protection from a government; one who is a member of the United States, or of the body politic of a sovereign state. Age or majority is not involved. Women are citizens as fully and truly as men. Nor does a recognition of women's citizenship involve a grant of political rights, such as are indeed usually conferred only on citizens, but do not inhere in that status." *State ex rel. McCabell v. County Court*, 2 S. W. 788, 789, 90 Mo. 593 (citing 1 Abb. Law Dict. 223). See, also, *In re Wehlitz*, 16 Wis. 443, 449, 84 Am. Dec. 700.

The word "citizen," as used in the Constitution and laws of the United States, has uniformly conveyed the idea of membership of a nation, and nothing more. *Cronly v. City of Tucson* (Ariz.) 56 Pac. 876, 877; *Minor v. Happersett*, 88 U. S. (21 Wall.) 162, 22 L. Ed. 627.



Chancellor Kent defines "citizens" as follows: "'Citizens,' under our Constitution and laws, mean free inhabitants born within the United States or naturalized under the laws of Congress." The possession of political rights is not essential to citizenship. Every citizen and freeman is endowed with certain rights and privileges, to enjoy which no written law or statute is required. These are fundamental or natural rights, recognized among all free people. *United States v. Morris* (U. S.) 125 Fed. 322, 325.

Citizens are members of the political community to which they belong. They are the people who compose the community, and who in their associated capacity have established or submitted themselves to the dominion of a government for the promotion of their welfare and protection of their individual, as well as their collective, rights. *United States v. Cruikshank*, 92 U. S. 542, 549, 23 L. Ed. 588.

In common parlance, all people are citizens. *Steketee v. Kimm*, 12 N. W. 177, 178, 48 Mich. 322.

All persons who are citizens of the United States and who are domiciled in the commonwealth are citizens thereof. *Rev. Laws Mass. 1902*, p. 55, c. 1, § 1.

"Citizen," as used in Const. art. 5, § 2, providing that no person shall be eligible to the office of Governor who shall not have been for two years a citizen of the United States and of this state, means a person who is an American citizen by birth, or a person of foreign birth who has been naturalized under the provisions of the uniform rule of naturalization established by Congress. *State v. Boyd*, 48 N. W. 789, 740, 745, 81 Neb. 682.

All persons born in this state; all persons born in any other state of this Union, who may be or become residents of this state; all aliens naturalized under the laws of the United States, who may be or become residents of this state; all persons who have obtained a right to citizenship under former laws; and all children, wherever born, whose father, or, if he be dead, whose mother, shall be a citizen of this state at the time of the birth of such children—shall be deemed citizens of this state. *Code Va. 1887*, § 39.

#### Aliens.

A native of Great Britain, born before the Revolution, is not a citizen of this country, as born under a common allegiance before the severance of the two countries. *Ex parte Dupont*, *Harp. Eq.* (S. C.) 5, 10.

As used in *Rev. St. § 5508* [U. S. Comp. St. 1901, p. 3712], providing a punishment to be inflicted on those who conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment

of any right or privilege secured to him by the Constitution or laws of the United States, it is used in its strict sense, as contrasted with "alien," and is not synonymous with "resident," "inhabitant," or "person." *Baldwin v. Franks*, 7 Sup. Ct. 656, 662, 120 U. S. 678, 32 L. Ed. 766; *Logan v. United States*, 12 Sup. Ct. 617, 626, 144 U. S. 263, 36 L. Ed. 429.

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States. A person born in a foreign country, out of the jurisdiction of the United States, whose father is not a citizen of the United States, can only become a citizen by naturalization. *North Noonday Min. Co. v. Orient Min. Co.* (U. S.) 1 Fed. 522, 527.

A party may not be a "citizen" for political purposes, and yet be a citizen for commercial or business purposes. An unnaturalized foreigner, residing and doing business in this state, is, for commercial purposes, in contemplation of our attachment laws, a "citizen" of this state. *Field v. Adreon*, 7 Md. 209, 214.

#### Children of American parents born abroad.

Persons born in a foreign country of American parents, who resided there, but who never renounced their citizenship, are citizens of the United States. *Ware v. Wisner* (U. S.) 50 Fed. 810, 812.

#### Children of resident aliens.

The term "citizens," defined in the fourteenth amendment of the federal Constitution as all persons born or naturalized in the United States and subject to the jurisdiction thereof, must be interpreted in the light of the common law, the principles and history of which were familiarly known to the Constitution. The Supreme Court, speaking through Gray, J., after stating the above doctrine, and giving an extended review of English, American, and foreign authorities, held that the fourteenth amendment affirmed "the ancient rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, except the children of foreign sovereigns or their ministers, or born on foreign public ships or of enemies during hostile occupation, and children of Indians owing direct tribal allegiance. It includes the children of all other persons, of whatever race or color, domiciled within the United States. The fourteenth amendment of the Constitution contemplates two sources of citizenship and two only—birth and naturalization. Every person born in the United States and subject to the jurisdiction thereof becomes a citizen at once, and needs no naturalization. A person born out of the jurisdiction can only become a citizen by being natur-

alized, either by treaty or by authority of Congress, in declaring certain classes of persons to be citizens, or by enabling foreigners individually to become citizens by proceedings in judicial tribunals." *United States v. Wong Kim Ark*, 18 Sup. Ct. 458, 459, 169 U. S. 649, 42 L. Ed. 890.

By the common law a child born within the allegiance and the jurisdiction of the United States is born a subject or citizen thereof, without reference to the political status or condition of its parents. *McKay v. Campbell* (U. S.) 16 Fed. Cas. 161; *In re Look Tin Sing* (U. S.) 21 Fed. 906. This, of course, does not include children born in the United States of parents engaged in the diplomatic service of foreign governments. The rule of common law has been incorporated into the fundamental law of the land, and the fourteenth amendment provides that all persons born in the United States are citizens of the United States. *Ex parte Chin King* (U. S.) 35 Fed. 354, 355.

All persons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States, and hence a person born within the United States of Chinese parents, residing therein and not engaged in any diplomatic or official capacity under the Emperor of China, is a citizen of the United States. *In re Look Tin Sing* (U. S.) 21 Fed. 905, 906; *In re Wy Shing* (U. S.) 88 Fed. 553, 554; *In re Yung Sing Hee* (U. S.) 36 Fed. 437, 438; *Lee Sing Far v. United States* (U. S.) 94 Fed. 834, 35 C. O. A. 377; *In re Wong Kim Ark* (U. S.) 71 Fed. 382, 392; *Gee Fook Sing v. United States* (U. S.) 49 Fed. 146, 147, 1 C. O. A. 211.

The laws of Congress and of Wisconsin use the word "citizen" as designating those who are liable to be enrolled in the militia. Persons of foreign birth, who have declared their intention to become citizens of the United States, and have become qualified electors of the state of Wisconsin under the state Constitution, and have exercised the right of suffrage, are liable to be enrolled in the militia of the state, and to be drafted into the military service of the United States, under the acts of Congress and the state Legislature in force July 9, 1863. But the children of such citizens, who came into this country with their parents while minors, and have since attained full age and resided in the state more than one year, are not qualified electors, nor liable to such enrollment and draft, in case their fathers were never fully naturalized, and they themselves have never declared their intention in conformity with the naturalization laws. *In re Conway*, 17 Wis. 526, 528.

#### As citizen of state.

"Citizens," as used in Bill of Rights, § 17, declaring that no distinction shall ever

be made between citizens and aliens in respect to the purchase, enjoyment, or descent of property, means citizens of Kansas, and not citizens of other states. *Buffington v. Grosvenor*, 27 Pac. 137, 138, 46 Kan. 730, 13 L. R. A. 282.

Const. art. 6, § 8, providing that any male citizen of the age of 21 years of proper qualifications shall be entitled to admission to practice of law in all courts of the state, means citizens of the state. *In re Henry*, 40 N. Y. 560.

The term "citizen of a state," as used in the judiciary act, does not include a citizen of the District of Columbia. *Land Company of New Mexico v. Elkins* (U. S.) 20 Fed. 545.

Citizens of a state, within the removal act, mean citizens of one of the United States, and the suits contemplated are suits between citizens of one of the states of the Union on one side, and foreign states, or citizens or subjects on the other. *Roberts v. Pacific & A. Ry. & Navigation Co.* (U. S.) 121 Fed. 785, 789, 58 C. C. A. 61.

#### Citizen of state and United States distinguished.

A man may be a citizen of the United States without being a citizen of the state; but an important element is necessary to convert the former into the latter. He must reside within the state to be a citizen of it, but it is only necessary that he should be born or naturalized in the United States to be a citizen of the Union. *Butchers Benev. Ass'n v. Crescent City Livestock Landing & Slaughter House Co.*, 83 U. S. (16 Wall.) 36, 73, 74, 21 L. Ed. 394. See, also, *Short v. State*, 31 Atl. 822, 823, 80 Md. 892, 29 L. R. A. 404.

#### As citizen of United States.

The term "citizen of the United States" must be understood to mean those who were citizens of the state as such after the Union had commenced and the several states had assumed their sovereignty. Before that period there were no citizens of the United States. *Inhabitants of Manchester v. Inhabitants of Boston*, 16 Mass. 230, 235.

Const. U. S. art. 4, § 2, declaring that the "citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states" means only citizens of the United States. *Davis v. Pierse*, 7 Minn. 18, 21 (Gil. 1, 9) 82 Am. Dec. 65.

The word "citizen," as used in section 25 of the Bill of Rights, providing that no distinction shall ever be made by law between aliens and citizens in reference to the possession, enjoyment, and descent of property, relates to the political status of persons as respects their relation to the United States. *Glynn v. Glynn*, 87 N. W. 1052, 62 Neb. 872.

Citizenship may be conferred by a nation or state, but not by a political subdivision thereof. A county is a political subdivision of the state. It cannot confer citizenship, and it follows that there cannot be such a civic character as a citizen of a county. The true meaning, therefore, of the words "citizen of the county" in Cr. Code, § 223, which provides that the grand jury is a body of men, returned at stated periods, from the "citizens of the county," is citizens of the United States, who are residents of the county. *People v. Scannell*, 75 N. Y. Supp. 500, 508, 37 Misc. Rep. 345.

#### Corporation.

A corporation is not a citizen, within the meaning of the constitutional provision, and hence has not the privileges and immunities secured to citizens against state legislation. *Orient Ins. Co. v. Daggs*, 19 Sup. Ct. 281, 282, 172 U. S. 557, 43 L. Ed. 552 (citing *Paul v. Virginia*, 75 U. S. [8 Wall.] 168, 19 L. Ed. 357; *Blake v. McClung*, 172 U. S. 239, 19 Sup. Ct. 165, 43 L. Ed. 432); *Norfolk & W. R. Co. v. Commonwealth*, 10 Sup. Ct. 958, 960, 136 U. S. 114, 34 L. Ed. 394; *Liverpool & London Life & Fire Ins. Co. v. Oliver*, 77 U. S. (10 Wall.) 566, 573, 19 L. Ed. 1029; *Lafayette Ins. Co. v. French*, 59 U. S. (18 How.) 404, 405, 15 L. Ed. 451; *Warren Mfg. Co. v. Etna Ins. Co.* (U. S.) 29 Fed. Cas. 294; *Insurance Co. v. New Orleans* (U. S.) 13 Fed. Cas. 67, 68; *Springs v. Southern Ry. Co.*, 41 S. E. 100, 103, 130 N. C. 186; *Woodward v. Commonwealth* (Ky.) 7 S. W. 613, 615; *Columbia Fire Ins. Co. v. Kinyon*, 37 N. J. Law (8 Vroom) 33, 34; *Hawley v. Hurd*, 47 Atl. 401, 402, 72 Vt. 122, 52 L. R. A. 195, 82 Am. St. Rep. 922; *Globe Acc. Ins. Co. v. Reid*, 49 N. E. 291, 292, 19 Ind. App. 203; *Rush v. Foos Mfg. Co.*, 51 N. E. 143, 147, 20 Ind. App. 515; *Utey v. Clark-Gardner Lode Min. Co.*, 4 Colo. 369, 371; *List v. Commonwealth*, 12 Atl. 277, 279, 118 Pa. 322; *D'Arcy v. Connecticut Mut. Life Ins. Co.*, 69 S. W. 768, 769, 108 Tenn. 567 (citing *Bank v. Earle*, 38 U. S. [13 Pet.] 538, 10 L. Ed. 274; *Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania*, 125 U. S. 181, 8 Sup. Ct. 737, 31 L. Ed. 650); *North British & Mercantile Co. v. Craig* (Tenn.) 62 S. W. 155, 157; *Fire Department of City of New York v. Stanton*, 51 N. Y. Supp. 242, 246, 28 App. Div. 334; *People v. Imlay* (N. Y.) 20 Barb. 68, 80; *Anglo-American Provision Co. v. Davis Provision Co.*, 62 N. E. 587, 589, 169 N. Y. 506, 88 Am. St. Rep. 608; *State v. Brown & Sharpe Mfg. Co.*, 25 Atl. 246, 248, 18 R. I. 16, 17 L. R. A. 856; *Caldwell v. Armour* (Del.) 43 Atl. 517, 518, 1 Pennewill, 545; *Ducat v. City of Chicago*, 48 Ill. 172, 179, 180, 95 Am. Dec. 529.

"Citizen," ordinarily means only a natural person, and will not be construed to include a corporation, unless the general purpose and import of the statute in which the

term is found seem to require it. *International & Life Assur. Co. v. Haight*, 35 N. J. Law (6 Vroom) 279, 282.

A corporation is not a "citizen" of the United States or of any state, within the meaning of the word as used in the Constitution, giving United States courts jurisdiction of suits between citizens of different states. *Winkler v. Chicago & E. I. R. Co.* (U. S.) 108 Fed. 305, 308; *Carnegie, Phipps & Co. v. Hulbert* (U. S.) 53 Fed. 10, 11, 3 C. O. A. 391; *Ohio & Miss. R. R. Co. v. Wheeler*, 66 U. S. (1 Black) 286, 295, 17 L. Ed. 130; *Anglo-American Provision Co. v. Davis Provision Co.*, 62 N. E. 587, 589, 169 N. Y. 506, 82 Am. St. Rep. 608.

The term "citizen," as used in the federal Constitution and statutes defining the jurisdiction of the federal courts, includes a corporation created by one of the states, when such corporation is regarded as a citizen of that state for the purpose of determining its residence. *Wisconsin v. Pelican Ins. Co.*, 8 Sup. Ct. 1370, 1378, 127 U. S. 265, 32 L. Ed. 239. See, also, *Baughman v. National Waterworks Co.* (U. S.) 46 Fed. 4, 7. A corporation is not considered as a citizen, or entitled to the privileges of a citizen, except for the purpose of giving jurisdiction to the federal courts, for which a corporation may be considered a citizen of the state by which it is incorporated. *Tatem v. Wright*, 23 N. J. Law (3 Zab.) 429, 445.

Corporations organized under state laws are "citizens of the United States," within the meaning of Act March 3, 1891, c. 538, 26 Stat. 851 [U. S. Comp. St. 1901, p. 758], giving the Court of Claims jurisdiction over claims for property of citizens of the United States destroyed by Indians. *United States v. Northwestern Express, Stage & Transportation Co.*, 17 Sup. Ct. 206, 207, 164 U. S. 686, 41 L. Ed. 599.

A corporation is not a citizen, within the meaning of the act of Congress authorizing a foreign corporation to transact business in the state, and providing that thereby it becomes a domestic corporation. *Hollingsworth v. Southern R. Co.* (U. S.) 86 Fed. 353, 356.

Within Act May 10, 1872, providing that all valuable mineral deposits in lands belonging to the United States shall be free and open to exploration and purchase by citizens of the United States, under such regulations as shall be prescribed by law, a corporation lawfully created and existing is a citizen. *North Noonday Min. Co. v. Orient Min. Co.* (U. S.) 1 Fed. 522, 538.

Citizenship, within the federal judiciary act, as applied to corporations, is based on the presumption that the members of the corporation are citizens of the state in which alone the corporate body has a legal existence and under the laws of which the corporation is created; and, since a suit by or

against the corporation in its corporate name must be presumed to be a suit by or against citizens of the state which created the body, no averment or evidence to the contrary is admissible for the purpose of withdrawing the suit from the jurisdiction of the United States courts. *Zambrino v. Galveston, H. & S. A. R. Co.* (U. S.) 38 Fed. 449, 451.

A corporation, as an artificial person, exists only by force of the law which created it. It has no extraterritorial existence, and what rights it may exercise in other jurisdictions are permitted upon the principle of comity. It is not a citizen of the state in the constitutional sense. *Anglo-American Provision Co. v. Davis Provision Co.*, 62 N. E. 587, 589, 189 N. Y. 506, 88 Am. St. Rep. 608.

A compliance by a foreign railroad corporation with the statute providing that such corporation shall not be entitled to the right of eminent domain, or have power to acquire a right of way or real estate, until they shall have become bodies corporate in accordance with the laws of the commonwealth, and prescribing the manner of such incorporation, does not render the corporation a "citizen" of the state, in such sense as to deprive it of the right to remove to the federal court actions instituted against it by a citizen of the state. *Davis v. Chesapeake & O. Ry. Co.*, 75 S. W. 275, 277, 25 Ky. Law Rep. 342.

"Citizens," within the meaning of Rev. St. U. S. § 5219, providing that the taxation of national banks shall not be at a higher rate than assessed on other moneyed capital in the hands of individual citizens of the state, means natural persons, and not corporations. The term "individual citizens" in this section is not substantially different from the term "individual" in the state statute, which only differs from the statute quoted in substituting the word "individual" for the words "individual citizens." *Primm v. Fort*, 57 S. W. 972, 23 Tex. Civ. App. 605.

The words "citizen" and "person," as used in the article relating to taxes on incomes, shall be deemed to include all natural persons, all copartners, and all members of any incorporated association, and to exclude, except as hereinafter included, all corporations duly chartered by the laws of the United States and of this or any other state. Civ. Code S. C. 1902, § 327.

#### Declaration of intention.

Within Rev. St. art. 3010, providing that no person shall be qualified to serve as a juror unless he is a citizen of the state and of the county in which he is to serve, the term "citizen" should be construed to include one who has declared his intention to become a citizen in due form and possesses the other conditions of age and residence within the state and voting district for the

appropriate length of time, becoming thereby a qualified elector. A citizen is a person, native or civilized, who has the privilege of voting for public officers and who is qualified to fill offices in the gift of the people; one who, under the Constitution and laws of the United States, has a right to vote for Representatives in Congress and for public officers, and who is qualified to fill offices in the gift of the people. *Abrego v. State*, 15 S. W. 408, 410, 29 Tex. App. 143.

Militia Act May 8, 1792, designating the persons to be enrolled for militia duty, provided that "every free, able-bodied, white, male citizen of the respective states, resident therein," etc., should be liable to militia duty. Held, that the word "citizen," as there used, included a resident alien who had declared his intention to become a citizen of the United States pursuant to the naturalization laws of the United States. In re *Wehlitz*, 16 Wis. 443, 445, 84 Am. Dec. 700.

#### Domicile as determining.

"Citizen," as the term is used, in the federal Constitution and judiciary act, with reference to the jurisdiction of federal courts, means a citizen of the United States residing permanently in any state; otherwise, a citizen by statute would never belong to any state, and could never maintain a suit in the courts of the United States. In the sense of the Constitution and judiciary act, he who is incorporated into the body of the state by permanent residence therein, so as to become a member of it, must be a citizen of that state, though born in another; or, to use the phrase more familiar in the books, "a citizen of the United States must be a citizen of that state in which his domicile is placed." *Prentiss v. Barton* (U. S.) 19 Fed. Cas. 1276; *Gardner v. Sharp* (U. S.) 9 Fed. Cas. 1196, 1199.

The word "citizen," as it is used in the statute providing for the jurisdiction of the federal courts as between citizens of different states, means a person who has a domicile in a state. A person does not lose his citizenship by removing from one state to another, providing such removal is in good faith and with the intention thereby to change his citizenship; but such removal must be real, *animo manendi*, and not merely ostensible, and, if so, he becomes a citizen for the purpose of the jurisdiction of the federal courts, though the time has not expired within which he could exercise all the rights of citizenship in such state. *Case v. Clarke* (U. S.) 5 Fed. Cas. 254; *Catlett v. Pacific Ins. Co.*, Id. 291.

Laws 1893, p. 239, § 6, provides that no person shall be entitled to a divorce unless a bona fide resident and citizen of the state for one year prior to the commencement of the action. It was held that, though in a restricted sense a citizen of a state is a cit-

izen of the United States domiciled in a state, yet the Legislature used the word "citizen" in the statute cited as meaning one who has in the state a fixed habitation and a permanent residence, without any present intention of removing therefrom. *Cairnes v. Cairnes*, 68 Pac. 233, 234, 29 Colo. 260, 93 Am. St. Rep. 55.

#### Indian.

An Indian, born a member of one of the Indian tribes within the United States, but which still exists and is recognized as a tribe by the government of the United States, who has voluntarily separated himself from his tribe and taken up a residence among the white citizens of the state, but who has not been naturalized, or taxed, or recognized as a citizen, either by the United States or by the state, is styled a citizen of the tribe or Indian nation in which he was born, and does not by his withdrawal from such tribe become a citizen of the United States, within the federal Constitution, since, being born a member of an independent political community, he is not born subject to the jurisdiction of the United States—not born in its allegiance—and hence cannot become a citizen thereof by any act of his own, without the consent and co-operation of the government. *Elk v. Wilkins*, 5 Sup. Ct. 41, 49, 112 U. S. 94, 28 L. Ed. 643; *Smith v. United States*, 14 Sup. Ct. 234, 236, 151 U. S. 50, 38 L. Ed. 67; *Stevenson v. Christie*, 42 S. W. 418, 420, 64 Ark. 72.

Indians are not citizens, although born in the United States. Whether or not the government can subject them to its jurisdiction, it has not done so in the case of offenses committed by one Indian upon another; and, not being subject to the jurisdiction of the United States, they are not citizens thereof. Under the laws as they now are, an Indian, if a member of a tribe, is not a member of the body politic. The tribes are permitted by the United States to exist as distinct nations, or as distinct political societies, separated from others, capable of managing their own affairs and governing themselves. So long as the government of the United States, through its legislative department, continues to treat them as beyond the jurisdiction of the United States, so long they must be held to be quasi foreign nations, whose citizens are not regarded as American citizens, and not subject to the responsibilities of such citizens. In *re Reynolds* (U. S.) 20 Fed. Cas. 582, 583 (citing *Jackson v. Goodell* [N. Y.] 20 Johns. 188, 193; *Cherokee Nation v. Georgia*, 30 U. S. [5 Pet.] 1, 8 L. Ed. 25; *Worcester v. Georgia*, 31 U. S. [6 Pet.] 515, 8 L. Ed. 483; *Kansas Indians v. Johnson*, 72 U. S. [5 Wall.] 737, 18 L. Ed. 667; *Scott v. Sandford*, 60 U. S. [19 How.] 393, 403, 15 L. Ed. 691); *United States v. Osborn* (U. S.) 2 Fed. 58, 59.

#### As inhabitant.

A citizen "is a native or naturalized person." It has a more extensive signification than the word "inhabitant," which only means one who dwells or resides permanently in a place. *State v. Kilroy*, 86 Ind. 118, 120.

"The word 'citizen' may properly be construed a member of a political society; and although he might be absent for years, and cease to be an inhabitant of its territory, the right of citizenship may not thereby be forfeited, but may be resumed whenever he may choose to return." "Citizen" and "inhabitant" cannot be considered synonymous. The word "inhabitant" comprehends a single fact, locality of existence; the word "citizen," a combination of civil privileges, some of which may be enjoyed in any state in the Union. In book 1, c. 19, § 213, Vattel says: "The inhabitants, as distinguished from citizens, are strangers who are permitted to settle and stay in the country. Bound by their residence to the society, they are subject to the laws of the state while they reside there, and they are bound to protect it while it grants them protection, though they do not participate in all the rights of citizens." This authority shows very plainly the distinction between the citizen and the inhabitant, and that the latter appellation is derived from abode and habitation, and not from political privileges. *Spragins v. Houghton*, 3 Ill. (2 Scam.) 377, 392, 402.

"Citizen" is usually defined as an inhabitant of a city, town, or place; but this definition is subject to various limitations, depending on the context in which it is found. It may indicate a permanent resident, or one who remains for a time, or from time to time. The word must always be taken in that sense which best harmonizes with the subject-matter in which it is used. *Union Hotel Co. v. Hersee*, 79 N. Y. 454, 461, 35 Am. Rep. 536.

The word "citizen," as used in Act March 23, 1860, § 3, providing that the territory adjoining the city of Nashville may be added thereto if 12 citizens, freeholders in the territory proposed to be added and included in the corporate limits of the city, shall sign a petition in writing, describing the particular territory proposed to be added, and shall submit the same to the mayor and aldermen for consent and approval, and, if the mayor and citizens in the territory consent, then it shall become a part of the city, is equivalent to resident or inhabitant, and hence no nonresident freeholder had a right to vote at the election; otherwise, the whole territory might have been annexed without an inhabitant having a chance to vote on the question. *Morris v. City of Nashville*, 74 Tenn. (6 Lea) 337, 341.

An ordinance prescribing the rate to be charged the "citizens" of the municipality

for the use of water from a chartered water-works company means "inhabitants." *Smith v. Birmingham Waterworks Co.*, 16 South. 123, 126, 104 Ala. 315.

Webster defines "citizen," first, as one who enjoys the freedom and privileges of a city, i. e., the freemen of the state, as distinguished from a foreigner, or one not entitled to its franchise, and, second, as an inhabitant in any city, town, or place; and, as used in Rev. St. 1881, § 2097, providing that "whoever keeps a place where intoxicating liquors are sold \* \* \* or suffered to be drunk in a disorderly manner, to the annoyance \* \* \* of any part of the citizens of this state," etc., "citizens" is synonymous with "inhabitants" or "residents." *Sunman v. Clark*, 22 N. E. 113, 116, 120 Ind. 142.

As used in Acts 1795, c. 56, prohibiting the issuance of an attachment upon warrant without an affidavit that the debtor was not a citizen of the state and not residing therein, or that, being a citizen, he has absconded, etc., the word is synonymous with "inhabitant" or "permanent resident." *Risewick v. Davis*, 19 Md. 82, 93.

As used in the insolvent law, which provides that any citizen may have the benefit thereof, "citizen" is used synonymously with "inhabitant." *Judd v. Lawrence*, 55 Mass. (1 Cush.) 531, 535.

Laws 1889 provided that personal property of inhabitants of Michigan should be subject to taxation. Comp. Laws 1897, § 3831, eliminated the word "inhabitant," and declared that for the purpose of taxation all shares in foreign corporations owned by citizens of Michigan should be included. It was held that the contention that the word "citizen," as so used, applied only to those citizens of the state who resided elsewhere, and not to resident citizens, because otherwise a nonresident citizen would escape taxation, and that the change made in the statute, with the word "citizen" substituted, to prevent nonresident citizens from escaping taxation, cannot be sustained, since the word was evidently used in its common meaning, as synonymous with "inhabitant" or "resident." *Bacon v. State Tax Com'rs*, 85 N. W. 307, 309, 126 Mich. 22, 60 L. R. A. 321, 86 Am. St. Rep. 524.

By the act of 1841, ca. sa. is prohibited from issuing against any citizen of the state without a previous affidavit of fraud, and by the act of 1785 ca. sa. is prohibited from issuing against any inhabitant of the state. It was contended that the act of 1841 was to be construed in connection with the act of 1785, but that, taken together, the restriction intended by the Legislature to be imposed on issuing process to take the body was designed to apply to resident citizens or inhabitants, and that the word "citizen,"

used in the act of 1841, was to be taken in that sense. It is true these laws are on the same subject, but they are distinct enactments, applying in terms to different persons, the former to inhabitants, and the latter to citizens, and there is nothing from which it can be collected that the Legislature meant the same thing by both. On the contrary, by the use of different terms not having the same meaning, we are to suppose they mean different things. A man may be a citizen without being an inhabitant of the state, as a man may be an inhabitant without being a citizen. This is not only an obvious distinction, but one which the Constitution itself makes, as, in the qualification of voters, it requires both citizenship and residence. *Quinby v. Duncan* (Del.) 4 Har. 383, 384.

Within Gould's Dig. c. 68, § 29, providing that every free white citizen of the state, male or female, being a householder or the head of a family, shall be entitled to a homestead exempt from sale or execution, the term "citizen" means an inhabitant, a resident of a town, state, or county, without any implication of political or civil privileges. *McKenzie v. Murphy*, 24 Ark. 155, 157.

The term "citizen," as used in Hart. Dig. art. 1270, declaring that there shall be reserved of every citizen or head of a family in this Republic, free and independent of the power of a writ of fieri facias or other execution, one horse, is not to be taken in a restricted sense as designating a native-born or naturalized citizen, but in its general acceptance, as descriptive of the inhabitants of the country. *Cobbs v. Coleman*, 14 Tex. 594, 597.

Our Constitution and statutes with great uniformity use the word "citizen" to designate one who is a citizen of the state and of the United States, and the term "inhabitant" to designate the domiciled resident of a town; and such is the general acceptance of the terms. *Bull v. Town of Warren*, 86 Conn. 83, 85.

#### Negro.

A free man of color, born within the United States, is a "citizen" of the United States, and as such is entitled to be a citizen of any one of the several states by becoming a citizen thereof. *Smith v. Moody*, 26 Ind. 299, 303; *United States v. Rhodes* (U. S.) 27 Fed. Cas. 785, 786.

"Citizen" means a freeman. In the United States it means a person, native or naturalized, who has the privileges of exercising the elective franchise and of purchasing and holding real estate. Colored persons are not citizens. *Crandall v. State*, 10 Conn. 339, 340, 345.

### As people of United States.

"In the federal Constitution the words 'people of the United States' and 'citizens,' are synonymous terms and mean the same thing. They both describe the political body, who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of these people, and a constituent member of this sovereignty." *Scott v. Sandford*, 60 U. S. (19 How.) 393, 404, 15 L. Ed. 691; *Civil Rights Cases*, 3 Sup. Ct. 18, 36, 109 U. S. 3, 27 L. Ed. 835.

### Porto Rican.

Within the meaning of Laws 1896, c. 909, § 34, subd. 1, requiring a person, in order to be entitled to vote at the state election, to be a male "citizen" of the United States, the term "citizen" does not include a native-born citizen of Porto Rico, who resided there until September, 1899, when he moved to the United States, and who has never been naturalized, as the treaty by which Porto Rico was acquired did not operate as a collective naturalization of the inhabitants thereof. *In Elk v. Wilkins*, 112 U. S. 94, 5 Sup. Ct. 41, 28 L. Ed. 643, the Supreme Court of the United States, defining the rights of persons individually or collectively to become citizens under the fourteenth amendment of the Constitution of the United States, says: "This section contemplates two sources of citizenship, and two sources only—birth and naturalization. The persons declared to be citizens are all persons born or naturalized in the United States and subject to the jurisdiction thereof. The evident meaning of these last words is not merely subject in some respect or degree to the jurisdiction of the United States, but completely subject to their political jurisdiction and owing them direct and immediate allegiance; and the words relate to the time of birth in one case as they do to the time of naturalization in the other. Persons not thus subject to the jurisdiction of the United States at the time of birth cannot become so afterward, except by being naturalized, either individually or by proceedings under the naturalization acts, or collectively as by the force of a treaty by which foreign territory is acquired." *People v. Board of Inspectors*, 67 N. Y. Supp. 236, 237, 32 Misc. Rep. 584.

### As resident.

The word "citizen" does not always mean the same thing. Thus, we speak of a person as a citizen of a particular place, when we mean nothing more than that he is a resident of the place. When we speak of a citizen of the United States, we mean one who was born within the limits of, or who

has been naturalized by the laws of, the United States. As used in the act relating to the acquisition of public lands by religious societies (Act March 14, 1831), requiring such societies to furnish a list of the names of their members, specifying that they are citizens of the township, the word "citizens" is used as synonymous with "resident." *State v. Trustees of Section 29, Delhi Tp.*, 11 Ohio, 24, 28.

Within Act March 3, 1887, c. 373, 24 Stat. 552 [U. S. Comp. St. 1901, p. 508], providing that any other suit of a civil nature at law or in equity, of which the Circuit Courts of the United States are given jurisdiction and which are now pending, or which may hereafter be brought in any state court, may be removed into the Circuit Court for the proper district by the defendant or defendants therein, being nonresidents of the state, and when, in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states, and which can be fully determined as between them, then one or more of the defendants actually interested may remove the suit into a Circuit Court of the United States for the proper district, the words "citizens" and "residents" are interchangeable and synonymous, and whenever a corporation is a citizen of the state it is a resident of that state, and citizenship and residence in respect to corporations are treated by the courts as one and the same. *Baughman v. National Waterworks Co.* (U. S.) 46 Fed. 4, 7.

In *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942, it was said that it has been long stated that an allegation that a party is a resident does not show that he is a citizen, within the meaning of the judiciary acts. *Galveston, H. & S. A. R. Co. v. Gonzales*, 14 Sup. Ct. 401, 403, 151 U. S. 496, 38 L. Ed. 248. See, also, *Parker v. Overman*, 59 U. S. (18 How.) 137, 141, 15 L. Ed. 318; *Tug River Coal & Salt Co. v. Brigel* (U. S.) 67 Fed. 625, 628, 14 C. C. A. 577; *Sharon v. Hill* (U. S.) 26 Fed. 337, 342; *Zambrino v. Galveston, H. & S. A. R. Co.* (U. S.) 38 Fed. 449; *Cleveland, C., C. & St. L. Ry. Co. v. Monaghan*, 30 N. E. 869, 871, 140 Ill. 474; *Brock v. Doyle*, 18 Fla. 172, 173.

"Citizenship" and "residence" are not synonymous terms, so that testimony of plaintiff that he lives in a certain state does not show his citizenship. *Danahy v. National Bank of Denison* (U. S.) 64 Fed. 148, 149, 12 C. C. A. 75.

A plaintiff's citizenship, for the purposes of the jurisdiction of a federal court, depends upon his domicile, which is a different thing from his residence, and may be in a different state. A person does not lose his citizenship in one state by removing to another to reside temporarily, with the inten-

tion of returning to his former residence at a definite time in the future. *Collins v. City of Ashland* (U. S.) 112 Fed. 175, 176, 177; *Illinois Life Ins. Co. v. Shenehon* (U. S.) 109 Fed. 674, 675.

One may be a citizen of one state, within the meaning of Act Cong. March 2, 1867, providing for the removal of a cause from a state court to a federal court, and yet be a resident of another state. *Darst v. Bates*, 51 Ill. 439, 440.

#### State.

A "citizen" is "a member of a nation or sovereign state, especially of a republic; one who owes allegiance to a government and is entitled to protection from it." Standard Dict. There is nothing under the act regulating the removal of suits to the federal courts to indicate that the words "state" and "citizen," when used therein, were intended to have other than their ordinary significance; and, as they are in no wise synonymous terms, the logical conclusion is that the term "citizens" has reference to the various persons who compose the members and citizenship of the several states, and not to the states themselves. *O'Connor v. State* (Tex.) 71 S. W. 409, 410.

A state is not a citizen within the removal act of Congress. *Chicago, St. L. & N. O. R. Co. v. Commonwealth* (Ky.) 72 S. W. 1119, 1121 (citing *Stone v. South Carolina*, 117 U. S. 430, 6 Sup. Ct. 799, 29 L. Ed. 962; *Postal Telegraph Cable Co. v. Alabama*, 135 U. S. 482, 15 Sup. Ct. 192, 39 L. Ed. 231); *State of Arkansas v. Kansas & T. Coal Co.*, 22 Sup. Ct. 47, 48, 183 U. S. 185, 46 L. Ed. 144; *State v. O'Connor* (Tex.) 74 S. W. 899.

#### As subject.

The word "citizens," as used in a treaty between the United States and a foreign monarchical state, must be construed in the same sense as the term "subjects" or "inhabitants," when applied to persons owing allegiance to the United States, and extends to all persons domiciled in the foreign state. *The Pizarro*, 15 U. S. (2 Wheat.) 227, 245, 4 L. Ed. 228.

A "citizen" is a freeman who has kept a family in the city. *Roy v. Hanger*, 1 Rolle, 138, 149. The term "citizen," as understood in our law, is precisely analogous to the term "subject" in the common law, and the change of phrases has entirely resulted from the change of government. The sovereignty has been changed from one man to a collective body of people, and he who before was a subject of the king is now a citizen of the state. "Citizens," under our Constitution and laws, means free inhabitants born within the United States or naturalized under the laws of Congress. *United States v. Rhodes* (U. S.) 27 Fed. Cas. 783, 788 (citing 1 Kent, Comm. 292, note).

#### As voter.

"Citizen," as used in article 1, § 23, of the Constitution, refers only to those who participated in the formation of the government or have a right to participate in its administration; and these include only white male citizens of the United States of the age of 21 years and white males of foreign birth of like age who have declared their intention under the act of Congress to become citizens of the United States and have resided in this state six months. *Thomasson v. State*, 15 Ind. 449.

A citizen "is a member of a civil state, entitled to all its privileges. According to Webster a citizen is 'a person, native or naturalized, who has the privilege of voting for public officers and who is qualified to fill offices in the gift of the people.' While the rights to vote and hold office are not always necessary constituents of citizenship, still the commonly accepted meaning of the word conveys the idea of a qualified voter." *Crandall v. State*, 10 Conn. 339, 340, 345.

"Citizen" means an elector, as used in Sand. & H. Dig. § 6984, denoting the persons who may sign petitions for change of school district boundaries. *School Dist. No. 11 v. School Dist. No. 20*, 39 S. W. 850, 851, 63 Ark. 543.

A "citizen," in the popular and appropriate sense of the term, is one who, by birth, naturalization, or otherwise, is a member of an independent political society called a "state," "kingdom," or "empire," and as such is subject to its laws and entitled to its protection and all his rights incident to that relation; and the right to vote is not necessarily incident to or coextensive with the right of citizenship. *Dorsey v. Brigham*, 52 N. E. 303, 304, 177 Ill. 250, 42 L. R. A. 809, 69 Am. St. Rep. 228 (citing *Blanck v. Pausch*, 113 Ill. 60).

Alleging that one is a citizen is not equivalent to saying that he is an elector, as used in Rev. St. 1874, c. 46, § 112, providing that an elector of a town may contest an election. *Blanck v. Pausch*, 113 Ill. 60, 64.

"Citizens" and "legal voters" are not synonymous. Minors and females may be citizens, and yet not legal voters. Suffrage is not a right of citizenship, and citizenship is not essential to the right of suffrage. *Dorsey v. Brigham*, 52 N. E. 303, 304, 177 Ill. 250, 42 L. R. A. 809, 69 Am. St. Rep. 228 (citing *People v. Oldtown Sup'rs*, 88 Ill. 202).

A citizen is a person born in the United States; one who owes to government allegiance, service, and money by way of taxation, and to whom the state in turn grants and guarantees liberty of person and of conscience, the right of acquiring and possessing property, of marriage and social relations, of suit and defense, and security in personal



estate and reputation. It is not necessary, for a person to be a citizen, that he should be in the actual enjoyment of all these rights and privileges which belong to a citizen. Thus women are citizens, although they cannot vote; and, within the statute providing that every juror shall be a male citizen of the state, resident of the county, persons are competent as jurors when they are residents of the county, though not qualified to vote therein. *State v. Fairlamb*, 25 S. W. 895, 899, 121 Mo. 137.

The charter of a town provided that the town authorities should have power to license the sale of spirituous and malt liquors, but should not grant any application for such license unless the same was accompanied by a petition signed by two-thirds of the citizens of such town asking for the license. It was held that the term "citizens," as used in the charter, embraced only the qualified voters of the town. *Wray v. Harrison*, 42 S. E. 351, 352, 116 Ga. 93.

"Citizen," as used in a statute providing that any citizen of the county may maintain an action to enjoin a nuisance, means any male person over 21 years of age who has his present home and domicile in such county, although it may be for a temporary purpose, provided he has a fixed intention of remaining there for an indefinite period of time, and has no home, domicile, or right of citizenship elsewhere, and does not necessarily mean a voter. *Fuller v. McDonnell*, 39 N. W. 277, 278, 75 Iowa, 220.

#### **Woman or minor.**

"The word 'citizen,' when used in its most common and most comprehensive sense, doubtless includes women; but a woman is not, by virtue of her citizenship, vested by the Constitution of the United States or by the Constitution of the commonwealth with any absolute right, independent of legislation, to take part in the government, either as a voter or as an officer, or to be admitted to practice as an attorney." The word "citizen" in St. 1876, c. 197, authorizing the admission of citizens to practice law, is but a repetition of the word originally adopted with a view of excluding aliens. In *re Robinson*, 131 Mass. 376, 41 Am. Rep. 239. See, also, In *re Ricker*, 29 Atl. 539, 66 N. H. 207, 24 L. R. A. 740.

A woman is both a "citizen" and a "person," within the meaning of a section of the Constitution providing against any law abridging the privileges of citizens of the United States, or depriving any person of life, liberty, or property without due process of law, since the right to contract is property; and the act declaring that no female shall be employed in any factory or workshop more than 8 hours in any one day, or 48 hours in any one week, is unconstitutional.

*Ritchie v. People*, 40 N. E. 454, 458, 155 Ill. 98, 29 L. R. A. 79, 46 Am. St. Rep. 315.

The word "citizens," in the organic act of Washington Territory (10 Stat. 174, § 5), providing that every white male inhabitant over the age of 21 years residing within the territory shall be a voter at the first election, but the qualifications of voters at subsequent elections shall be as prescribed by the legislative assembly, providing that the right of suffrage shall be exercised only by citizens of the United States over the age of 21 years, or by those above that age who have declared on oath their intention to become such, means only male inhabitants, so that an act conferring the right of suffrage upon women is void. *Bloomer v. Todd*, 19 Pac. 135, 142, 8 Wash. T. 599, 1 L. R. A. 111. For a contrary holding see *Cronly v. City of Tucson* (Ariz.) 56 Pac. 876, 877.

Acts Mo. 1883, p. 86, making it unlawful to grant a dramshop license, except on petition of a majority of the "assessed taxpaying citizens," meant persons entitled to the protection of the government and enjoyment of a citizen's rights, and did not exclude women or minors. *State v. Howard County Court*, 2 S. W. 788, 789, 90 Mo. 593.

The word "citizen," as used in a Texas statute, providing that a given number of citizens and freeholders may apply for an election to change the county seat, means those who are recognized by law as competent to exercise political rights, including particularly the sovereign right of voting, and does not include women and children. *Scarborough v. Eubank* (Tex.) 52 S. W. 569, 571.

"Citizen" is more commonly used to describe a person living under a republican form of government. When used in this sense it conveys the idea of membership of a nation. In that sense women, if born of citizen parents within the jurisdiction of the United States, have always been considered citizens of the United States. *Minor v. Happersett*, 88 U. S. (21 Wall.) 162, 166, 22 L. Ed. 627.

#### **CITIZEN OF TEXAS.**

By section 8 of the declaration of the Texas general convention, it was declared that the state would give donations of land to all who volunteered their services in the Texas struggle against Mexico for independence and receive them as citizens. 4 *Sayles' St. Tex.* p. 138. Held, that a citizen of Illinois, who entered the military service of Texas as a volunteer in such war after the adoption of such declaration of promised citizenship, and who died in her service, became a citizen of Texas, though his wife remained in Illinois until after his death, and that she and his children also thereby

became citizens of Texas, and were thus entitled to bounty lands under such provision. *Kircher v. Murray* (U. S.) 54 Fed. 617, 621.

### **CITIZENSHIP.**

Citizenship "is the state of being vested with the rights and privileges of a citizen." *Abrigo v. State*, 15 S. W. 408, 410, 29 Tex. App. 143.

"Citizenship," within the meaning of Act May 15, 1820, c. 113, §§ 4, 5, providing that if any citizen of the United States, being of the crew or ship's company of any foreign vessel engaged in the slave trade, or any other person whatever, shall land from any such vessel and on any foreign shore seize any negro or mulatto, with intent to make such negro or mulatto a slave, shall be adjudged a pirate, means "that unequivocal relation between every American and his country which binds him to allegiance and pledges to him that protection that goes with him wherever he goes, stamping him a traitor if he be found in the ranks of an enemy, as a criminal if violating her law, but watching over him and covering him with the shield of her power, though he traverse the sea under a strange flag, or sojourn on a foreign shore. It is not the citizenship of domicile; the citizenship of the man who comes to be a guest on our shores, and who is entitled to protection, just as the stranger becomes a member of the household when invited to stay for the night. That is not the citizenship the act refers to, for that subjects to no liability whatever beyond the territorial limits of the country in which the domicile is; nor is it what some law books have called judicial citizenship, for that has no relation to a subject like this, but applies only to the question whether the party can sue or be sued in the courts of the United States, or whether their litigation must go over to the state courts; nor is it what some might call 'diplomatic citizenship'—that grade of inchoate citizenship which might be claimed by one who has declared his intention to become a citizen hereafter, prospective in its allegiance, actual in its asserted rights. Such is not the citizenship meant by the act of Congress. It is that citizenship which makes us constituent members of this country, and that binds us everywhere to obey its laws, because it protects us everywhere. The right and the duty are inseparable. They begin and end together." *United States v. Darnaud* (U. S.) 25 Fed. Cas. 754, 762.

### **Alienage distinguished.**

The right of citizenship, as distinguished from alienage, is a national right, character, or condition, and does not pertain to the individual states separately considered. The question is of national, and not individual, sovereignty, and is governed by the principles of the common law, which prevail in the United States and become, under the

Constitution, to a limited extent a system of national jurisprudence. *Town of New Hartford v. Town of Canaan*, 5 Atl. 360, 362, 54 Conn. 39.

### **Domicile distinguished.**

"Citizenship," "habitaney," and "residence" are several words which may in a particular case mean precisely the same as "domicile," but very frequently they may have other and inconsistent meanings; and while, in one use of language, the expression a change of domicile, of citizenship, of habitaney, or of residence, are necessarily identical and synonymous, in a different use of language they may import different things. In general, "citizenship," while including "domicile," means something more. It means allegiance to the government of the domicile, or a part of the community entitled to all the rights, privileges, and immunities of members thereof. *Borland v. City of Boston*, 132 Mass. 89, 93, 42 Am. Rep. 424.

### **As inhabitancy.**

Citizenship, as a jurisdictional fact, is precisely similar to inhabitancy. They are established, when controverted, by similar evidence, and one is as easily proved as the other. To give the national courts jurisdiction on the ground of citizenship, the opposing parties must be either citizens of different states, or one must be a citizen and the other an alien. Unless this condition exists, the court has no jurisdiction, and the court in which the case is brought must necessarily determine for itself whether the jurisdictional fact exists or not. When this jurisdictional fact is alleged in the pleadings, established to the satisfaction of the court, and determined by it, its adjudication upon the fact is conclusive. *Holmes v. Oregon & C. R. Co.* (U. S.) 9 Fed. 229, 233.

"Citizenship," as used in a statute authorizing suits in the federal courts by reason of diverse citizenship, means "residence with intention of remaining permanently at that place. A man may reside in a state for an indefinite period of time without becoming a citizen, but the moment a man takes up his residence in a state different from that where he formerly was domiciled, or was a citizen, with intent and purpose of making the new place of residence his future home, that moment he loses his former domicile and becomes domiciled in the new place, or, in other words, he ceases to be a citizen of the former place of residence and becomes a citizen of the state of his adoption." *Winn v. Gilmer* (U. S.) 27 Fed. 817.

### **Residence distinguished.**

As used in the act defining the jurisdiction of the federal courts, citizenship means that the parties to the suit are actual citizens of different states, and hence an al-

legation in a petition for removal, showing diverse residence of the parties only, was insufficient; the terms "citizenship," and "residence" in that connection not being synonymous. *Pennsylvania Co. v. Bender*, 18 Sup. Ct. 591, 148 U. S. 255, 37 L. Ed. 441; *Wolfe v. Hartford Life & Annuity Ins. Co.*, 13 Sup. Ct. 602, 603, 148 U. S. 389, 37 L. Ed. 493. Contra, see *Cooper v. Galbraith* (U. S.) 6 Fed. Cas. 472, 475. And see *Baughman v. National Waterworks Co.* (U. S.) 46 Fed. 4, 5, 7.

An averment in a bill of the residence of the parties is not an equivalent of an averment of citizenship, and an averment of residence in a particular state is not an averment of citizenship. In *Denny v. Pironi*, 141 U. S. 121, 123, 11 Sup. Ct. 966, 967, 35 L. Ed. 657, it is said that an averment of residence is not the equivalent of an averment of citizenship, and that it is insufficient to give the Circuit Court jurisdiction has been settled in a multitude of cases. *Gale v. Southern Building & Loan Ass'n* (U. S.) 117 Fed. 732, 733. See, also, *Dinet v. City of Delavan* (U. S.) 117 Fed. 978.

"Citizenship" and "residence" are not synonymous terms, though "resident" and "inhabitant" are usually so regarded. While a person may be said to have but one domicile, he may have several residences. Thus Mr. Morse, in his treatise on Citizenship (page 99), says: "While an individual can have but one domicile, he may have many residences. The residence may be constructive; the word 'reside' being used in two senses—the one, constructive, technical, legal; the other, denoting the personal, actual habitation of individuals." *Zambrino v. Galveston, H. & S. A. R. Co.* (U. S.) 88 Fed. 449, 453.

"Citizenship" and "residence," as has often been declared by the courts, are not convertible terms. Citizenship is a status or condition, and is the result of both act and intent. An adult person cannot become a citizen of a state by simply intending to, nor does any one become such citizen by mere residence. The residence and intent must co-exist and correspond, and though, under ordinary circumstances, the former may be sufficient evidence of the latter, it is not conclusive, and the contrary may always be shown. *Sharon v. Hill* (U. S.) 26 Fed. 337, 342; *Illinois Life Ins. Co. v. Shenehon* (U. S.) 109 Fed. 674, 675; *Danahy v. National Bank of Denison* (U. S.) 64 Fed. 148, 149, 12 C. C. A. 75; *Tug River Coal & Salt Co. v. Brigel* (U. S.) 67 Fed. 625, 628, 14 C. C. A. 577; *Allen B. Wrisley Co. v. George E. Rouse Soap Co.* (U. S.) 90 Fed. 5, 6, 32 C. C. A. 496.

## CITRON.

Citron is the fruit of the citrus or citron tree. It belongs to the family of fruits,

and falls within the great group of that family designated as "dried fruits." In common speech and by the language of trade and commerce it is a dried fruit. *United States v. Nordlinger* (U. S.) 121 Fed. 690, 691, 53 C. C. A. 438.

## CITY.

See "Incorporated City."

In England the term "city" does not depend upon the number of its inhabitants, but upon its being the seat of a bishop. For instance, Chester, with a few thousand inhabitants, has been for centuries a city, while the city of Liverpool, with many times the population, was only a town, until comparatively recently, when it became a city by being given a bishop. *State v. Green*, 35 S. E. 462, 463, 126 N. C. 1032.

By the term "city" in Spanish jurisprudence was understood a place surrounded by walls. *Villars' Heirs v. Kennedy*, 5 La. Ann. 724, 725.

"City," as used in Act 1874 relative to city courts, may be construed in a plural, as well as in a singular, sense. *People v. Common Council of City of Aurora*, 84 Ill. 157, 160.

A city is a body politic and corporate, with the general powers of the corporation, and the powers specified or necessarily implied in the title relating to the government of cities, or any special laws. *Pol. Code Cal.* 1903, § 4354.

The word "city" includes all places incorporated as such. *Cobbey's Ann. St. Neb.* 1903, § 10,407.

The word "city" shall be construed to mean a town containing a population of 5,000 or more and having a corporation or hustings court. *Code Va.* 1887, § 5.

### Compactness implied.

The legal, as well as the popular, idea of a town or city, in this country, both by name and use, is that of oneness, community, locality, vicinity; a collective body, not several bodies; collective body of inhabitants; that is, a body of people collected or gathered in one mass, not separated into distinct masses, and having a community of interest, because residents of the same place, not different places. So, as to territorial extent, the idea of a city is one of unity, not of plurality; of compactness or contiguity, not separation or segregation. *City of Denver v. Coulehan*, 39 Pac. 425, 427, 20 Colo. 471, 27 L. R. A. 751.

A city is an assembly of inhabitants living in the vicinity of each other, and not separated by any other intervening civil division of the state. *Town of Enterprise v. State*, 10 South. 740, 744, 29 Fla. 128.

A city designates a closely and thickly settled place, the houses and stores contiguous or near each other, with a great amount and variety of travel, as distinguished from places thinly settled and houses scattered, in which there is little variety of travel, when used in relation to the liability of cities and towns for defective highways. *Fitz v. City of Boston*, 58 Mass. (4 Cush.) 365, 368.

#### **As included in county.**

Under a statute prohibiting counties from subscribing for stock in any incorporated company, unless the same be paid for at the time of such subscription, it is held that cities, though an integral part of the county, are not intended to be included in the prohibition. *Thompson v. City of Peru*, 29 Ind. 305, 307; *City of Aurora v. West*, 9 Ind. 74, 77.

#### **As governed by corporate limits.**

A city is defined by Webster as a large number of houses and inhabitants established in one place, but such definition has no relation to the technical limits of a legal corporation. *Appeal of State Soc. of Cincinnati*, 26 Atl. 647, 649, 154 Pa. 621.

The term "city of W.," in a statute vacating the streets and alleys in a certain addition in the "city of W.," was construed to mean the city in fact, as composed of the collective body of people in that vicinity which in reality constituted the city, and not as determined by its corporate limits, and therefore the fact that the addition in question was not within the corporate limits of the city did not defeat the operation of the statute. *City of Wichita v. Burleigh*, 12 Pac. 332, 336, 36 Kan. 34.

Code 1880, § 1047, providing that any person who may be injured by the locomotive or cars of a railroad company, while such cars are running at a greater rate of speed than six miles an hour through any city, town or village, shall have a right of action, etc., refers to an incorporated city, town, or village, and the statute applies to all violations of its terms within the legal or corporate limits of such city, town, or village, without regard to the irregular and variable lines of settlement and improvement of such city. *Illinois Cent. R. Co. v. Jordan*, 63 Miss. 458, 461.

#### **As limited to existing cities.**

The word "cities" in Const. 1894, art. 6, § 17, requiring judicial officers of cities not otherwise provided for to be chosen by vote of the electors of the city, refers to municipalities existing as cities at the time provision was originally made by law for the establishment of the court or the creation of the judicial office, and a statute providing for a choice of such judicial officers by the

electors throughout the whole territory of such a city is not rendered unconstitutional by a subsequent incorporation of that city in a larger one, so long as the jurisdiction of the court and its judges remain confined to the territory in which the judges are voted for. *People v. Dooley*, 75 N. Y. Supp. 350, 357, 69 App. Div. 512.

The word "city," in Burns' Rev. St. 1901, § 5915, providing that the common council of each city and the board of trustees of each incorporated town shall, at their first regular meeting in the month of June, elect three school trustees, and annually thereafter shall elect one school trustee, does not include a city incorporated after the passage of the act, and therefore such city is not entitled to elect three school trustees, but the trustees of the incorporated town, which was incorporated into the city, continue until the expiration of the terms for which they were elected. *State v. Ogan*, 63 N. E. 227, 159 Ind. 119.

#### **As incorporated towns.**

A city is a town incorporated by that name. *Van Riper v. Parsons*, 40 N. J. Law (11 Vroom) 1, 4; *Borders v. State (Tex.)* 66 S. W. 1102, 1103.

"City," as used in Act 1872, providing that taxation on all real and personal property in all incorporated towns and cities in every county throughout the state shall be uniform, and providing for the repeal of all special laws requiring any city to support and provide for its paupers, should be construed to include incorporated towns. Webster says a city is "a corporated town, a town or collective body of inhabitants incorporated and governed by particular officers, as a mayor and alderman." *Burke v. Monroe County*, 77 Ill. 610, 612.

"Cities," as used in Act March 10, 1880, entitled "An act concerning cities," cannot be construed to include incorporated towns. *Day v. City of Morristown*, 41 Atl. 964, 965, 62 N. J. Law, 571.

Const. art. 15, § 1, provides for the appointment of commissioners to establish harbor lines in navigable waters lying in front of cities. Held, that the word "cities" not only meant cities strictly speaking, but included incorporated towns. *State v. Board of Harbor Line Com'rs*, 29 Pac. 938, 939, 4 Wash. 6.

The terms "villages," "cities," and "townships," in a statute authorizing villages, cities, and townships to issue bonds in aid of railroads does not include an incorporated town. *Welch v. Post*, 99 Ill. 471, 473.

Laws 1899, c. 11, § 51, providing for a license tax on sale of meats in cities and towns, applies only to incorporated towns, without reference to population. *State v. Green*, 35 S. E. 462, 463, 126 N. C. 1032.

In determining whether the term "town" or "city," within the meaning of Const. art. 16, § 15, providing that the homestead, not in a town or city, shall consist of not more than 200 acres of land, and that the homestead in a city, town, or village shall consist of lot or lots, embraces a certain tract of land, the fact of incorporation or not is not of controlling influence, and will not of itself determine that the land is or is not within the limits of a city or town. *Posey v. Bass*, 14 S. W. 156, 77 Tex. 512. The property in question may be within the corporate limits of a town or city and still be a rural homestead, within the meaning of the Constitution, or it may be actually within the limits of a town or village not incorporated and be an urban homestead in its character. *Wilder v. McConnell*, 45 S. W. 145, 146, 91 Tex. 600.

#### **Municipal corporation imported.**

The word "city," as used in a complaint in an action for injuries against a railroad, alleging that the defendant railroad runs through the city of West Plains, and that there was duly passed, published, and in force, at the time of the accident, an ordinance in said city regulating the speed of railroad trains and cars within its corporate limits, is equivalent to municipal corporation, so that the complaint in effect alleges that West Plains is a municipal corporation. *Jackson v. Kansas City, Ft. S. & M. R. Co.*, 58 S. W. 32, 35, 157 Mo. 621, 80 Am. St. Rep. 650.

"City," as used in Act April 6, 1866, providing that, whenever any person or persons shall lay out any town or addition to any city or town in the state before the plat thereof shall be recorded, the lands shall be valued, etc., imports a municipal corporation. *Mitchell v. Franklin County Treasurer*, 25 Ohio St. 143, 154.

#### **As political subdivision of state.**

A city is only a political subdivision of the state, made for convenient administration of the government. It is an instrumentality with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the Legislature. *Jefferson City Gas-Light Co. v. Clark*, 95 U. S. 644, 654, 24 L. Ed. 521; *City of Guthrie v. Territory*, 31 Pac. 190, 192, 1 Okl. 188, 21 L. R. A. 841; *City of Guthrie v. New Vienna Bank*, 38 Pac. 4, 5, 4 Okl. 194. It is only a political subdivision of the state, made for the convenient administration of the government. It is an instrumentality, with powers more or less enlarged, according to the requirements of the public, and which may be increased or repealed at the will of the Legislature. *Johnson v. City of San Diego*, 42 Pac. 249, 250, 109 Cal. 468, 80 L. R. A. 178.

Cities are the creatures of the legislative will, and are created by express legislative enactment, for the purpose, mainly, that the people within their territorial limits may thereby be enabled for their own interest and advantage to administer their local or internal concerns, or, in other words, that they may have the power of local self-government; and a municipal corporation possesses and can exercise the following powers, and no others. First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable. *Logan City v. Buck*, 2 Pac. 706, 707, 3 Utah, 301.

Cities are political subdivisions of the state, which is the concrete whole. Whatever is done by such subdivision under and by virtue of the permission of the state is the act of the state, and may reasonably and properly be designated as state action, at least indirectly. In this sense a city debt created by authority of the Legislature is the act of the state, being created by the exercise of the state sovereignty acting through one of its political divisions. This would not make the state as a whole, however, liable for the payment of such debt, because in the creation and under the contract with the lender the liability for such payment was expressly limited to the property within the limits of the city. *State v. Levy Court (Del.)* 43 Atl. 522, 524, 1 Pennewill, 597.

A city is a public corporation designed for local government. It is an agency of the state to assist in the civil government of the territory and people of the state embraced within its limits. It is a public agency, and acts for the public. *Brooks v. City of Wichita (U. S.)* 114 Fed. 297, 208, 52 C. C. A. 209.

A city is only a political subdivision of the state, made for the convenient administration of government. It is an instrumentality with powers more or less enlarged, according to the requirements of the public. *Wooster v. Plymouth*, 62 N. H. 193, 206.

#### **Town distinguished.**

See, also, "Town."

"Town" is a generic word. Of the genus "cities" and "boroughs" are species. *New York & L. B. R. Co. v. Drummond*, 46 N. J. Law (17 Vroom) 644, 646.

According to lexicographers there is no marked distinction between a "city" and a "town"; the former being more important than the latter. *Heard v. State*, 39 S. E. 118, 113 Ga. 444.

A city is a town incorporated by that name, and the word "town," as used in the

state Constitution, is sufficiently elastic to take in, when put to some of its uses, the institution denoted by the term "city." Mr. Tomlin in his Law Dictionary says: "Under the name 'town' or 'village' boroughs and cities are contained, for every borough or city is a town." State ex rel. Rice v. Simmons, 35 Mo. App. 374, 380.

A town is not always a city, but a city is always a town. Webster's definition of a city is that it is a large town; an incorporated town. Harvey v. Osborn, 55 Ind. 535, 542.

A city is a municipal corporation of the larger class, with powers of government confided in officers who are usually elected by popular vote. As defined by Black, the term is used in America to denote a municipal corporation of a larger class, the distinctive feature of whose organization is its government by a chief executive and a legislative body. In the Standard Dictionary, a city is defined to be a place inhabited by a permanent, organized community, more important than a town. As a matter of law the words "town" and "city" are not synonymous. Wight & Weslosky Co. v. Wolff, 37 S. E. 395, 112 Ga. 169.

In St. 1884, c. 820, § 2, to provide for the appointment of persons to fill offices in the government of the commonwealth of the several cities, etc., the term "cities" includes towns having a population of 12,000 inhabitants or over, under the provisions of St. 1894, c. 267. Johnson v. Kimball, 48 N. E. 1020, 1021, 170 Mass. 58.

A city is a town within the meaning of that word as used in this country as embracing all kinds of municipal corporations which have the right to make police rules or regulations controlling all persons and things within certain specified limits. It is a municipal corporation possessing all the powers of other municipal corporations, with such additions and limitations as are contained in the charter which gives it existence as the city. That which is its chief distinguishing characteristic consists in the mode in which its general affairs are administered by means of certain officers, such as mayor, aldermen, and councils, to whom the citizens intrust most of the legislative and the executive powers which in towns they exercise in person in town meetings. State v. Glennon, 3 R. I. 276, 278.

"City," as used in the Illinois township organization law of 1874, when included within the limits of a town, may be considered as a component part thereof, and as provided for under the word "town." Allen v. People, 84 Ill. 502.

**As township.**

See "Township."

2 Wds. & P.—12

## CITY COUNCIL.

A city council is a miniature General Assembly, and its authorized ordinances have the force of laws passed by the Legislature of the state. City of Richmond v. Henrico County Sup'rs, 2 S. E. 26, 30, 83 Va. 204 (citing Taylor v. City of Carondelet, 22 Mo. 105).

A city council is a part of the legislative power of the state within the limited district of an incorporated municipality, and, within the sphere of the powers so delegated to it by the state Legislature, has absolute control, in the absence of fraud or manifest abuse of such powers. In other words, a city council is the city's lawmaking power. City of Huron v. Campbell, 53 N. W. 182, 185, 3 S. D. 309.

The words "city council," as used in an act relating to reformatory institutions established by counties and cities, shall be taken and held to mean the corporate authorities of any city or town, by whatever name or style the same may be designated. Shannon's Code Tenn. 1896, § 4416.

## CITY COURT.

As an inferior court, see "Inferior Courts."

The phrase "city court," as used in Const. art. 6, § 5, par. 1, which declares that, in any county within which there is or hereafter may be a city court, the judge of said court and the judge of a superior court may preside in the courts of each other in cases where the judge of either court is disqualified, refers exclusively to city courts designated in par. 5, § 2, of the same article, providing for city courts where writs of error lie to the Supreme Court. Wells v. Newton, 28 S. E. 640, 641, 101 Ga. 141.

## CITY ELECTION.

The term "city election," as used in the chapter relating to elections, shall apply to any municipal election held in a city or town. Code Iowa 1897, § 1089.

In statutes relative to elections, the term "city election" shall apply to any election held in a city for the choice of a city officer by the voters, whether for a full term or for the filling of a vacancy. Rev. Laws Mass. 1902, p. 104, c. 11, § 1.

The term "city election," as used in acts relating to ballots and manner of voting in counties of 50,000 inhabitants or more, applies to any municipal election so held in a city. Shannon's Code Tenn. 1896, § 1231.

## CITY ENGINEER.

A contract which required the amount of gravel deposited in filling up to a fixed

grade to be measured on the ground by the city engineer did not require that it should be made by the engineer in person or in his actual presence; but it was sufficient, if made by his assistants according to his directions, if subsequently revised by him. *Palmer v. Clark*, 106 Mass. 373, 388.

### CITY LAW.

The phrase "laws relating to the property, affairs, and government of cities, and the several departments thereof," within the meaning of Const. art. 12, § 2, which provides that such laws are divided into general and special city laws, and which requires such laws, when special, to be passed by the Legislature after a nonacceptance by the mayor, means laws connected with or in some wise affecting the city government and its affairs. A statute changing the constitutional offices of sheriff, county clerk, and register, and providing for a change from the fee system to that of salaries, is not a city law. *McGrath v. Grout*, 74 N. Y. Supp. 779, 781, 37 Misc. Rep. 64.

### CITY LIMITS.

In Pen. Code, art. 198, prohibiting gaming for money within the limits of any city on Sunday, the term "city limits" means the corporate limits of the city, so that a person cannot be convicted for gaming at a residence outside of the corporate limits of the city, though the residence was on platted ground adjacent to the city. *Borders v. State (Tex.)* 66 S. W. 1102, 1103.

### CITY OFFICER.

City officers are those appointed or elected for a city, and who must reside therein and perform their functions within the limits thereof, such as mayor, recorder, alderman, etc. In *re Whiting* (N. Y.) 1 Edm. Sel. Cas. 498, 500.

"City, town, or village officers" within the meaning of a constitutional provision designating a separate mode of election for city, town, or village officers, county officers, and all other officers, are those who are appointed or elected for a city, and must reside and perform the duties of their offices within their cities, such as mayor, recorder, alderman, and the like. In *re Whiting* (N. Y.) 2 Barb. 513, 516.

Where a city charter provided that the council should have power to fix the compensation of all city officers, the term "city officers" referred to the respective officers appointed by the city council, and not to the aldermen, since to give such a construction would be in contravention of the well-settled rule that no public officer shall fix his own compensation. *McFarland v. Gordon*, 41 Atl. 507, 508, 70 Vt. 455.

In statutes relative to elections, the term "city officer" shall apply to any person to be chosen by the voters at a city election. *Rev. Laws Mass. 1902*, p. 104, c. 11, § 1.

The term "city officer," as used in acts relating to ballots and manner of voting in counties of 50,000 inhabitants or more, applies to any person to be chosen by the qualified voters at such an election. *Shannon's Code Tenn. 1896*, § 1231.

### Assessor.

An assessor, elected pursuant to Code 1873, § 390, which provides that "in any township in which is situated a city or incorporated town two township assessors shall be elected, one by the voters of said township residing without the corporate limits of such city or town at the general election, and the other by the voters thereof residing within such limits at the municipal election in said city or town, and each in the discharge of his duties as assessor shall be confined to that portion of his township for which he is elected as hereinbefore provided; and said city or town assessor shall hold his office for one year," etc., is not a city officer. *Kinnie v. City of Waverly*, 42 Iowa, 486, 487.

### Clerk of district court.

A clerk of the district court of New York, whose appointment, at the time of the adoption of the Constitution, was vested in the mayor, aldermen, and commonalty of the city, which body had also the power of removal, and whose duties were all to be performed within the city, was a city officer, within the meaning of the constitutional provision that all city officers should be elected in a certain manner. *People v. Batchelor*, 22 N. Y. 128, 140.

### Foreman of sidewalks.

While the foreman of sidewalks may not be city officers in one sense, they are in another, and notice of defects in sidewalks given to a foreman of sidewalks, appointed by and clothed with general power to repair throughout a large district of the city by the executive board, who are the commissioners of highways, is notice to a city officer having charge of highways, required by the charter to be given a reasonable time before the accident to charge the city with liability. A strict construction would confine the words "city officers" to officers proper, named as such in the charter; but a liberal construction, in view of the object of the statute, would extend these words to any person having charge of the highways, by virtue of superintendence delegated to him by the executive board. *Sprague v. City of Rochester*, 53 N. E. 697, 699, 159 N. Y. 20.

**Police officer.**

Under the various provisions of the acts of 1863 and 1865 an individual commissioner of the board of police, as such, possessed no official authority and had no official duties. The word "commissioner" merely served to describe a member of the board, which possessed the official power and exercised the official duties while the commissioner as such could do nothing except in the name of the board and by means of its concurrence. Consequently the mayor's bill of 1872, providing that all "city officers" whose election by qualified voters was not provided for by law, and also all members of boards organized under the charter, except those appointed by the Governor of the state, should be appointed by the mayor, applied to a commissioner of the board of police, though formerly his election by the voters was provided for by law. *People v. Wright*, 70 Ill. 388, 390, 395.

The charter of the city of Grand Rapids by title 2, § 1, provides that the officers of said city shall be one mayor, one treasurer, etc. In no place in the charter are police officers named or designated as such officers. Laws May 24, 1881, § 8, creating the board of police and fire commissioners of the city of Grand Rapids, vests the board with sole power to elect, appoint, and remove police constables, and gives it the management of the officers of police and policemen. How. St. § 6576, as amended by Laws 1881, p. 97, provides that the superior court shall have exclusive jurisdiction of actions of a civil nature by or against the city or any of its officers. Held, that the term "city officers," as used in the latter statute, means only such officers as are provided for by the charter for general municipal purposes, and does not include policemen or police officers. City policemen and police officers are not named in the charter, and are not subject to removal under the provisions of law for the removal of city officers. They are not elected or appointed under the provisions of the charter, but by authority vested in the board of police of the city; hence they are not, properly speaking, city officers. *Burroughs v. Eastman*, 53 N. W. 532, 533, 93 Mich. 433.

**President of council.**

The president of the city council of Minneapolis is not an officer of the city within the meaning of either the city charter or the Constitution, but is merely the officer or servant of the legislative body which elected him. *State v. Klichil*, 53 Minn. 147, 155 54 N. W. 1069, 1071, 19 L. R. A. 477.

**As trustees.**

The "officers of the city" are trustees in the management and application of the funds and property of the people of the city. *Russell v. Tate*, 18 S. W. 130, 132, 52 Ark. 541,

7 L. R. A. 180, 20 Am. St. Rep. 193 (citing 2 Dillon, Mun. Corp. 915).

**CITY ORDINANCE.**

See "Ordinance."

**CITY PRINTER.**

A city charter provides that after the publication of an ordinance the city printer shall file with the city clerk a copy of such publication, with his affidavit or the affidavit of his foreman of the length of time the same has been published, etc. It is made the duty of a common council to let all the printing and publication necessary to be done by the city to the lowest bidder, who shall be styled the "city printer." Hence the charter makes the person who does the work or causes it to be done the city printer, or, in other words, makes the publisher of the official paper the city printer, and, while the publisher or the irresponsible party who obtains the contract may not do any of the manual labor performed in printing a paper, he is the city printer, under the charter, who is to make the affidavit required. *Schwartz v. City of Oshkosh*, 13 N. W. 450, 451, 55 Wis. 490.

**CITY PURPOSE.****Bridge between cities.**

"City purpose," as used in Const. art. 8, § 11, providing that no city shall give any money or property, or loan its credit, to or in aid of any individual association or corporation, or become directly or indirectly the owner of stock in or bonds of any association or corporation, nor incur any indebtedness, except for "city purposes," should be construed to include the construction of a bridge over a river between two cities. "It is impossible to define in a general way with entire accuracy what a city purpose is within the meaning of the Constitution. Each case must largely depend on its own facts, and the meaning of these words must be evolved by a process of exclusion and inclusion in judicial construction. It would not be a city purpose for the city of New York to build a railroad from that city to Philadelphia or to improve the navigation of the Hudson River generally between that city and Albany, though incidental benefits might flow to the city. Such works have never been regarded as within the legitimate scope of municipal government. On the contrary, it would be a city purpose to procure a supply of water outside of the city and convey it into the city, and for such a purpose a city debt could be created. Such improvements are for the common and general benefit of all the citizens, and have always been regarded as within the scope of municipal government. It cannot, therefore, be held that what is



meant by a city purpose is some work or expenditure within the city limits." *People v. Kelly*, 76 N. Y. 475, 484.

#### Lighting of streets.

Const. art. 8, § 11, providing that a city should not be allowed to incur any indebtedness, except for city purposes, should be construed to include the lighting of the streets and public places of a city by means of an electric light system. *Hequembourg v. City of Dunkirk*, 2 N. Y. Supp. 447, 448, 49 Hun, 550.

#### Park.

Const. art. 8, § 11, forbidding a city to contract debts, except for city purposes, means some purpose which "must be primarily for the benefit, use, or convenience of the city, as distinguished from that of the public, outside of it." It authorizes the purchase of property for parks when the property is so situated that it may be used by the inhabitants of the city. In re *City of New York*, 2 N. E. 642, 651, 99 N. Y. 569.

It is impossible to formulate a proper definition of what is meant by "city purpose." Yet two characteristics it must have. The purpose must be primarily the benefit, use, and convenience of the city, as distinguished from that of the public outside of it, and the work be of such character as to show plainly the predominance of that purpose. Acquiring and maintaining parks is within the language. *City of Lexington v. Kentucky Chautauqua Assembly (Ky.)* 71 S. W. 943, 944 (citing *People v. Kelly*, 76 N. Y. 487).

#### School tax.

Under an act exempting certain lands from taxation from general "city or town purposes" (Acts 1877, Sp. Sess. p. 74), a school tax was held not a tax for general city or town purposes. *City of South Bend v. University of Notre Dame Du Lac*, 69 Ind. 344, 347.

#### Street railway.

A street railway is a highway, and, being necessary, and constructed by the city after failure to induce construction by private capital, is for a city purpose, within Const. art. 8, § 10, prohibiting the incurring of indebtedness by a city, except for a city purpose. *Sun Printing & Publishing Ass'n v. City of New York*, 46 N. E. 499, 500, 152 N. Y. 257, 87 L. R. A. 788; *Sun Printing & Publishing Ass'n v. City of New York*, 40 N. Y. Supp. 607, 609, 8 App. Div. 230.

#### Water supply.

The establishment by the city of a water department for the supply of water to the city and its inhabitants is a city purpose, within the meaning of a constitutional pro-

vision that no city shall be allowed to incur any indebtedness, except for city purposes. *Comstock v. City of Syracuse*, 5 N. Y. Supp. 874, 879.

#### CITY RAILWAY.

The term "city railway," as used in a grant of an exclusive franchise to a street railway company to operate a "city railway," must be taken to mean only what is essential to the definition of the term, and obviously no particular motive power is essential, and, no kind of motive power being mentioned, it should be taken to indicate that the Legislature meant what it said—a city railway, however propelled, whether by powers then familiar or those they know not of; in fact any kind of power which the ingenuity of man may contrive that does not constitute an additional burden upon the highway, or an injury and annoyance to the public. *Wilmington City R. Co. v. Wilmington & B. S. R. Co. (Del.)* 46 Atl. 12, 23.

#### CITY SUPPLIES.

See "Supplies."

#### CITY TAX.

A highway tax, which is levied by the authority of a city, the highways of which are under its control, is a city tax, within the meaning of a contract relieving a water works company from "city taxes" in consideration of free water for public purposes. *Alpena City Water Co. v. City of Alpena*, 90 N. W. 323, 324, 130 Mich. 518.

#### CIUDADES.

The Spanish name for cities. It is distinguished from towns (pueblos) and villages (villas). *Hart v. Burnett*, 15 Cal. 530, 537.

#### CIVIL

Webster's Unabridged Dictionary defines the ordinary meaning of the word "civil" to be: "Relating to rights and remedies sought by action or suit, distinct from criminal proceedings." *Bouvier's Law Dictionary* defines the legal or technical meaning of the word "civil" to be: "In contradistinction to criminal, to indicate the private rights and remedies of men as members of the community, in contrast to those which are public and relate to the government; thus, we speak of 'civil process' and 'criminal process,' 'civil jurisdiction' and 'criminal jurisdiction.'" *Anderson's Law Dictionary* defines the word thus: "Concerning the rights of and wrongs to individuals, considered as private persons, in contradistinction to criminal, or that which concerns the whole political society, the community,

state, government: as civil action, case, code, court, damage, injury, proceeding, procedure, process, remedy." Thus "civil cases" and "civil causes," as used in Acts 1877, p. 43, § 10, defining the jurisdiction of the superior court of Allen county, are used in contradistinction to "criminal cases," and include drainage proceedings had before the county commissioners. *Hockemeyer v. Thompson*, 49 N. E. 1059, 1060, 150 Ind. 176.

#### CIVIL ACTION—CASE—SUIT—ETC.

See "Proper Civil Action"; "Suit of Civil Nature."

A civil action is a proceeding in a court of justice by one party against another for the enforcement or protection of a private right, or for the redress or prevention of a private wrong. *Brown v. Crego*, 29 Iowa, 321, 322; *Iowa v. Chicago, B. & Q. R. Co.* (U. S.) 37 Fed. 497, 498, 3 L. R. A. 554; *Tate v. Powe*, 64 N. C. 644, 646, holding, also, that any proceeding that under the old mode was commenced by a *capias ad respondendum* (including ejectment), or by a bill in equity for relief, is a civil action, and that to enforce a right or redress a wrong is the purpose of the suit in equity as well as at law; and there is as much reason for including the one as the other under the term "civil action."

"A civil action is a personal action which is instituted to compel payment or the doing of something which is purely civil." "At common law: an action which has for its object the recovery of a private or civil right, or compensation for their infraction." *Iowa v. Chicago, B. & Q. R. Co.* (U. S.) 37 Fed. 497, 498, 3 L. R. A. 554 (quoting *Bouv. Law Dict.* 317). Civil actions are those actions which have for their object the recovery of private or civil rights, or of compensation for their infraction. *State v. Schomber*, 63 Pac. 221, 222, 23 Wash. 573 (citing *Bouv. Law Dict.*). A civil action at common law is defined to be an action which has for its object the recovery of private or civil rights, or a compensation for their infraction. In *re Farnum*, 51 N. H. 376, 383; *State v. Frost*, 89 N. W. 915, 918, 113 Wis. 623.

A civil action is one brought to recover some civil right, or to obtain redress for some wrong, not being a crime or misdemeanor. *Landers v. Staten Island R. Co.* (N. Y.) 14 Abb. Prac. (N. S.) 346, 353 (citing *Burrell, Law Dict.*); *Iowa v. Chicago, B. & Q. R. Co.* (U. S.) 37 Fed. 497, 498, 3 L. R. A. 554.

Civil suits are suits which relate to the rights of the parties against whom they are brought; individual rights which are within their individual control, and which they may part with at their pleasure; and the design of which suits is the enforcement of merely private obligations and duties. *Can-*

*cemi v. People*, 18 N. Y. 128, 136; *Duplex Printing Press Co. v. Journal Printing Co.*, 43 Atl. 840, 1 Pennewill, 565.

A "civil action" has been variously defined to be the rightful method of obtaining in court what is due to any one; the lawful demand of one's right in a court of justice; the lawful demand of one's right in the form given by law; the form of a suit given by law for the recovery of that which is one's due; the lawful demand of one's rights; a remedial instrument of justice whereby redress is obtained for any wrong committed or right withheld; any judicial proceeding which, conducted to a termination, will result in a judgment. *Jefferson County v. Philpot*, 50 S. W. 453, 66 Ark. 243.

A civil action is an action wherein an issue is presented for trial, formed by the averments of the complaint and the denials of the answer, or the replication to new matter, and the trial takes place by the introduction of legal evidence to support the allegations of the pleadings; and a judgment in such an action is conclusive upon the rights of the parties, and could be pleaded in bar. *Berry v. Berry*, 46 N. E. 470, 471, 147 Ind. 176; *Evans v. Evans*, 5 N. E. 24, 105 Ind. 204; *Deer Lodge County v. Kohrs*, 2 Mont. 66, 71.

*And. Law Dict.* p. 185, gives the definition of the word "civil" as "concerning the rights of and wrongs to individuals, construed as private persons, in contradistinction to criminal, or that which concerns the whole political society." *State v. Frost*, 89 N. W. 915, 918, 113 Wis. 623.

The term "civil action" embraces every form and character of action at law, or suit in equity, that was known to legal jurisprudence prior to the enactment of the Civil Code. It embraces actions *ex contractu*, *ex delicto*, suits in equity, mixed actions, and all their various modifications; so that under Civ. Code, § 190, providing that the plaintiff in a civil action for the recovery of money may have an attachment against the property of the defendant upon certain grounds, it is immaterial whether it be an action on contract, an action to recover damages for a tort, or an action for equitable relief. *Hendrickson v. Brown*, 65 Pac. 935, 11 Okl. 41.

The term "civil action," as used in Rev. St. c. 90, §§ 1, 19, and St. 1791, c. 17, § 1, providing that the Supreme Court has authority to grant a review in any civil action, means a suit brought by one person against another to obtain redress for himself for an injury done him, and includes a liability for injuries. *Lucas v. Lucas*, 69 Mass. (3 Gray) 136.

"Civil actions," as used in Act July 2, 1864, which provides that there shall be no exclusion of any witness in civil actions in the courts of the United States because the

witness is a party or interested in the issue tried, will be construed to include actions in which the government is a party, as well as those between private persons. *Green v. United States*, 76 U. S. (9 Wall.) 655, 658, 19 L. Ed. 808.

Under Civ. Code Prac. § 2, a "civil action" is a demand, by pleadings in a court of justice, for the enforcement of an alleged right of a plaintiff against a defendant. *Combs v. Commonwealth* (Ky.) 71 S. W. 504, 505.

Code Civ. Proc. (Revision, 1883) § 118, provides that in all cases where more than one attachment shall be issued against the same person or persons, and returned to the same court to which they are returnable, and when a judgment in a civil action shall also be rendered at the same term against the defendant, who is the same person and defendant in the attachment or attachments, the court shall direct the clerk to make an estimate of the several amounts each attaching or judgment creditor will be entitled to, out of the property of the defendant attached, either in the hands of the garnishee or otherwise, etc., so that each attaching and judgment creditor will receive a just part thereof in proportion to his demand. Held, that the term "civil action" includes both classes of creditors—first, those who are plaintiffs in actions wherein writs of attachment have been issued; second, those obtaining judgments in civil actions at the same term of court to which the writs of attachment are returnable. *Brady v. Farwell*, 5 Pac. 808, 8 Colo. 97.

By Code, § 3, a "civil action" is a substitute for all proceedings, such as prior thereto were known as "actions at law" or "suits in equity." *Chinn v. Fayette Trustees*, 32 Ohio St. 236, 237.

A criminal action is one prosecuted by the state as a party, against a person charged with a public offense, for the punishment thereof. Every other is a civil action. Rev. Codes N. D. 1899, §§ 5159, 5160; Code Civ. Proc. S. D. 1903, §§ 15, 16; Code Civ. Proc. S. C. 1902, §§ 5, 6; Rev. St. Okl. 1903, §§ 4205, 4206; Rev. St. Wis. 1898, §§ 2598, 2599.

In a general sense, "civil actions" include actions at law, suits in chancery, proceedings in admiralty, and other judicial controversies in which the rights of property are involved. *Lamson v. Hutchings* (U. S.) 118 Fed. 321, 323, 55 C. C. A. 245.

A civil action is an ordinary proceeding in a court of justice by one party against another for the enforcement or protection of a private right, or the redress or prevention of a private wrong. It may also be brought for the recovery of a penalty or forfeiture. *Ann. St. Ind. T. 1899*, § 3117.

A criminal action is (1) an action prosecuted by the state as a party, against a person charged with a public offense, for the punishment thereof; (2) an action prosecuted by the state, at the expense of an individual, to prevent an apprehended crime against his person or property. Every other is a civil action. *Clark's Code N. C. 1900*, §§ 129, 130.

A civil action is one founded on private rights, arising either from contract or tort. Civ. Code Ga. 1895, § 4932. See, also, *Western Union Tel. Co. v. Taylor*, 84 Ga. 408, 418, 11 S. E. 396, 8 L. R. A. 189.

#### Account render.

Act March 20, 1810, authorizing arbitration in all "civil suits," will not be construed to include an action of account render. *Jones v. Stratton* (Pa.) 4 Serg. & R. 76, 77.

#### Acknowledgments.

"A civil case is a suit at law to redress the violation of some contract, or repair some injury to property, or to the person or personal rights of individuals." Hence, under a statute giving a mayor all the powers of justices of the peace in civil cases, he is not given power to take acknowledgments of deeds. *Shultz's Lessee v. Moore* (Ohio) *Wright*, 280, 281.

#### Actions for fines, forfeitures, or penalties.

"Under the Code all ordinary civil proceedings are covered by the term 'civil action.'" Prosecutions for violation of municipal ordinances are therefore civil actions. *City of Greeley v. Hamman*, 20 Pac. 1, 3, 12 Colo. 94. See, also, *Miller v. O'Reilly*, 84 Ind. 168, 169.

A proceeding for a violation of a city ordinance is a civil, and not a criminal, action. *Cassville v. Jimeron*, 75 Mo. App. 426.

Proceedings for the violation of town or city ordinances are "civil actions" in Colorado. And where a jury is called in a prosecution for the violation of such an ordinance, and they find defendant guilty, they must also fix his fine, where it is not fixed by the ordinance; the action being in the form of debt, and the jury taking the place of the magistrate. *Walton v. Canon City*, 13 Colo. App. 77, 56 Pac. 671.

An action brought by a municipal corporation to enforce a penalty for a violation of an ordinance is a civil action. *City of Hammond v. New York, C. & St. L. Ry.*, 31 N. E. 817, 820, 5 Ind. App. 526; *City of Greenburg v. Cleveland, C. & St. L. Ry. Co.*, 55 N. E. 46, 23 Ind. App. 141; *City of Gallatin v. Tarwater*, 44 S. W. 750, 751, 143 Mo. 40; *Hoyer v. Town of Mascoutah*, 58 Ill. 137, 138; *City of St. Louis v. Knox*, 74 Mo. 79, 81.

An action to recover a penalty for hawking and peddling without a license is a civil action, entitling either party to an appeal. *Webster v. People*, 14 Ill. 365, 366.

An action instituted for the recovery of a penalty provided for by a municipal ordinance, prohibiting use of profane and obscene language, is a civil action, though the person charged with such breach may be brought into court under a warrant; and therefore either party has the right of appeal. *Knowles v. Wayne City*, 31 Ill. App. 471.

Where the violation of a city ordinance is punishable by fine only, the proceeding before a justice of the peace for violation of the ordinance is regarded as a civil suit. *Unger v. Fanwood Tp.* (N. J.) 55 Atl. 42, 43.

The phrase "civil action" includes actions to recover a penalty or forfeiture for the violation of some law. *Ives v. Jefferson County Sup'rs*, 18 Wis. 166, 168.

An action for the fine, under the Massachusetts statute providing that, in cases of death resulting from negligence of a railroad or street railway corporation or its servants, the corporation shall be punished by a fine of not less than \$500 nor more than \$5,000, is not a suit of a civil nature, within the meaning of the acts of Congress, but is rather an action to recover a penalty. *Lyman v. Boston & A. R. Co.* (U. S.) 70 Fed. 409, 413.

An action for a penalty under Act Iowa April 5, 1888, § 27, providing that any railroad guilty of extortion shall forfeit and pay to the state a certain sum, to be recovered in a civil action by ordinary proceedings instituted in the name of the state, is one of a criminal nature, and not removable under Act Cong. March 3, 1887, c. 373 (24 Stat. 553), providing that any suit of a civil nature may be removed. *Iowa v. Chicago, B. & Q. R. Co.* (U. S.) 37 Fed. 497, 498, 3 L. R. A. 554.

An action of *qui tam* for the rescue by defendant of certain sheep, contrary to the statute against pound breach, which gives the penalty one half to the prosecutor and the other half to the town in which the offense is committed, is a civil action within the statute relating to the jurisdiction of a justice of the peace, and hence, since one-half of the debt recovered was payable to the town of which the justice was a rated inhabitant, he was interested, and was therefore without jurisdiction. *Waters v. Day*, 10 Vt. 487, 489.

"Civil actions," as the term is popularly used in law, is not limited to actions for damages merely, but extends to and includes actions to recover penalties in which the state is a party, and hence an action by the

state to recover a penalty for the obstruction of a highway is a civil action, in which the state is entitled to appeal from a judgment against it. *State v. Smith*, 8 N. W. 870, 872, 52 Wis. 134.

A "civil case," as used in Code, p. 778 (Ed. 1891) c. 116, § 21, allowing a special jury in civil cases, does not include a prosecution under Code, c. 5, § 10, providing that if any person, whether a candidate or not, offer, give, or distribute any intoxicating drink to any voter on the day of election, he shall forfeit not less than ten nor more than fifty dollars, such prosecution being rather one of a quasi criminal nature to recover a penalty or forfeiture. *State v. Pearls*, 13 S. E. 1006, 1007, 35 W. Va. 820.

A statute only giving a court admiralty jurisdiction in civil cases will be construed to include a proceeding against the vessel to establish penalties and forfeitures. *Ketland v. Cassius*, 2 U. S. (2 Dall.) 365, 368, 1 L. Ed. 418.

In *Martin v. McNight*, 1 Tenn. (1 Overt.) 330, it was held that an action for a penalty is a civil proceeding. So it is held that a fine, forfeiture, or penalty imposed by ordinances of a municipal corporation may be recovered by warrant in debt. *Meaher v. City of Chattanooga*, 38 Tenn. (1 Head) 76. "Debt," says the court, "is a proper action for penalties prescribed for certain offenses by acts or ordinances." Undeniably, then, a suit to enforce a penalty is a civil cause of action. *McCreary v. First Nat. Bank*, 70 S. W. 821, 823, 109 Tenn. 128.

#### Actions for flowing lands.

The term "civil action," as used in St. 1836, c. 273, abolishing special pleadings in civil actions, construed as being used in contradistinction to criminal proceedings, and not to be limited to the technical common-law meaning of the term, and includes an action for flowing lands. *Howard v. Proprietors of Locks & Canals*, 66 Mass. (12 Cush.) 259, 263.

A complaint for flowing land is a civil action or proceeding, and the complainant is a competent witness, within the express language of St. 1859, c. 305. *Hosmer v. Warner*, 81 Mass. (15 Gray) 46, 48.

Proceedings brought against the United States under authority of Act Cong. March 3, 1875, c. 134 (18 Stat. 456), to recover damages caused to lands by the improvement of the Fox and Wisconsin rivers, though of a special statutory character under the Wisconsin Laws, are yet, after transference to the federal court, to be regarded as civil actions, which is a part of the district attorney's regular duty to prosecute. *Colman v. United States* (U. S.) 66 Fed. 695, 699, 14 C. C. A. 65.

**Actions on forfeited undertaking.**

An action on a forfeited undertaking, given to secure appearance in a criminal case, is itself a civil action on a contract with liquidated damages. *United States v. Ensign*, 2 Mont. 396, 397.

**Actions to enforce trust.**

An action to enforce a trust is a civil action, equitable in its nature. *Brinkerhoff v. Smith*, 49 N. E. 1025, 1026, 57 Ohio St. 610.

**Adjudications of insanity.**

A proceeding to adjudge a person insane and commit him to an insane asylum is a special proceeding, and not a civil action, within the meaning of Code Iowa, § 2505, defining a "civil action" as a proceeding in which one party, known as plaintiff, demands against another party, known as defendant, the protection of a private right or the redress of a private wrong. *In re Bresee*, 48 N. W. 991, 992, 82 Iowa, 573.

**Admiralty proceedings.**

Act Cong. March 3, 1887, c. 373, § 1, 24 Stat. 552 [U. S. Comp. St. 1901, p. 508], providing that "no person shall be arrested in one district for trial in another in any civil action," etc., does not apply to causes of admiralty and maritime jurisdiction, and hence a libel in admiralty in personam may be maintained against a corporation of another state in any district in which service may be had on it. *In re Louisville Underwriters*, 10 Sup. Ct. 587, 134 U. S. 488, 33 L. Ed. 991.

"Civil suit," as used in Judiciary Act, § 11 (1 Stat. 78), declaring that no civil suit shall be brought before certain federal courts against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ, the term "civil suit" means ordinary proceedings in courts of law and equity, and was not intended to include cases of admiralty and maritime jurisdiction. *Atkins v. Fibre Disintegrating Co.* (U. S.) 2 Fed. Cas. 76.

**Bastardy proceedings.**

A prosecution for bastardy to compel the father to support the bastard is a civil, and not a criminal, suit, though begun in the name of the people. *Maloney v. People*, 38 Ill. 62, 63; *Steinert v. Sobey*, 44 N. Y. Supp. 146, 148, 14 App. Div. 505; *In re Comstock*, 61 Pac. 921, 922, 10 Okl. 299; *Bond v. State*, 15 South. 591, 592, 34 Fla. 45; *In re Walker*, 86 N. W. 510, 511, 61 Neb. 803; *Conefy v. Holland*, 56 N. E. 701, 702, 175 Mass. 469.

A prosecution under the statute for the support of bastard children is not a civil proceeding, but a criminal proceeding, and cannot be tried at a term of the court which

is restricted to the transaction of civil business only. *Hyde v. Chapin*, 56 Mass. (2 Cush.) 77, 79.

A prosecution for bastardy, the object of which is to procure an order upon the putative father compelling him to aid the mother in support of the child, is not a "civil cause" within the meaning of the statute authorizing a review in civil causes tried before the county court. *Sweet v. Sherman*, 21 Vt. 23.

A proceeding under the bastardy act is a civil, and not a criminal, proceeding. Though in form criminal, it is essentially of the nature of a civil action, the object being, not the imposition of a penalty, but merely to compel the putative father to contribute to the support of his illegitimate child. Therefore such a proceeding is not embraced within Laws 1879, § 88, providing that, in all criminal cases below the grade of felony, the appeal from the county court shall be taken directly to the Appellate Court. *Rawlings v. People*, 102 Ill. 475, 476, 478.

**Civil cause and action distinguished.**

As used in the statute providing that in civil causes at law the party prevailing shall recover costs, except where otherwise provided, "civil causes" is a term of wider meaning than "civil actions," and would apply to proceedings under special statutes. *Aldrich v. City of Providence*, 10 Atl. 592, 15 R. I. 613.

**Claims against estates.**

The term "civil action," as used in the Indiana statute declaring that the court in term, or the judge thereof in vacation, may change the venue of any civil action upon the application of either party, made upon affidavit, showing one or more of specified causes, includes a claim filed against an estate and placed on an appearance docket for trial. *Lester v. Lester*, 70 Ind. 201, 202.

**Condemnation proceedings.**

A proceeding for assessing the amount of just compensation for private property taken for public uses is not a civil suit. It is a special proceeding, provided and authorized by the sovereign power, by whose authority the property is taken, to determine a specific fact. *Kennebec Water Dist. v. City of Waterville*, 52 Atl. 774, 780, 96 Me. 234.

Civil cases are suits between two or more parties in the ordinary course of law, and do not extend to special proceedings provided by statute, as, for instance, to a proceeding to condemn property for a railroad right of way. *Convers v. Grand Rapids & I. R. Co.*, 18 Mich. 459, 468.

Not every case which is not a criminal case is a civil one, chancery causes, and proceedings for the assessment of damages to

real estate taken for public works, not being considered civil cases. *Lake Erie, W. & St. L. R. Co. v. Heath*, 9 Ind. 558, 559.

#### Contempt proceedings.

Code, § 416, providing that civil actions shall be commenced by the service of a summons, does not include an application by the receiver of taxes in New York City for the enforcement of a tax on personal property, such application being commenced by an order to show cause why a defendant should not be committed for contempt. *McLean v. Jephson*, 13 N. Y. Supp. 884, 835.

The term "civil suit," as used in Rev. St. § 643 [U. S. Comp. St. 1901, p. 521], which provides for the removal into the Circuit Court of the United States for the proper district of any civil suit commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States, etc., includes a rule upon a United States internal revenue collector, granted by a state court upon the petition of a sheriff, to show cause why an attachment should not issue against him for contempt of the process of the latter court in refusing to permit the sheriff to enter a bonded warehouse of the United States and seize, in execution, whisky which is there held for the internal revenue tax. *McCullough v. Large* (U. S.) 20 Fed. 809, 810.

#### Criminal proceedings distinguished.

The term "civil actions" includes actions at law or suits in equity, and all other judicial controversies in which rights of property are involved, and is used in contradistinction to "criminal actions." A "civil action" is instituted for the purpose of enforcing a private or civil right, or to redress a private wrong, as distinguished from actions to punish crimes which are known as "criminal actions." *Fenstermacher v. State*, 25 Pac. 142, 143, 19 Or. 504.

A civil action is an action "brought to recover some civil right or to obtain redress for some wrong, not being a crime or misdemeanor, and is thus distinguished from a criminal action or prosecution." *Landers v. Staten Island R. Co.*, 53 N. Y. 450, 456.

"Civil cause," as used in Bill of Rights, declaring that no retrospective law shall be made for the decision of civil causes, means causes in which private rights are involved, as distinguished from "criminal causes," in which the public alone is concerned. *Dow v. Norris*, 4 N. H. 16, 18, 17 Am. Dec. 400.

"The purpose of a civil action is not to punish crime, but to enable persons who have been injured or damaged to obtain redress from those who are responsible by reason of their own conduct or that of their servants, agents, or employes." *City of Hammond v. New York, C. & St. L. R. Co.*, 81 N. E. 817, 820, 5 Ind. App. 526.

A civil action does not become a criminal proceeding because it becomes necessary for a party to prove that his opponent has committed a crime. No one is being prosecuted or proceeded against criminally. In *re Leslie* (U. S.) 119 Fed. 406, 410.

#### Disbarment proceedings.

A civil action at common law is an action which has for its object the recovery of private or civil rights, or compensation for their infraction. Under such definition a proceeding for the disbarment of an attorney is not a civil action, within the meaning of the Constitution of Texas, giving the court of appeals jurisdiction in civil cases. *Scott v. State*, 25 S. W. 337, 6 Tex. Civ. App. 343.

#### Divorce proceedings.

While an action for divorce is, in a certain sense, a judicial proceeding, jurisdiction of it was not originally vested in the courts of the common law, and the trial and proceedings were not according to the course of the common law. And though, in a certain sense, the object of the libellant is to obtain redress for a grievance or private injury, yet it is not by way of recovery of damages or obtaining property, but rather for ascertaining and declaring the status or social and civil condition of a party, and will not be included in the term "civil action." *Lucas v. Lucas*, 69 Mass. (3 Gray) 136.

Any judicial proceeding which, conducted to a termination, will result in a judgment, is an action, and hence a divorce case, being one in which issues are formed, evidence heard, and judgment rendered, settling the parties' rights of property, which judgment is conclusive and may be pleaded in bar, is a "civil action" within the meaning of the statute of Indiana authorizing change of venue in civil actions; for the question of divorce, the custody of children, the amount of alimony, and final settlement of property rights make the proceeding an action for the enforcement or protection of private rights and redress of private wrongs, at least for the purpose of a change of venue. *Evans v. Evans*, 5 N. E. 24, 105 Ind. 204.

"Civil cases," as used in Act 1848, p. 32, conferring upon the circuit courts of the state jurisdiction in all civil cases both of law and equity, includes cases for divorce, which are to be regarded as civil proceedings in jurisdictions where no ecclesiastical tribunals have ever been established. *Ellis v. Hatfield*, 20 Ind. 101, 102.

"Civil cases," as used in Code, § 99, providing that judgments in civil cases taken by default, through mistake, inadvertence, surprise, or excusable neglect may be set aside, does not include a divorce proceeding. *Ewing v. Ewing*, 24 Ind. 468, 475.

A suit for a divorce is a civil proceeding, and, if the respondent appears and defends,

either party may testify fully against the other. Act May 23, 1887, § 5, cl. 3. *Costello v. Costello*, 43 Atl. 240, 244, 191 Pa. 879.

"Civil action," as used in Rev. St. 1881, § 249, providing that there shall be one form of action for the enforcement or protection of private rights and the redress of private wrongs, which shall be denominated as "civil actions," does not include divorce cases. *Powell v. Powell*, 3 N. E. 639, 641, 104 Ind. 18.

A suit for divorce is a civil suit. A judgment in such a suit is not followed by any penal consequences. *Sullivan v. Sullivan*, 42 Atl. 230, 92 Me. 84.

#### **Drainage proceedings.**

The phrases "civil cases" and "civil causes," as used in Acts 1877, p. 43, § 10, defining the jurisdiction of the superior courts, are used in contradistinction to "criminal cases," for the purpose of including all cases other than criminal cases, and include drainage proceedings had before the board of commissioners. *Hockemeyer v. Thompson*, 48 N. E. 1029, 1030, 1059, 150 Ind. 176.

Decisions by a state supreme court that a special statutory proceeding under the state laws, such as a proceeding to establish a drain and assess benefits, etc., is not a "civil suit," are not controlling on the federal courts, when the question is whether the proceeding is a civil suit, in law or equity, within the meaning of the acts relating to the removal of causes. *In re The Jarnecke Ditch* (U. S.) 69 Fed. 161, 163.

#### **Election contests.**

Within a statute providing a rule for the taxing of costs in a "civil action," a contest of an election for the removal of a county seat is not a civil action. *Bayard v. Klinge*, 16 Minn. 249, 260 (Gil. 221, 233).

An election contest is not a "civil cause," within Shannon's Code, § 1309, providing that the chancery court shall have concurrent jurisdiction of all "civil causes" triable in the circuit court. *Shields v. Davis*, 53 S. W. 948, 949, 103 Tenn. 533.

The contesting of an election of a county officer under Gen. St. c. 1, providing for the contesting of elections and the introduction of testimony, etc., and giving the court power to secure attendance of witnesses, is a special proceeding, and not a civil action. *Ford v. Wright*, 13 Minn. 518, 520 (Gil. 480, 487).

#### **Forcible entry and detainer proceedings.**

The term "civil case," as used in Const. art. 11, § 1, which provides that the jurisdiction of the justices of the peace shall extend to all civil cases, includes special proceedings, and hence includes an action of

forcible entry and detainer. *Herkimer v. Keeler*, 81 N. W. 178, 180, 109 Iowa, 680.

The term "civil action" does not include summary or special proceedings, such as certiorari, mandamus, etc. A summary proceeding to remove a tenant holding over after his term is not a civil action. *People v. Hamilton*, 39 N. Y. 107, 109.

Forcible entry and detainer proceedings are not "civil cases," within the meaning of that term as used in a constitutional provision relative to appeals in civil cases. *Adkins v. Andrews* (Neb.) 96 N. W. 228.

#### **Foreclosure proceedings.**

A proceeding to enforce a mechanic's lien is a "civil action," under Pub. St. c. 191, § 12, providing that the petition therein may "be inserted in a writ of original summons and be served, returned and entered, as in other civil cases." *Graham v. Lord*, 48 N. E. 778, 779, 170 Mass. 1.

The term "civil actions," in St. 1893, c. 396, § 13, providing that civil actions brought in certain courts shall be brought in the court in the district where some one of the parties live or has his usual place of business, has reference to transitory and personal actions, and not to local or statutory actions, as a proceeding to establish a mechanic's lien. *Boyle v. Gould*, 41 N. E. 114, 115, 164 Mass. 144.

An action to foreclose a mortgage securing notes is a "civil action," within the definition of the Statutes of Oklahoma. *Stahl v. Wade*, 69 Pac. 301, 11 Okl. 483.

#### **Garnishment proceedings.**

Within the provision that the total amount of the justice's fees taxed in any civil action shall not exceed a certain sum, the term "civil action" means a suit. Thus in *United States v. Ten Thousand Cigars* (U. S.) 28 Fed. Cas. 39, Mr. Justice Miller said the "phrase 'civil action' includes all actions at law, suits in chancery, proceedings in admiralty, and all other judicial controversies in which the rights of property are involved." It is also held that, in a legal sense, "action," "suit" and "cause" are convertible terms. A garnishment proceeding in aid of an attachment is a suit, and hence a civil action within such provision. *Nylan v. Renhard*, 49 Pac. 266, 267, 10 Colo. App. 46.

#### **Habeas corpus proceedings.**

The writ of habeas corpus is the remedy which the law gives for the enforcement of the civil right of personal liberty. Resort to it sometimes becomes necessary because of what is done to enforce laws for the punishment of crimes; but the judicial proceeding under it is not to inquire into the criminal act which is complained of, but into the right of liberty notwithstanding the act.

Proceedings to enforce civil rights are civil proceedings, and hence habeas corpus proceedings are civil proceedings. *Ex parte Tom Tong*, 2 Sup. Ct. 871, 872, 108 U. S. 558, 27 L. Ed. 826; *Legate v. Legate*, 23 S. W. 281, 282, 87 Tex. 248; *In re Borrego*, 46 Pac. 211, 8 N. M. 655. *Contra*, see *McFarland v. Johnson*, 27 Tex. 105, 109.

"Civil action," as used in 2 *Gavin & H. St.* 154, § 207, providing for a change of venue in any civil action, means a proceeding for the enforcement or protection of a private right or the prevention or redress of a private wrong, and hence does not include a proceeding by habeas corpus. *Garner v. Gordon*, 41 Ind. 92, 101.

Civil cases are essentially those in which a defendant or party against whom relief is sought is a natural person or corporation other than the state, and do not include cases in which a party is detained on the charge of a crime or disobedience of police regulations, and the like, and seeks release by habeas corpus. *State v. Judge of Commercial Court*, 15 La. 192, 194.

#### Injunction proceedings.

The term "civil action," as used in Code, § 3416, providing that all controversies which may be the subject of civil actions may be submitted to the decision of one or more arbitrators, includes all proceedings, either at law or in chancery, except those which are of a criminal nature; hence it includes an injunction suit, to restrain the maintenance of a nuisance, which is not coupled with a claim for damages. *Richards v. Holt*, 16 N. W. 595, 596, 61 Iowa, 529.

Anciently in England many proceedings by information were classed not as civil, but rather as criminal, although their purpose was not strictly punishment, but the recovery of moneys or property of which the sovereign claimed to be wrongfully deprived. While a proceeding by the state, even in its sovereign capacity, to accomplish a purpose other than its penal laws, is not a "civil action" within the above definitions, it is of a civil nature, and those words are used in Acts Cong. 1888, c. 866, §§ 1, 2, conferring on the United States Circuit Courts jurisdiction of suits of a civil nature, and authorizing the removal of such suits into such courts when not originally brought there; and hence an information in equity, in behalf of the state, to enjoin the receiver of a railroad, must be regarded as falling within such provisions. *State v. Frost*, 89 N. W. 915, 918, 113 Wis. 623.

A petition for an injunction under Laws 1887, c. 77, declaring any building used for the illegal sale of liquors to be a common nuisance, and providing for its abatement in equity, is a civil proceeding, and therefore depositions may be taken and used there-

in. *Rancour's Petition*, 66 N. H. 172, 20 Atl. 980.

#### Mandamus proceedings.

"Mandamus is a civil remedy, and the name of the state in such a proceeding is only nominally used." *Brower v. O'Brien*, 2 Ind. (2 Cart.) 423, 431. See, also, *In re Brown*, 89 Pac. 469, 471, 2 Okl. 590; *Territory v. Chicago, R. I. & P. Ry. Co.*, 39 Pac. 389, 2 Okl. 108; *Leigh v. State*, 69 Ala. 261, 266; *State v. Jefferson County*, 11 Kan. 66, 71; *State v. Marston*, 6 Kan. 524, 532.

In Ohio it is held that mandamus is not a civil action and is not appealable. *State v. Smiley*, 14 Ohio Cir. Ct. R. 660, 8 O. C. D. 117.

Under Rev. St. § 2600, providing that the distinctions between actions at law and suits in equity, and the forms of all such actions and suits, have been abolished, and that there shall be but one form of action, which shall be denominated a "civil action," a proceeding by mandamus is a civil action. Though at common law the words "civil actions" did not include writs of mandamus, in substance mandamus is a civil remedy for the citizen who has been deprived of a clear legal right, notwithstanding it has been commenced and prosecuted in the name of the state; and hence, as to the sufficiency of the general pleadings, proceedings by mandamus must be governed and controlled by the same rules which prevail in other civil actions. *State v. Jennings*, 14 N. W. 28, 29, 30, 56 Wis. 113. So, also, under a like statute. *Brown v. Crego*, 29 Iowa, 321, 322.

Act Feb. 24, 1806, § 19, providing that the Supreme Court shall have no original jurisdiction in "civil actions," does not include mandamus, certiorari, or habeas corpus. *Commonwealth v. Lancaster County Com'rs* (Pa.) 6 Bin. 5, 8.

#### Motions.

A proceeding by motion against the stockholders of a corporation, after the recovery of a judgment against the corporation, is a "civil action," although termed a "motion," within the meaning of the term as used in the Kansas statute of limitations. *Crissey v. Morrill* (U. S.) 125 Fed. 878, 885, 60 C. C. A. 460.

A motion under Rev. St. § 4030, to enforce in the circuit court a justice's judgment against a railroad company, is a civil action, and the same pleadings may be filed and issue formed therein as in other actions. *Chicago & A. R. Co. v. Summers*, 14 N. E. 783, 735, 113 Ind. 10, 8 Am. St. Rep. 616.

#### Partition proceedings.

Under Code Proc. § 2, defining a "civil action" as a regular judicial proceeding in which a party prosecutes another for the



enforcement or prosecution of a right or the redress or prevention of a wrong, the old suit in equity for the partition of lands is now merged in the civil action, and may be prosecuted by summons and complaint, since it is a regular proceeding prosecuted according to the same forms of proceeding and rules of practice as other actions under the Code. *Myers v. Rasback* (N. Y.) 4 How. Prac. 83, 85; *Backus v. Stillwell* (N. Y.) 3 How. Prac. 318.

"Civil cases at law," as used in Act March 23, 1852, providing that an appeal may be had from all final judgments in civil cases at law, decrees in chancery, and interlocutory decrees rendered by the court of common pleas in which that court had original jurisdiction, means all civil cases at law, whether the action be given by statute or existed at common law, and includes a petition for partition, as well as the various other suits or actions authorized by statute. It would not embrace mere motions or summary proceedings, based upon other matters before the court, which do not belong to the class of remedies by original suit or action destined to be comprehended by the expression "civil cases at law." The expression "civil cases at law" distinguishes a class of remedies from suits in equity and the criminal modes of procedure. *Mack v. Bonner*, 3 Ohio St. 366, 367.

Since by Code, § 3, the term "civil action" embraces only such cases as were, before the enactment of the Code, known "as actions at law" and "suits in equity," a petition for partition under the statute is not a civil action. *Barger v. Cochran*, 15 Ohio St. 460, 461.

#### **Petition for writ of review.**

Rev. St. c. 100, § 22, provides "that the court in which a 'civil action' is pending may allow amendments of any process, pleading, or proceeding in the same." Though, in the strict technical sense, "civil actions" might not include petitions yet considering that the statute is remedial, that the term "civil action" is used in immediate connection with the more general word "proceeding" in the immediately preceding section, and that the statute from which the revision was taken did in terms extend to all legal proceedings, the term "civil action" will be held to include petitions for writ of review. *Davenport v. Holland*, 56 Mass. (2 Cush.) 1, 13.

#### **Probate proceedings.**

Where petitions have been filed to compel an administrator to pay claims which have been allowed against insolvent estates, and the only question is whether the administrator has a right to settle the estate without paying them, it is not a "civil action" within Rev. St. 1881, § 412, Rev. St. 1894, § 416, granting a change in such an action on

the application of the other party. *Everroad v. Lewis*, 43 N. E. 1010, 1011, 16 Ind. App. 65.

"Civil suits," as used in Const. art. 7, § 18, authorizing the Legislature to impose a tax on civil suits, does not include the settlement of estates in probate. *State v. Mann*, 45 N. W. 526, 528, 76 Wis. 469.

"Civil case," in Acts 1871-72, p. 188, relating to payment of jury fees in a civil case by a party, as a condition to bringing other proceedings, embraces a trial arising on an application made to revoke the probate of a will through a special proceeding, since it is a civil case, though not a civil action. *Carpenter v. Jones*, 121 Cal. 362, 53 Pac. 842.

#### **Proceedings for assignment of dower.**

The phrase "civil action," in Rev. St. § 5226, giving an appeal from a judgment or final order in a civil action rendered by the court of common pleas, includes a proceeding by a widow for the assignment of dower in the lands of her deceased husband. *Corry v. Lamb*, 2 N. E. 851, 852, 43 Ohio St. 390.

#### **Proceedings in rem.**

Proceedings on an information in rem are civil, and not criminal, proceedings. *Anonymous* (U. S.) 1 Fed. Cas. 996, 997.

#### **Proceedings to assess damages for diversion of water.**

A proceeding in a Massachusetts court under St. Mass. 1881, c. 268, for the appointment of commissioners for the assessment of damages suffered by plaintiffs, millowners in Rhode Island, by reason of the diversion of the water of a stream in Massachusetts by the defendant, is a "suit of a civil nature either at law or in equity," within the statute as to removal of causes, where it does not appear that there is no reason why the federal court may not administer relief by the appointment of commissioners, as well as the state court. *Banigan v. City of Worcester* (U. S.) 30 Fed. 392, 393.

#### **Proceedings to assess damages for establishment of highway.**

A civil case is an ordinary contention between parties, in which the courts are always open to the party feeling himself aggrieved; but where a case cannot be litigated in the ordinary mode, but requires the interposition of the lawmaking power in order to decide the manner of fixing damages, or some other material point, the proceeding is not a civil one, within a constitutional provision giving certain courts jurisdiction of civil cases. In the general acceptance of the term, chancery causes, proceedings to assess damages caused by the laying out of highways, and contested elec-

tion cases, are not "civil cases." *Norristown, H. & St. L. Turnpike Co. v. Burket*, 26 Ind. 53, 62.

A rule of court, requiring the appellant to docket appeals in "civil cases" from justice courts or other inferior tribunals, includes a proceeding before the board of supervisors to determine a claim for damages caused by the establishment of a highway through the claimant's lands. *Scott v. Lasell*, 32 N. W. 322, 324, 71 Iowa, 180.

#### **Proceedings to vacate judgments.**

A petition to vacate a judgment is entered as a separate suit, like a petition for a writ of review, and is in a broad sense a civil action, and as such is appealable from the justice court to the superior court, under Pub. St. c. 154, § 3943, allowing appeals to the superior court. *Clarke v. Bacall*, 50 N. E. 614, 171 Mass. 292.

A statute providing that an appeal may be taken from all "civil actions" does not include a statutory proceeding to modify or vacate a judgment by the court rendering such judgment, since they are merely special proceedings in an action. *Coates v. Chillicothe Branch State Bank of Ohio*, 23 Ohio St. 415, 431.

#### **Quo warranto proceedings.**

A proceeding for dissolution of a corporation under Code, § 3167, by filing a petition setting forth the facts and praying a writ of quo warranto, is not a civil action within the meaning of section 2851, requiring all civil actions in courts of record to be commenced by service of summons. *Capital City Water Co. v. State (Ala.)* 18 South. 62; 66, 29 L. R. A. 748.

An action in the nature of a quo warranto, filed by a district court attorney of Mississippi in one of the circuit courts thereof, under the provisions of the act of 1843 making it the duty of any district attorney who shall have reason to believe that any party in the state has been guilty of a violation of its charter, or upon the affidavit of one or more credible persons to that fact, forthwith to file such information, is a civil, and not a criminal, proceeding. *Commercial Bank v. State*, 12 Miss. (4 Smedes & M.) 439, 503.

The remedy by information in the nature of quo warranto in Kansas is a civil proceeding. *Foster v. State of Kansas*, 5 Sup. Ct. 97, 98, 112 U. S. 201, 28 L. Ed. 629.

#### **Scire facias.**

The term "civil action," in that section of the practice act providing that there shall be in this state but one form of civil action for the enforcement of rights, etc., includes remedies of scire facias, provided for the enforcement of judgments. *Humiston v. Smith*, 21 Cal. 129, 134.

The term "civil action," as used in St. 1866, c. 279, § 9, providing for the removal from the municipal court of Boston to the superior court of a civil action wherein the debt or damage demanded exceeds a certain amount, must be construed as meaning a proceeding before the court in which a debt or damage is demanded, and hence a writ of scire facias returnable before the municipal court of Boston, in which no debt or damage is demanded, is not a civil action, and cannot be removed to the superior court. *Gray v. Thrasher*, 104 Mass. 373, 375. See, also, *State v. Murmann (Mo.)* 28 S. W. 2, 3.

A scire facias brought to recover the forfeiture on a recognizance conditioned on the appearance of the principal therein to answer a criminal charge is a civil action, and must be prosecuted in a court having civil jurisdiction. No crime attaches to the sureties for permitting a forfeiture, any more than in failing to perform any other civil contract, and a court of criminal jurisdiction, alone, has therefore, in the absence of statutory provisions, no power to issue any process for the collection of the sums forfeited. *State v. Kinne*, 39 N. H. 129, 135.

#### **Seizures for violation of law.**

Under a complaint and search warrant under St. 1855, c. 215, § 25, for intoxicating liquors unlawfully kept for sale, liquors were seized, and subsequently the proceedings were quashed for informality, and the liquors ordered to be returned to the claimant, who moved for costs. The court were of the opinion that this was not a civil suit or proceeding in which the claimant could recover costs of the commonwealth. The process on which the liquors were seized was a criminal process, and the proceedings after the seizure were proceedings in a criminal prosecution. *Commonwealth v. Certain Intoxicating Liquors*, 80 Mass. (14 Gray) 375, 376.

As used in 13 Stat. 351, providing that no witness shall be excluded in the courts of the United States in any civil action because he is a party to or interested in the issue tried, the term "civil action" "includes actions at law, suits in chancery, proceedings in admiralty, and all other judicial controversies in which the rights of property are involved, whether between private parties, or such parties and the government. It is used here in contradistinction to prosecutions for crime." A seizure of property for a violation of the internal revenue law is a civil action within the meaning of the act. *United States v. Ten Thousand Cigars (U. S.)* 28 Fed. Cas. 39.

#### **Special proceedings distinguished.**

"Civil cases" is defined by Code, § 2504, to include actions and special proceedings.

College of Physicians & Surgeons of Keokuk v. Gullbert, 69 N. W. 453, 455, 100 Iowa, 213.

"Civil cases," as used in Code, § 351, providing for the review of justices' judgments, is synonymous with "actions," in contradistinction to the term "special proceedings." *People v. Bigelow* (N. Y.) 11 How. Prac. 83, 86.

"Civil cases," as used in the Bill of Rights, § 20, providing that in civil cases the right of trial by jury shall remain inviolate, "does not include cases in equity nor special statutory proceedings, and therefore in such cases the Legislature may provide for the trial by the court without jury." *Powell v. Powell*, 3 N. E. 639, 641, 104 Ind. 18.

The term "civil action," as used in Code 1851, includes not only actions on the law side of the court, but actions formerly denominated "suits in equity." The term is used to distinguish civil proceedings from proceedings in other actions, and to distinguish actions from special proceedings or particular relief. *Kramer v. Rebman*, 9 Iowa, 114, 118.

A "civil action" is defined to be an ordinary proceeding in a court of justice by which one side prosecutes another for the enforcement or protection of a right or for the redress or prevention of a wrong. Every other civil remedy is defined to be a "special proceeding." A proceeding on a petition for the sale of estrays is a special proceeding, and not an action. *In re Rafferty*, 43 N. Y. Supp. 760, 761, 14 App. Div. 55.

#### Submission of controversy.

"Civil action," as used in Rev. St. c. 121, § 21, providing that costs may be allowed to the prevailing party in a civil action, cannot be construed to include a submission entered into before a magistrate, for neither party can be said to be the plaintiff or defendant. It is true that each stands in that relation toward the other so far as their respective claims and demands are submitted to the determination of the arbitrators, but the proceeding derives all its force and effect from the mutual assent of the parties, and in this respect essentially differs from an action at law or in equity, in which one party compels the other to appear and litigate his rights. It is therefore a civil proceeding rather than a civil action. *Bond v. Fay*, 83 Mass. (1 Allen) 212.

#### Suit.

See "Suit."

#### Suits in equity.

A civil case is one which involves disputes or contests between man and man, and

which only terminates in the adjustment of the rights of plaintiffs and defendants, and means all cases, whatever technical appellation they may assume, in the shape of an action or chancery bill, which cannot legally be denominated "criminal cases"; and hence equity proceedings must be denominated a "civil case." *Grimball v. Ross* (Ga.) 1 T. U. P. Charlt. 175, 181.

"Civil cases," as used in Const. art. 3, § 1, declaring that the inferior courts shall have jurisdiction of all other civil cases save those of which the superior court has jurisdiction, does not embrace equity cases. *Gilbert v. Thomas*, 3 Ga. (3 Kelly) 575, 578.

The term "civil action" is used in Kansas as the name of the one form of proceedings authorized by the Kansas Statutes, which abolished the distinction between law and equity. *Broadway Nat. Bank v. Baker*, 57 N. E. 603, 605, 176 Mass. 294.

The expression "civil action," as used in Act 1859, § 34, providing that in all civil actions, in any court of law or equity of this state, any party thereto may be sworn and examined as a witness, includes all proceedings which are not criminal, and suits in equity as well as actions at law. *Smith v. Burnet*, 35 N. J. Eq. (8 Stew.) 314, 320.

Civil actions include all judicial controversies in which the rights of parties are involved, whether between private parties or such parties and the government, and the term is used in contradistinction to "prosecutions for crime," and hence includes actions in equity. *Fenstermacher v. State*, 25 Pac. 142, 143, 19 Or. 504.

Act Cong. July 2, 1864 (13 Stat. 351), provides that in courts of the United States there shall be no exclusion of any witness on account of color, nor in any "civil actions" because he is a party to or interested in the issue tried. Held, that the phrase "civil actions" as there used was undoubtedly used as opposed to "criminal actions," and therefore includes suits in chancery as well as actions at law. *Green v. United States*, 70 U. S. (9 Wall.) 655, 658, 19 L. Ed. 806; *Rison v. Cribbs* (U. S.) 20 Fed. Cas. 833, 834.

As the term "civil cases" is used in Bill of Rights, § 20, providing that in all civil cases the right of trial by jury shall remain inviolate, it means only such cases as were known as "civil cases" before and at the time the Constitution was adopted, and does not include cases which are termed "civil cases" after the adoption of the Code abolishing the distinction between actions at law and suits in equity. *Powell v. Powell*, 3 N. E. 639, 641, 104 Ind. 18.

The term "civil actions," as used in the statute giving probate courts in civil cases concurrent jurisdiction with district courts where the sum involved does not exceed

\$1,000, is used as opposed to "criminal cases," and includes any action in which a litigant may be entitled to a civil remedy; that is, to a remedy which is legal in its character, or to a remedy which is equitable in its character. *Rogers v. Bonnett*, 37 Pac. 1078, 1079, 2 Okl. 553.

Whether a proceeding is deemed civil or criminal depends upon the form permitted, not upon the question whether the penalty described is denominated a "fine" or "forfeiture." *State v. McConnell* (N. H.) 46 Atl. 458, 459.

Code, § 5091, enacts that the court shall render judgment without the verdict of a jury in all "civil cases founded on contract" where an issuable defense is not filed on oath. Held, that the phrase "civil cases founded on contract" means cases at law and not in equity, the words "civil cases" referring to actions at law, as also does the word "judgment." *Isaacs v. Tinley*, 58 Ga. 457, 459.

#### **Suits to recover possession of land.**

A suit to recover the possession of land is a civil action, and not a special proceeding. *Woodley v. Gilliam*, 64 N. C. 649.

#### **Supplementary proceedings.**

"Civil action," as used in Rev. St. 1881, § 412, relating to the change of venue of any civil action, includes proceedings supplementary to execution. *Burkett v. Holman*, 3 N. E. 408, 408, 104 Ind. 6.

#### **Trespass quare clausum fregit.**

As used in the Constitution, providing that all civil cases shall be tried in the county wherein the defendant resides, the term "civil cases" includes an action of trespass quare clausum fregit. *Osmond v. Flournoy*, 34 Ga. 509, 510.

#### **CIVIL BUSINESS.**

"Civil and criminal business," as used in Const. art. 8, § 5, providing that all civil and criminal business arising in any county must be tried in such county, etc., will not be held to mean simply business of the court, but as a general term to include all causes of action, and all other business which might arise in any county. *Konold v. Rio Grande W. R. Co.*, 51 Pac. 256, 257, 16 Utah, 151.

The phrase "civil business," in Const. art. 8, § 5, providing that all civil and criminal business arising in any county must be tried in such county, unless a change of venue be taken in such cases as may be provided by law, means the fact or facts that constitute the cause of action. *Condon v. Leipsiger*, 55 Pac. 82, 17 Utah, 498.

The phrase "civil business," as used in Const. art. 8, § 5, providing that all civil and

criminal business arising in any county must be tried in such county unless a change of venue be taken, means such civil business as amounts to a cause of action as the law defines a cause of action, so that where defendant's false and fraudulent testimony and concealment of material facts misled the court sitting in Salt Lake county, and he obtained a decree declaring plaintiff's deed to be a mortgage, an action to set the decree aside and to decree plaintiff's title to be absolute was properly brought in that county, notwithstanding the land was situated in Tooele county. *Mosby v. Gisborn*, 54 Pac. 121, 128, 17 Utah, 257.

#### **CIVIL CASE.**

See "Civil Action—Case—Suit—etc."

#### **CIVIL CAUSE.**

See "Civil Action—Case—Suit—etc."

#### **CIVIL CODE.**

The term "Civil Code" means the Code of Civil Procedure. *Laws 1892 N. Y. c. 677*, § 29.

#### **CIVIL COMMOTION.**

"Riot, insurrection, and civil commotion" were held to import occasional local or temporary outbreaks of unlawful violence, which, though temporarily destructive in their effects, did not rise to the proportions of organized rebellion against the government. *Boon v. Aetna Ins. Company*, 40 Conn. 575, 584.

A civil commotion must necessarily arise where there is a civil war. It is true that there may be a civil commotion without civil war, but, within an exception in an insurance policy of risks from civil commotion, it cannot be said that there was no civil commotion in Virginia between 1861 and 1865. *Grame v. Mutual Assur. Soc.*, 5 Sup. Ct. 150, 112 U. S. 273, 28 L. Ed. 718.

The expression "civil commotion," as used in a life policy wherein it is provided that the same shall be void if the insured die by means of any civil commotion, means the wild or irregular action or tumultuous conduct on the part of any persons assembled together. *Spruill v. North Carolina Mut. Life Ins. Co.*, 46 N. C. 126, 127.

#### **CIVIL CONSPIRACY.**

The term "civil" is used to designate a conspiracy which will furnish ground for a civil action, as where, in carrying out the design of the conspirators, overt acts were done causing legal damage, the person damaged has a right of action. It is said that the gist of civil conspiracy is the injury or damage. While criminal conspiracy does not

require such overt acts, yet, so far as the rights and remedies are concerned, all criminal conspiracies are embraced within civil conspiracies. *Brown v. Jacobs Pharmacy Co.*, 41 S. E. 553, 555, 115 Ga. 429, 57 L. R. A. 547, 90 Am. St. Rep. 128.

### CIVIL CONTEMPT.

"Civil contempts are those quasi contempts which consist in failing to do something which the contemnor is ordered by the court to do for the benefit or advantage of another party to the proceedings before the court." *Wyatt v. People*, 28 Pac. 961, 963, 17 Colo. 252; *State v. Downing*, 66 Pac. 917, 921, 40 Or. 309.

A civil contempt is not an offense against the dignity of the court, but against the party in whose behalf the mandate of the court has been issued, and a fine is imposed solely as indemnity of the insured party. *People v. McKane*, 28 N. Y. Supp. 981, 983, 78 Hun, 154.

Under Code Civ. Proc. § 14, declaring a "civil contempt" any misconduct by which a right or remedy of a party to a civil action or a special proceeding pending in the court may be defeated, impaired, impeded, or prejudiced, the misconduct cognizable is such as arises out of an injury or wrong done to a party who is a suitor before the court, and has established a claim on its protection. Citing *People v. Court of Oyen & Terminer*, 101 N. Y. 245, 4 N. E. 259, 54 Am. Rep. 691. So that the surety on a bond given to indemnify the sheriff on an attachment is not punishable for contempt in making a false affidavit of justification, where the only person injured thereby was not a party to the attachment suit. *Schreiber v. Raymond & Campbell Mfg. Co.*, 45 N. Y. Supp. 442, 443, 18 App. Div. 158.

### Criminal contempt distinguished.

There seems to be a well-defined distinction between "contempts" which are merely criminal or punitive, and those which are termed "civil contempts," the latter applying to such as are remedial in character. The two classes of contempts are often distinguished as "direct" and "constructive" or "consequential." Civil contempts are those quasi contempts which consist in failing to do something which the contemnor is ordered by the court to do for the benefit or advantage of another party to the prosecution before the court, while criminal contempts are those acts in disrespect of the court or its processes, or which obstruct the administration of justice or tend to bring the court into disrespect. Criminal contempts are those committed in the immediate view and presence of the court, such as insulting language or acts of violence which interrupt the regular proceedings of the court. This class of contempts may and shall be

punished summarily. *Laramie Nat. Bank v. Steinhoff*, 53 Pac. 299, 300, 7 Wyo. 464. See, also, *In re Wilson*, 17 Pac. 698, 700, 75 Cal. 580; *State v. Downing*, 66 Pac. 917, 921, 40 Or. 309. This classification is not affected by the fact that the procedure is in most instances substantially the same whether the contempt be civil or criminal, nor is the character of the contempt in this regard controlled by the character of the court in which it occurs. *State v. Downing*, 66 Pac. 917, 921, 40 Or. 309.

Contempts are of two classes: First, those which are purely criminal, and are noticed and punished merely to vindicate and to preserve the authority of judicial tribunals, and propriety of conduct in their proceedings; second, civil contempts, which, though criminal in nature, as to procedure are primarily a means of conferring civil rights. Originally this was the usual method of enforcing decrees and orders made in courts of chancery, and in England it was long, if not yet, a concurrent method after the court was authorized to issue rights of fieri facias and elegit. *City of Eaton Rapids v. Horner*, 85 N. W. 284, 285, 128 Mich. 52.

"Civil contempts" are such contempts as affect a private person, as, for instance, where a party refuses to obey an order of court which will benefit such private person. In civil contempts the case is not punitive, but executive, and the punishment is to commit the offender until he complies with the order. *State ex inf. Crow v. Shepherd*, 76 S. W. 79, 86, 177 Mo. 205.

Proceedings for contempt instituted to preserve and enforce the rights of private parties to suits, and to compel obedience of orders to decrees made to enforce the rights and administer the remedy to which the court has found them to be entitled, are civil, remedial, and coercive in their nature, and the parties chiefly in interest are the individuals whose private rights and remedies they were instituted to protect and enforce. *In re Nevitt (U. S.)* 117 Fed. 448, 458, 54 C. C. A. 622.

### Violation of injunction.

By Rev. Code, § 5984, "civil contempts" is defined as follows: "Every court of record has power to punish by fine or imprisonment for either a neglect or violation of duty, or other misconduct by which a right or remedy of a party to a civil action or proceeding pending in the court may be defeated, impaired, impeded, or prejudiced in the following cases." Subdivision 3 provides "or for any other disobedience to any lawful order, judgment or process of court." Under such definition the violation by a defendant of an injunction is a civil contempt, and not a criminal one. *Merchant v. Pielke*, 83 N. W. 18, 19, 9 N. D. 245.

A petition alleging that certain parties were violating an injunction restraining them from certain acts is a proceeding for civil contempt. *City of Eaton Rapids v. Horner*, 85 N. W. 264, 265, 126 Mich. 52.

#### CIVIL COURT.

A court created by the Legislature, which operates on the persons and property of private citizens in civil life by way of fine to punish for neglect of military duty, and not acting at all on the person to compel obedience, is a "civil court," though the court be composed of military officers. *State v. Davis*, 4 N. J. Law (1 Southard) 811, 812.

#### CIVIL DAMAGE LAW.

"Civil damage laws" are the statutory laws of various states which impose a liability on liquor dealers for damages to third persons caused by the sale of intoxicating liquors to others. Thus, *St. Mass.* 1879, c. 297, which was an act to provide for the recovery of damages for injuries caused by the use of intoxicating liquors, and provides that every husband, wife, child, parent, guardian, employer, or other person who shall be injured in person or property or means of support by any intoxicated person, or in consequence of the intoxication, habitually or otherwise, of any person, shall have a right of action against the person furnishing the liquor, is a civil damage law. *Moran v. Goodwin*, 130 Mass. 158, 159, 39 Am. Rep. 443. So, also, is a like statute in *Laws N. Y.* 1873, c. 646; *Baker v. Pope* (N. Y.) 2 Hun, 556.

#### CIVIL DAMAGES.

The term "civil damages" has a very well defined meaning when used in intoxicating liquor statutes, and has reference to the damages which may be collected by wife, child, parent, or guardian or employer injured in person, property, or means of support by reason of the sale of intoxicating liquors. An action to recover the sum of \$100 under Code, § 2403, declaring that one selling liquor to minors shall pay such sum, is not an action for civil damages. *Headington v. Smith*, 84 N. W. 982, 983, 113 Iowa, 107.

#### CIVIL DAY.

"The 'civil day' is the solar day, and is measured by the diurnal revolution of the sun, denoting the interval of time which elapses between the successive transits of the sun over the same hour circle, so that the 'civil day' commences and terminates at midnight." *Pederson v. Eugster* (U. S.) 14 Fed. 422.

#### CIVIL DEATH.

The term "civil death," as used in the books, seems to involve, first, a total ex-

tinguishment of civil rights, and the passage of the party's estate to his heirs as though he were dead; second, an incapacity to hold property or to sue in the King's Court, attended with a forfeiture of estate and corruption of blood, and the King took the property to the exclusion of the heirs. Perpetual imprisonment, or perpetual banishment without forfeiture of the estate, did not produce civil death at the common law. *Town of Baltimore v. Town of Chester*, 53 Vt. 315, 319, 38 Am. Rep. 677.

There were three principal incidents consequent on an attainder for treason or felony, one of which was an extinction of civil rights, more or less complete, which was denominated "civil death." The incident of civil death attended every attainder of treason or felony, whereby, in the language of Lord Coke, the attainted person is disabled to bring any action, for he is *extra legem positus*, and is accounted in law *civiliter mortuus*, or, as stated by Chitty, he is then disqualified from being a witness, can bring no action, nor perform any legal function. It seems to be a necessary conclusion from the rules of the common law governing rights of property as affected by forfeiture for crime that "civil death," one of the consequences of conviction for treason or felony, did not of itself, as a general rule at least, operate to divest the offender of his title to his lands. *Avery v. Brerett*, 18 N. E. 148, 150, 151, 110 N. Y. 317, 1 L. R. A. 264, 6 Am. St. Rep. 368.

If a person be convicted of treason or felony, and, saving his life, is banished forever, this is civil death; and so it is, also, if he receives sentence of death and afterwards leaves the kingdom for life on a conditional pardon. *Troup v. Wood* (N. Y.) 4 Johns. Ch. 228, 248.

"Civil death" imports a deprivation of all rights whose exercise or enjoyment depends upon some provision of positive law. It is the extinction of civil rights; the state of a person who, possessing natural life, has lost all his civil rights, and as to them is considered as dead. Thus, under Pen. Code, § 674, which provides that a person sentenced to imprisonment in the state prison for life is thereafter deemed civilly dead, a person who is serving a life sentence at the time of his father's death does not inherit from him. *In re Donnelly's Estate*, 58 Pac. 61, 125 Cal. 417, 73 Am. St. Rep. 62.

A person convicted of a felony and sentenced to imprisonment in the state prison for life is not *civiliter mortuus*, and, strictly speaking, civil death seems to have been confined to cases of persons professed, abjured, or banished from the realm. *Platner v. Sherwood* (N. Y.) 6 Johns. Ch. 118, 129.

Civil death is not identical in law with physical death, under the statutes of California which provide that a life convict may be

a competent witness in criminal actions, and capable of making and acknowledging a sale or conveyance of property. *Coffee v. Haynes*, 57 Pac. 482, 483, 124 Cal. 561, 71 Am. St. Rep. 99.

The statute of Missouri which enacts that a sentence of imprisonment in the penitentiary for a term less than life suspends all civil rights of persons so sentenced for the period thereof applies only to sentences of the state court, and, there being no similar act as to sentences of the federal court, a sentence for life in such court would not have the effect of making the convict civilly dead. *Presbury v. Hull*, 34 Mo. 29, 30, 34.

#### CIVIL DISABILITIES.

"Civil disabilities," as used in an act relating to married women, declaring that the civil disabilities of the wife are abolished, and that "for any usurpation of her natural or property rights she may appeal to the courts," should be construed simply as meaning a removal of such disabilities as were incident to the marriage relations, so far as the married woman's natural or property rights were concerned, and could not be construed so as to confer on her civil political rights, such as the right to vote, etc. *Harland v. Territory*, 13 Pac. 453, 465, 8 Wash. T. 131.

"Civil disabilities," as used in Hill's Code, § 2998, providing that all laws which impose or recognize civil disabilities on a wife which are not imposed or recognized as existing on the husband are repealed, means disqualification created by law. It means some disqualification created by or the result of law, which renders her incapable of doing certain acts or things. Section 2885 of the Code, permitting every father by his last will in writing to appoint a guardian or guardians for any of his children, whether born at the time of making the will or afterward, to continue during the minority of the child, does not create a civil disability in the wife, she having no right at common law to make a testamentary disposition of the guardianship of children. *Ingalls v. Campbell*, 24 Pac. 904, 905, 18 Or. 461.

#### CIVIL EFFECTS.

As used in Civ. Code, art. 118, providing that if only one of the parties to an invalid marriage acted in good faith the marriage produces its civil effects only in his or her favor and in favor of the children of the marriage, the term "civil effects" is employed without restriction, and necessarily imports all civil effects given to marriage by the law. *Smith v. Smith*, 10 South. 248, 250, 43 La. 1140.

#### CIVIL ENGINEER.

As laborer, see "Laborer."

As mechanic, see "Mechanic."

#### CIVIL FRUITS.

Civil fruits are rents of real property, the interest of money, and annuities. Code La. 1900, art. 545.

#### CIVIL IMPOSITION.

"Civil imposition," as used in the charter of Harvard College, exempting from civil impositions lands of the college exceeding a certain value, means "all burdens and duties, to be rendered in money or in kind, imposed by the civil authority equally on the lands, or on the owner or tenant in respect thereof." *Harvard Coll. Aldermen of Boston*, 104 Mass. 470, 41

#### CIVIL INJURIES.

Wrongs are divided into two sorts, wrongs, "private wrongs" and "public wrongs." The former are an infringement or privation of the private or civil rights belonging to the individuals, considered as individuals, and are thereupon frequently termed "civil injuries." The latter are a breach and violation of public rights and ties which affect the whole community, considered as a community, and are distinguished by the harsher appellation of "crimes or misdemeanors." *Cullinan v. Burkhard*, 1 N. Y. Supp. 825, 827, 41 Misc. Rep. 321. See also, *Tomlin v. Hildreth*, 47 Atl. 649, 65 65 N. J. Law, 438.

#### CIVIL JURISDICTION.

"Civil jurisdiction simply means jurisdiction to hear and determine civil action. Civil jurisdiction is that which exists where the subject-matter is not of a criminal nature." *Landers v. Staten Island R. Co.*, 3 N. Y. 450, 456.

The term "civil," when applied to an action, is used with reference to the jurisdiction of a court or a judicial proceeding generally, has respect to the nature and form of a remedy and cause of action, or occasion for instituting legal proceedings, and has respect to the object of the jurisdiction of the court, and not to the presence of suitors. *In re City of Buffalo*, 34 N. E. 1103, 1104, 139 N. Y. 422.

#### CIVIL LAW.

Common law distinguished, see "Common Law."

#### CIVIL LIBERTY.

"Civil liberty" is defined by Blackstone to be none other than natural liberty, so far as it is restrained by human laws, and no farther, as is necessary and expedient for the general advantage of the public. *Dennis v. Moses*, 52 Pac. 333, 339, 18 Wash. 537. 4 L. R. A. 302 (citing Comm. book I, p. 125).

"Political or civil liberty, which is that of a member of society, is no other than natural liberty, so far restrained by human laws, and no further, as is necessary and expedient for the general advantage of the public." Hence we may collect that the law which restrains a man from doing mischief to his fellow citizens, though it diminishes the natural, increases the civil, liberty of mankind; but that every wanton and causeless restraint of the will of the subject, whether practiced by a monarch, a nobility, or a popular assembly, is a degree of tyranny. Nay, that even laws themselves, if they regulate and constrain our conduct in matters of mere indifference, without any good end in view, are regulations destructive of liberty; whereas if any public advantage can arise from observing such precepts, the control of our private inclinations in one or two particular points will conduce to preserve our general freedom in others of more importance, by supporting that state of society which alone can secure our independence. *People v. Berberich*, 20 Barb. 224, 231 (quoting Bl. Comm. 125).

Civil liberty is no other than natural liberty, so far restrained by human laws (and no farther) as is necessary and expedient for the general welfare. There are many restrictions imposed on personal liberty which spring from the helpless or dependent condition of individuals in the various relations of life, among them being those of parent and child, guardian and ward, teacher and scholar; and just and legal restraints on personal liberty, which are demanded by the welfare of society, when not abused, are entirely consistent with the constitutional guaranty of liberty. In *re Ferrier*, 103 Ill. 367, 372, 43 Am. Rep. 10 (citing *Cooley's Const. Lim.* 339, 342).

The conception of civil liberty has been variously phrased thus: "Every man may claim the fullest liberty to exercise his faculties, compatible with the possession of like liberty by every other." *Spencer's Social Statistics*, p. 94. Liberty consists in doing what we ought to will, and in not being constrained to do what we ought not to will. *Montesquieu*. Even liberty itself, the greatest of all rights, is not unrestricted license to act according to one's own will. It is only freedom from restraint under conditions essential to the equal enjoyment of the same rights by others. *State v. Kreutzberg*, 90 N. W. 1098, 1101, 114 Wis. 530, 58 L. R. A. 748, 91 Am. St. Rep. 934 (citing *Field, J.*, in *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13, 34 L. Ed. 620).

"Civil liberty" is a natural liberty shorn of the excesses which invade and trench on the equal liberties of others; and no man can rightfully complain of any encroachment on his personal liberty which he himself, by his violence and lawlessness, has rendered

necessary for the safety and protection of others. "Civil liberty" is liberty as defined by law, and not unbridled license. *Hayes v. Mitchell*, 69 Ala. 452, 454.

"Civil liberty," as an institution under our federal and state constitutions, implies more than mere freedom from physical restraint; it comprehends the right of every person living under our government to acquire and dispose of property by lawful means and for lawful purposes, and to pursue any lawful business, trade, or calling in such manner as to him shall seem meet, provided only he does not thereby offend against any superior social right or the equal rights of other persons. *Bell v. Gaynor*, 86 N. Y. Supp. 122, 123, 14 Misc. Rep. 334.

#### CIVIL MATTERS.

*McClain's Code*, § 769, provides that the Supreme Court shall have jurisdiction, in all civil matters, concurrent with the district court, etc. It was held that the term "civil matters" as used in the act was evidently intended to include all matters other than criminal, for of the two it is a more comprehensive term than "civil actions," and, as "civil cases" is defined in the Code to include actions and special proceedings, the term "civil matters" will be held to be as broad in meaning as "civil cases," and thus includes actions and special proceedings. *Certiorari* to compel the state board of medical examiners to recognize petitioner as a medical school in good standing, which it had declared to be otherwise, is a "civil matter." *College of Physicians & Surgeons of Keokuk v. Guilbert*, 69 N. W. 453, 455, 100 Iowa, 218.

There has always been a well-recognized distinction under the various statutes and laws of Mississippi between "matters civil" and "matters in equity." The Constitution of 1809 gave the circuit court jurisdiction in all matters civil, and provided for the establishment of the chancery court with full jurisdiction of all matters of equity. *Simrall*, in *Bell v. City of West Point*, 51 Miss. 270, in reference to the language used in conferring jurisdiction on the circuit court, says: "Dwelling a moment on the language used, it is broad enough to embrace suits at common law as well as in equity—all matters civil. But that language had the purpose of creating a common-law cognizance, and we therefore give that import to the words." The framers of the Constitution evidently intended by all "matters civil" to mean "matters of common-law cognizance." *Illinois Cent. R. Co. v. Le Blanc (Miss.)* 21 South. 760, 761.

#### CIVIL OBLIGATION.

A civil obligation is a legal title which gives the person in whose favor it is contracted a right of judicially enforcing it. A natural obligation is that which obliges the



person in honor and conscience. Obligations are commonly both natural and civil. There are some, however, which are merely civil, and which the debtor may be judicially compelled to perform without being under any obligation to do so in point of conscience. *Blair v. Williams*, 14 Ky. (4 Litt.) 34, 39.

A civil obligation is a legal tie which gives the party with whom it is contracted the right of enforcing its performance by law. Civ. Code La. 1900, art. 1757.

### CIVIL OFFICE.

A civil office is a grant and possession of the sovereign power, and the exercise of such power within the limits prescribed by the law which creates the office constitutes the discharge of the duties of the office. *State v. Spaulding*, 102 Iowa, 639, 644, 72 N. W. 288, 289 (citing *State v. Valle*, 41 Mo. 29).

In a certain popular acceptance, the words "civil office under this state" might possibly be interpreted to mean state officers, in the sense of participating directly in the administration of the state government as such; but they are none the less civil officers under this state because their functions are confined to the local administration. The offices are created, and the officers are appointed, and their powers given and their duties defined, and their salaries fixed, directly by act of the legislature. They exercise a share of the powers of civil government, and their authority comes directly from the state. They are to be considered as much civil officers under this state, as the judge of a court or the mayor of the city. The mode of appointment is not material. *Montgomery v. State* (Ala.) 18 South. 157, 159 (quoting and approving *State v. Valle*; 41 Mo. 31).

### Employment distinguished.

A civil office is a grant and possession of sovereign power, and the exercise of such power within the limits prescribed by the law which creates the office constitutes the discharge of the duties of the office, and is distinguished in this respect from a mere employment, as a contractor or agent under some public office. *Attorney General v. Detroit Common Council*, 70 N. W. 450, 456, 112 Mich. 145, 37 L. R. A. 211; *State ex rel. Wingate v. Valle*, 41 Mo. 29, 31.

### Military office distinguished.

Const. art. 4, § 9, providing that no person holding office under the United States government shall be eligible to any "civil office" in this state, means any office not a military office, including all offices connected with the civil administration of the country, in contradistinction to "military." Therefore all who hold appointments under the national government, whether their duties are executive or judicial, in the highest or lowest de-

partment of the government, with the exception of officers in the army and navy, are properly "civil officers." *State v. Clarke*, 31 Pac. 545, 546, 21 Nev. 333, 18 L. R. A. 313, 37 Am. St. Rep. 517.

### CIVIL OFFICER.

Civil officers are either political, judicial, or ministerial. *Ex parte Faulkner*, 1 W. Va. 269, 297 (citing 7 Bacon's Abr. 279, 280, tit. "Office and Officers").

"Civil officers," within the meaning of the constitutional provision that all civil officers shall be liable to impeachment for any misdemeanor in office, must be understood to mean public officers holding civil offices of any grade of honor, trust, or profit under the state. *State v. O'Driscoll* (S. C.) 3 Brev. 526, 527.

Civil officers are government agents. They are natural persons in whom a part of the sovereignty is vested or imposed, to be exercised by the individuals so intrusted with it for the public good. The power to act for the state is confided to the person appointed to act. It belongs to him upon assuming the office. He is clothed with the authority which he exerts, and the official acts done by him are done as his acts, and not as the acts of a body corporate. *Board of County School Com'rs of Worcester County v. Goldsborough*, 44 Atl. 1055, 1058, 90 Md. 198.

In *United States v. Hatch* (Wis.) 1 Pin. 182, the term "civil officers" was said to embrace only those in whom a portion of the sovereignty is vested, or to whom the enforcement of municipal regulations for the control of the general interest of society is confided. *State v. Crawford*, 21 Atl. 546, 17 R. I. 292.

### Attorney at law.

An attorney at law is not a "civil officer" within Const. art. 7, § 6, providing that no one save a qualified elector shall be appointed to any civil office in the state, and, in the absence of statutory restrictions, women will be admitted to the bar. *In re Thomas*, 27 Pac. 707, 708, 16 Colo. 441, 13 L. R. A. 538.

Act June 26, 1863, prescribing a certain oath to be taken by every person elected or appointed to any office of trust, civil or military, is not to be construed to include an attorney at law. *Ex parte Faulkner*, 1 W. Va. 269, 291.

### Canal commissioners.

The term "civil officers," as used in Act Cong. April 20, 1836 (organic act creating the territory of Wisconsin), means only those officers in whom a portion of the sovereignty is vested, or to whom the enforcement of municipal regulations or the control of the general interests of society is confided, and does

not include such officers as canal commissioners. *United States v. Hatch* (Wis.) 1 Pin. 182, 188.

#### **Employé distinguished.**

An "officer" is distinguished from an "employé" by the greater importance, dignity, and independence of his position, in being required to take an official oath, and perhaps to give an official bond, in the liability for misfeasance in office, and usually, though not necessarily, in the tenure of his office. *City of Baltimore v. Lyman*, 48 Atl. 145, 146, 92 Md. 591.

#### **Notary public.**

All officers of the United States who hold their appointments under the national government, whether their duties are executive or judicial, in the highest or lowest departments of the government, with the exception of officers in the army or navy, are properly "civil officers" within the meaning of the Constitution. A notary public is a civil officer within such definition. In re House Bill No. 166, 21 Pac. 473, 9 Colo. 628 (citing 1 Story Const. § 789).

The term "civil office of profit" in Const. art. 4, § 20, providing that no person holding any lucrative office under the United States shall be eligible to any civil office of profit under this state, etc., refers only to offices under the state, regardless of amount of compensation. *People v. Leonard*, 14 Pac. 853, 855, 73 Cal. 230.

#### **Police officer.**

14 Stat. U. S. p. 569, which provides that there shall be allowed and paid to certain officers in Washington, including civil officers, and all other clerks and employes, etc., an additional compensation of a certain amount on their respective salaries, should be construed to include the police of the capital. *Mallory v. United States*, 3 Ct. Cl. 257, 258.

The term "civil officers," as used in Mill. & V. Code, § 5526, providing that such civil officers who shall arrest and prosecute to conviction any person guilty of carrying a bowie knife shall be entitled to \$50, means policemen or other officers charged with the duty of preserving the public peace, preventing crime, and detecting and arresting offenders, and to enforce all law relating to the suppression of crime. *Porterfield v. State*, 21 S. W. 519, 92 Tenn. 289.

Police officers are civil officers. Their principal duty is to assist in the preservation of the public peace, a matter of public concern. They are state or public officers, not town or private officers. *Gooch v. Town of Exeter*, 48 Atl. 1100, 70 N. H. 413, 85 Am. St. Rep. 637.

#### **Quasi municipal officer.**

The term "civil officers," as used in the Constitution of Rhode Island, defining qualifications of voters who shall have a right to vote in all elections of "civil officers," primarily if not solely has reference to municipal and state officers, and will not include officers of a quasi municipal corporation. *Wood v. Quimby*, 40 Atl. 161, 164, 20 R. I. 482.

#### **Sergeant at penitentiary.**

The term "civil officer," as used in Pen. Code, art. 319, exempting from amenability for carrying a pistol civil officers engaged in the discharge of official duty, includes a sergeant in the penitentiary service, while in charge of a convict camp and engaged in the duties incidental thereto. *Carmichael v. State*, 11 Tex. App. 27, 28.

#### **CIVIL POSSESSION.**

Civil possession is the detention of the thing, accompanied with the design of possessing in quality of proprietor. *Sunol v. Hepburn*, 1 Cal. 254, 265.

Possession is civil when a person ceases to reside in the house or on the land which he occupied, or ceases to detain the movable which he possessed, but without intending to abandon the possession. "Civil possession" is also defined to be the detention of a thing by virtue of a just title, and under the conviction of possessing as owner. Civ. Code La. 1900, arts. 3429, 3431.

#### **CIVIL PROCEEDINGS.**

See "Civil Action—Case—Suit—etc."  
Other civil proceeding, see "Other."

#### **CIVIL PROCESS.**

The term "civil process" in Act April 18, 1861, providing that no civil process shall issue or be enforced against any person in the military service of the state or of the United States, includes a writ of scire facias upon a mortgage, unless expressly prohibited by the act of the contracting parties. *Coxe's Ex'r v. Martin*, 44 Pa. (8 Wright) 322-326.

#### **CIVIL RIGHTS.**

A "civil right" is said by Anderson to be a right accorded to every member of a distinct community or nation, and Bouvier says: "Civil rights are those which have no relation to the establishment or management of the government. These consist in the power to acquire and enjoy property, and of exercising the paternal and marital powers, and the like." *People v. Barrett*, 67 N. E. 742, 743, 203 Ill. 99, 96 Am. St. Rep. 296.

A civil right is the right of a citizen; the right of an individual as an individual; the

right due from one citizen to another, the privation of which is a civil injury for which redress may be sought by a civil action. *State of Iowa v. Chicago, B. & Q. R. Co.* (U. S.) 37 Fed. 497, 498, 3 L. R. A. 554 (citing *Burr. L. Dict.* 296).

By "civil rights which are protected by the federal Constitution" is meant those rights which the municipal law will enforce, at the instance of private individuals, for the purpose of securing to them the enjoyment of their means of happiness. They are distinguished from "natural rights," which would exist if there was no municipal law, some of which are abrogated by municipal law, while others lie outside of its scope, and still others are enforceable under it as "civil rights." "Civil rights" are also distinguishable from "political rights," which are directly concerned with the institution and administration of government. "Civil rights" include the right of every citizen to seek redress of wrongs and the enforcement of rights in the courts, and, as an incident to this, include the right of a party to testify in a criminal case in his own behalf. *State v. Powers*, 17 Atl. 969, 970, 51 N. J. Law (22 Vroom) 432.

The term "civil rights" ordinarily "means all those rights which the laws give a person, which depend upon the laws of the community in which he lives and of which he is a member." *Bowles v. Habermann*, 95 N. Y. 246, 247.

As defined by Bouvier, "civil rights are those which have no relation to the establishment, support, or management of government. These consist in the power of acquiring and enjoying property, of exercising the parental and marital power, and the like." They are the absolute rights of persons, the right of personal security, the right of personal liberty, and the right to acquire and enjoy property as regulated and protected by law. They are the rights which, according to the fundamental principles of American government, are inalienable. *People v. Washington*, 36 Cal. 658-662.

"A civil right is a right accorded to every member of a district or community, while a political right is a right exercisable in the administration of government. Bouvier in his Law Dictionary says: 'Political rights consist in the power to participate directly or indirectly in the establishment of government or management thereof. These political rights are fixed by the Constitution. Every citizen has the right to vote for public officers and to be elected to office. Civil rights are those which have no relation to the establishment, support, or management of the government. They consist in the power of acquiring and enjoying power to exercise the paternal or marriage relation, or the like.' It will be observed

that every one, unless deprived of them by sentence of civil death, is in the enjoyment of civil rights, which is not the case with political rights. An alien, for an example, has no political rights, although in full enjoyment of the civil rights." *Fletcher v. Tuttle*, 37 N. E. 683, 686, 151 Ill. 41, 25 L. R. A. 143, 42 Am. St. Rep. 220.

Const. art. 2, § 3, which declares that no person shall be denied any "civil or political right, privilege or capacity" on account of his religious opinions, means that whatever civil rights, privileges, or capacities belong to or are enjoyed by citizens of the state generally, shall not be taken from or denied any person on account of any religious views that he may entertain. *Hroneck v. People*, 24 N. E. 861, 865, 134 Ill. 139, 8 L. R. A. 837, 23 Am. St. Rep. 652.

#### CIVIL SERVICE.

"Civil service" means all service rendered to and paid for by the state or nation, or by political subdivisions thereof, other than that pertaining to naval or military affairs. *Hope v. City of New Orleans (La.)* 30 South. 842, 843.

"Civil service," within the meaning of *Laws 1899, c. 270*, entitled "An act in reference to the civil service of the state of New York and the city and civil divisions thereof," includes all offices and positions of trust or employment in the service of the state, or of such civil division or city, except such offices and positions in the militia and the military departments as are or may be created under the provisions of article 11 of the Constitution." *People v. Cram*, 61 N. Y. Supp. 858, 861, 29 Misc. Rep. 359.

#### CIVIL STATUS.

Lord Westbury, in *Udny v. Udny*, L. R. 1 H. L. Sc. 441, said: "The law of England and of almost all civilized countries ascribes to each individual at his birth two distinct legal states or conditions; one by virtue of which he becomes the subject of some particular country, binding him by the tie of natural allegiance, and which may be called his 'political status'; another by virtue of which he has ascribed to him the character of a citizen of some particular country, and as such is possessed of certain municipal rights and subject to certain obligations, which latter character is the 'civil status' or condition of the individual, and may be quite different from his political status." *United States v. Wong Kim Ark*, 18 Sup. Ct. 456, 459, 169 U. S. 649, 42 L. Ed. 890.

#### CIVIL SUIT.

See "Civil Action—Case—Suit—etc."

**CIVIL WAR.**

"Custom appropriates the term 'civil war' to every war between the members of one and the same political society. If it be between part of the citizens on one side, and the sovereign, with those who continue in obedience to him, on the other—provided those in rebellion have any reason for taking up arms—nothing further is required to entitle such disturbance to the name of 'civil war' instead of 'rebellion.'" Hubbard v. Harnden Exp. Co., 10 R. I. 244, 246 (quoting Vattel, Law of Nations [Chitty's Ed.] book 3, c. 18, p. 421).

"A civil war," Vattel says, "is when a party arises in a state which no longer obeys the sovereign, and is sufficiently strong to make head against him, or when, in a republic, the nation is divided into two opposite factions, and both sides take up arms. Civil war breaks the bonds of society and of the government; it gives rise in a nation to two independent parties, who acknowledge no common judge. They are in the position of two nations who engage in disputes, and, not being able to reconcile them, have recourse to arms. The common laws of war are in civil wars to be observed on both sides. The same reasons which make them obligatory between foreign states render them more necessary in the unhappy circumstance where two exasperated parties are destroying their common country." Riquelme says: "When a faction is formed in a state which takes up arms against the sovereign in order to wrest from him the supreme power, or impose conditions on him, or when a republic is divided into two parties which mutually treat each other as enemies, this war is called 'civil war.' Civil wars frequently commence by popular tumults which in no wise concern foreign nations; but when one faction or party obtains dominion over an extensive territory, gives laws to it, administers justice, and, in a word, exercises acts of sovereignty, it is a person in the law of nations; and, however so much one of the two parties gives to the other the title of rebel or tyrant, the foreign powers which desire to maintain their neutrality ought to consider both as two states, independent as respects one another and other states, who recognize no judge of their differences." *Bello Principios de Derecho Internacional*, c. 10, 267; Brown v. Hiatt (U. S.) 4 Fed. Cas. 884, 887.

A civil war is a war *de facto*, existing within the borders of a state. "The true test of its existence, as found in the writing of the sages of the common law, may be summarily stated: When the regular course of justice is interrupted by revolt, rebellion, or insurrection, so that courts of justice cannot be kept open, civil war exists, and hostilities may be prosecuted on the same footing as if those opposing the

government were foreign enemies invading the land." Prize Cases, 67 U. S. (2 Black) 635, 667, 17 L. Ed. 459.

"Civil war is what Grotius calls a 'mixed war.' It is, according to him, public on the side of the government, and private on the part of the people resisting its authority. But the general custom of nations regards such a war as entitling both the contending parties to all the rights of war as against each other, and even as respects neutral nations." Wheat. Int. Law, pt. 4, c. 1, § 7 (quoted and approved in the Prize Cases, 67 U. S. [2 Black] 635, 17 L. Ed. 459).

"A civil war exists when a party is formed in a state which no longer obeys the sovereign, and is of strength sufficient to make head against him. A civil war breaks the bands of society and government, or, at least, it suspends their force and effect." *Juando v. Taylor* (U. S.) 13 Fed. Cas. 1179, 1183.

War is either international or civil, foreign or domestic. Civil war is preceded by insurrection, which becomes magnified and matured into war in the legitimate sense. The American Revolution of 1776 commenced in insurrection. But the insurgent colonies soon became belligerent states. And by the Declaration of Independence civil war was inaugurated, as often and authoritatively recognized and adjudged. After the transforming event, the American resistance was no longer rebellion, but war. *Bland v. Adams Exp. Co.*, 62 Ky. (1 Duv.) 232, 233, 234, 85 Am. Dec. 623.

**Rebellion distinguished.**

Civil war "includes every war between members of one and the same political society. If it is between part of the citizens on one side, and the sovereign, with those who continue in obedience to him, on the other, provided the malcontents have any reason for taking up arms, nothing further is required to entitle such disturbance to the name of 'civil war,' and not that of 'rebellion.' The term 'civil war' was anciently more commonly used to denote a contest in arms between two great parties in the state for the control of the state, but without any design of separation, but the distinction has been more extended in modern times so as to include every contest, for whatever purpose, between citizens of the same country. The term 'rebellion' is applied only to such an insurrection against lawful authority as is void of all appearance of justice. The sovereign never fails to bestow the appellation of 'rebels' on all such of his subjects as openly resist him, but when the latter have acquired sufficient strength to oblige him to carry on war according to the rules, he must necessarily submit to the terms of 'civil war.'" Hubbard v. Harnden Exp. Co., 10 R. I. 244, 247.

According to some writers upon international law, the distinction between a "civil war and rebellion is where the malcontents for any cause have taken up arms against the sovereign authority. If they have, it is termed a 'civil war.' If they have not, it is termed a 'rebellion.'" "A civil war," says Vattel, "breaks the bonds of society and government, or at least suspends their force and effect. It produces in the nation two independent parties, who consider each other as enemies, and acknowledge no common judge. These two parties, therefore, must necessarily be construed as thenceforward constituting, at least for a time, two separate, distinct societies. Though one of the parties may have been to blame in breaking the unity of the state and resisting the lawful authority, they are not the less divided in fact." It was held that the Confederate States, by seceding from the Union, did not become foreign states or have the power to confiscate the property of loyal citizens. *Central Railroad & Banking Co. v. Ward*, 37 Ga. 515, 526.

#### CIVILITER MORTUUS.

See "Civil Death."

#### CIVILIZATION.

"'Civilization' is a term which covers several states of society. It is relative, and has not a fixed sense, but in all its applications it is limited to a state of society above that existing among the Miami Indians. It implies an improved and progressive condition of the people, living under a recognized government, with systematized labor, individual ownership of the soil, individual accumulation of property, humane and somewhat cultivated manners and customs, the institution of the family, with well-defined and respected domestic and social relations, institutions of learning, intellectual activity, etc. We know historically that the North American Indians are classed as savage, and not as civilized people, and that in fact it is problematical whether they are susceptible of civilization. The Miami Indians are not educated above the condition of nomadic pastoral tribes, if up to it. They cannot be regarded as civilized." *Roche v. Washington*, 19 Ind. 53, 56, 81 Am. Dec. 376.

#### CIVIS.

"The word 'civis,' taken in its strictest sense, extends only to him that is entitled to the privileges of a city of which he is a member, and in that sense there is a distinction between a citizen and an inhabitant in the same city, for every inhabitant there is not a citizen." *United States v. Rhodes* (U. S.) 27 Fed. Cas. 785, 788 (quoting *Scot v. Schwartz*, Comyn, 677).

#### CLAIM.

See "Adverse Claim"; "Contingent Claim"; "Disputed Claim"; "Doubtful Claim"; "Equitable Claim"; "Honest Claim"; "Just Claim"; "Lawful Claim or Demand"; "Legal Claim"; "Non-claim"; "Private Claim"; "Unliquidated Claim"; "Valid Claim."

See "Creek Claim"; "Mining Claim"; "Municipal Claims"; "Possessory Claim"; "Pre-emption Claim"; "Tax Claim"; "Tunnel Claim"; "War Claim."

All claims, see "All."

Any claim, see "Any."

Liquidated claim, see "Liquidate."

Stale claim, see "Stale."

The legal definition of the word "claim," as given by Jacobs, is: "A challenge of interest in anything that is in the possession of another, or at least out of a man's own possession;" or, as quoted by Jacobs from Clowden, giving the definition of Chief Justice Dyer, "a challenge of the ownership of property that one hath not in his possession, but which is detained from him by wrong" is a legal claim in favor of one person on the estate of another. *Robinson v. Wiley*, 15 N. Y. 489, 491; *Saddlesvene v. Arms* (N. Y.) 32 How. Prac. 280, 285; *Fordyce v. Godman*, 20 Ohio St. 1, 14; *Jackson v. Losee*, 4 Sandf. Ch. 381, 383.

To "claim," as used in a complaint alleging that the plaintiff claims of the defendant a certain sum due by promissory note, means, according to Webster, "to ask or seek to obtain by virtue of authority, right, or supposed right to demand as due; to be entitled to anything as a matter of right; the right to claim or demand; a title to any debt or privilege or other thing in possession of another." Bouvier defines it as follows: "A challenge of the ownership of a thing which a man has not in possession, and is wrongfully withheld by another." Burrill gives the following definition: "A challenge or demand by any man of the property or ownership of a thing or some interest in it which he has not in possession, but which is withholden from him wrongfully;" and as "a demand of some matter as of right to do, or to forbear to do, some act or thing as a matter of duty." It means that thereby the plaintiff asserts in himself the ownership of or the right to the money due on the promissory note, which money he has not in possession, and which is wrongfully withheld by the defendant. *Douglas v. Beasley*, 40 Ala. 142, 147.

A claim is, "in a just juridical sense, a demand of some matter of right made by one person upon another to do, or to forbear to do, some act or thing as a matter of duty." *Prigg v. Pennsylvania*, 41 U. S. (16 Pet.) 539, 615, 10 L. Ed. 1060; *United States v. Spauld-*

ing, 18 N. W. 357, 360, 3 Dak. 85; Buhl v. Fort St. Union Depot Co., 57 N. W. 829, 832, 98 Mich. 596, 23 L. R. A. 892 (citing Coster v. City of New York, 43 N. Y. 399); Vulcan Iron Works v. Edwards, 86 Pac. 22, 23, 27 Or. 563; Fretwell v. McLemore, 52 Ala. 124, 140. It is used in this sense in Const. art. 4, § 2, providing that no person held for service or labor in one state under the laws thereof, and escaping into another, shall, in consequence of any law therein, be discharged from such service or labor, but shall be delivered up on claim to the party to whom such service or labor may be due. Prigg v. Pennsylvania, 41 U. S. (16 Pet.) 539, 615, 10 L. Ed. 1060.

"Claim," as used in Rev. St. § 5438 [U. S. Comp. St. 1901, p. 3674], providing that every person making or presenting for payment any claim against the government of the United States, knowing such claim to be false, shall be imprisoned, etc., means "a demand then existing and known to be wrongful, and not a demand heretofore presented." United States v. Rhodes (U. S.) 80 Fed. 431, 433.

The word "claim" is defined to mean "a demand of anything that is in the possession of another; to demand; to require"; and such is its meaning in the compound "counterclaim." Silliman v. Eddy (N. Y.) 8 How. Prac. 122, 123.

As the term "claim" imports, it is the assertion of a demand, or the challenge of something as a matter of right. Thus, where a person notified a sheriff in writing that he owns property seized in execution, and demands possession, it is a claim for the property. Vulcan Iron Works v. Edwards, 86 Pac. 22, 23, 27 Or. 563.

The right to recover against a plaintiff in replevin the value of the property delivered to him under the right, together with damages, is a claim against plaintiff, so as to pass under a general assignment of all dues and "claims." Jackson v. Losee (N. Y.) 4 Sandf. Ch. 381, 383.

The word "claim," as used in the statute relating to the allowance of claims against a county, generally imports a matter of charge which is based on some statute, or grows out of the performance of some authorized contract, wherein the inquiry of the commissioners as to the auditor is confined to whether or not the service was rendered, and, as to other claims, to determine the amount due, as contrasted with a mere demand unsupported by law. Jones v. Lucas County Com'rs, 48 N. E. 882, 886, 57 Ohio St. 189, 63 Am. St. Rep. 710.

Code 1882, § 2537, authorizing administrators, executors, and guardians to compromise all contested or doubtful "claims of the estate" or wards, that they represent, etc., means that "which is claimed to belong or to

be owing to the estate." Maynard v. Cleveland, 70 Ga. 52, 70.

The words "claims and demand," as used in Rev. St. § 1216, providing that "all claims and demands against a county shall be presented for audit and allowance to the county commissioners before any action shall be maintained thereon," embraces all claims and demands based on a money demand. Houtz v. Uinta County Com'rs (Wyo.) 70 Pac. 840, 842.

#### Account distinguished.

The word "claim," used in reference to the subject of judicial proceedings, with nothing in the context expressive of a contrary sense, seems to have acquired a technical meaning of "claim on contract." It is a word of more general signification than the word "account," as every account is a claim, but every claim is not an account. Cavan v. City of Brooklyn, 5 N. Y. Supp. 758, 760.

#### All causes of action included.

Laws 1895, p. 188, § 1, provides that any person or corporation having a claim against the state of Washington shall have a right to bring an action against the superior court of Thurston county. It was contended that the word "claim," as here used, meant a claim for money; that the statute is one in derogation of common law, and should be strictly construed. But as the statute was passed in pursuance of the state Constitution requiring the Legislature to direct by law in what manner and in what courts suits may be brought against the state, the word "claim" will be held to include all causes of action. Northwestern & Pacific Hypotheek Bank v. State, 50 Pac. 586, 587, 18 Wash. 73, 42 L. R. A. 83.

Within Const. art. 2, § 29, providing that no money shall be paid on any claim the subject-matter of which shall not have been provided by a pre-existing law, means any demand for money, legal or equitable. Fordyce v. Godman, 20 Ohio St. 1, 14.

"Claim or demand," as used in Prac. Act, § 17, providing that any claim or demand may be set off, embraces all cases arising out of contracts or agreements, expressed or implied. Nichols v. Ruckells, 4 Ill. (3 Scam.) 298, 300.

"Claim," as used in Rev. St. § 5464, providing that, when the personal and real property of a judgment debtor subject to levy and execution is not sufficient to satisfy the judgment, his interest in any money, contract, claim, or chose in action shall be subject to the payment of the judgment by action, includes demands "for money in varied forms, whether on contract, express or implied, or for damages growing out of injury to person or property." City of Cin-

*cinnati v. Hafer*, 30 N. E. 197, 198, 49 Ohio St. 60.

**As amount demanded or recoverable.**

In an action on a life policy containing a provision for a deduction from the sum named in the policy of all unpaid premium notes, it appeared that by a subsequent agreement between the company, the insured, and the beneficiary it was agreed that the sum so named should be scaled down two-fifths, and a stipulation was made abandoning all "defense to the merits of the claim." Held, that the word "claim" meant all that she could recover in the action. *Leonard v. Charter Oak Life Ins. Co.*, 33 Atl. 511, 513, 65 Conn. 529.

Within the meaning of the statute giving a justice of the peace jurisdiction of civil cases, provided the amount of money or damages or the value of the property claimed does not exceed \$300, inclusive of interest and costs, the word "claimed" does not refer to the amount claimant might be entitled to demand from the defendant, but to the amount he actually does demand, and for which he claims judgment, so that a person with a claim in excess of such sum may release the portion in excess so as to give the justice jurisdiction. *Junkins v. Hamilton Lumber Co.*, 29 S. E. 1017, 1018, 44 W. Va. 641.

**Amount included.**

The term "claim" is defined by Webster as "a demand made of a right, or supposed right; a calling on another for something due, or supposed to be due, as a claim for wages or services." It must state the amount claimed. *Marsh v. Benton County*, 39 N. W. 713, 714, 75 Iowa, 469.

"Claim for damages," within the meaning of a statute requiring a person receiving injuries caused by a defective highway to give notice to the town liable therefor, stating his claim for damages, includes the amount of such claim. *Lord v. City of Saco*, 82 Atl. 887, 87 Me. 231.

**As assertion or pretension.**

"Claim," in its primary meaning, is used to indicate the assertion of an existing right. In its secondary meaning it may be used to indicate the right itself. *Appeal of Beach*, 55 Atl. 596, 599, 78 Conn. 118.

"Claim" has "generally been defined as a demand for a thing, the ownership of which or an interest in which is in the claimant, but the possession of which is wrongfully withheld by another. In common parlance, a 'claim' means an assertion; a pretension. When 'claim' is used as a verb, many respectable writers seem to regard it as a synonym for state, urge, insist, or assert." *Ovirs v. Jennings* (N. Y.) 6 Daly, 434, 446.

A contract whereby the purchaser agrees to keep a certain machine "if it is satisfactory or does what is claimed for it" would be construed so as to bind the purchaser if the machine met the conditions of the warranty, whether the purchaser was satisfied with it or not. *Clark v. Rice*, 9 N. W. 427, 428, 46 Mich. 308.

"Claim," as used in Civ. Code, § 672, providing that if a nonresident alien takes by succession he must "appear and claim" the property within five years, relates to an appearance and claim to be proved by acts within the state indicating that the alien asserts a right to the property. *State v. Smith*, 12 Pac. 121, 123, 70 Cal. 153.

**As belief in ownership.**

"The term 'claim' implies an active assertion of right, the demand for its recognition. This assertion and demand need not be made in words. The party may specify by acts in their support, as by the payment of taxes, the erection of improvements, etc. The expression of a belief as to the ownership of a thing is not equivalent to a claim of ownership." *Grube v. Wells*, 34 Iowa, 148, 151.

**Bounty.**

A "claim against the United States" is a right to demand money from the United States. *Hobbs v. McLean*, 117 U. S. 567, 6 Sup. Ct. 870, 29 L. Ed. 940. Under such provision a claim for bounties for growing sugar not yet earned is not a claim against the United States. *Milliken v. Barrow* (U. S.) 65 Fed. 888, 894.

A claim is a demand of some matter as of right, made by one person upon another, to do or forbear to do some act or thing as a matter of duty. The right of a person to bounty from the state for killing coyotes is a "claim," within the provision that the contractor must not draw his warrant for any claim until it is approved by the board of examiners. *Ingram v. Colgan*, 38 Pac. 315, 316, 106 Cal. 113, 28 L. R. A. 187, 46 Am. St. Rep. 221.

**As cause of action or defense.**

The word "claim," as used in Code, § 139, providing for the amendment of pleadings to conform to the facts proven when such amendment does not change substantially the claim or defense, is synonymous with "cause of action." *Ellis v. Flaherty*, 70 Pac. 586, 587, 65 Kan. 621.

As used in Code Civ. Proc. § 531, providing that the court may in any case direct a bill of the particulars of the claim of either party to be delivered to the adverse party, the word "claim" cannot be construed as synonymous with "demand" and "cause of action," and as intended to express only the ground, or cause of action, on which

some affirmative relief is asked of the court, and in cases only in which affirmative relief is asked, but as applied to a defendant means whatever is set up by him as a reason why the action may not be maintained against him. "The claim of the defendant is that ground of fact which he alleges in his answer as the reason why judgment should not go against him. His claim in the case is the position he takes in his pleading, based upon the facts he sets up, and the law applied thereto, why he should go without day." *Dwight v. Germania Life Ins. Co.*, 84 N. Y. 493, 503; *Tilton v. Beecher*, 59 N. Y. 176, 183, 17 Am. Rep. 337; *Marco v. Bird*, 53 N. Y. Supp. 411, 412, 24 Misc. Rep. 377; *Cunningham v. Massena Springs & F. C. R. Co.*, 3 N. Y. Supp. 98, 99, 50 Hun, 605, 16 Civ. Proc. R. 244.

The word "claim," as used in a statute authorizing a bill of particulars where an account is pleaded, or where the claim of a party is lacking in definiteness, is co-extensive with "case," and embraces all causes of action and all grounds of defense, the pleas of both parties and pleas of confession and avoidance, no less than complaints and counterclaims. It warrants the court to require a defendant who justifies in a libel suit to furnish particulars of the facts relied on in justification. *Orvis v. Jennings* (N. Y.) 6 Daly, 434, 446.

The word "claim," as used in Code, § 147, providing that the court may amend any pleading by striking out the name of any party, etc., when the amendment does not change substantially the claim or defense, means the plaintiff's right of action appearing by the pleadings. *Irwin v. Paulett*, 1 Kan. 418, 426.

The word "claim," as used in 2 Rev. St. p. 541, § 2, prohibiting a submission to an arbitrator respecting the claim of any person to any estate in fee or for life to real estate, must be construed to mean the allegation on which issue is taken, the fact or matter put in issue to be tried, and which must be determined before an award can be made. The claim to an estate in any particular description in lands is a claim that such estate is in the claimant, and a decision on it would necessarily determine whether the estate was in the claimant or not. *Olcott v. Wood*, 14 N. Y. (4 Kern.) 32, 39.

Nat. Bankr. Law, 18 Stat. 108, provides that, if a greater rate of interest has been paid than is lawful, the person paying the same may recover back in an action of debt twice the amount of interest thus paid. Held, that the right of action given by the statute is a claim of debt, which passes to the assignee in bankruptcy under the provisions of the bankrupt law. *Wright v. First Nat. Bank* (U. S.) 30 Fed. Cas. 673, 674.

#### Claims ex delicto.

The word "claim" is sufficiently comprehensive to embrace actions founded on tort as well as actions founded on contract. In its popular sense the word "claim" is usually applied to a demand founded in agreement or contract, and is seldom used when referring to a demand for damages a party may sustain in consequence of a wrong or injury done to his person or property. It is used in the latter sense in Rev. St. c. 102, § 102, which provides that in all trials of actions before a justice of the peace, or in the county court, if the claim of the plaintiff or any part thereof be denied by the defendant, it shall be lawful for the plaintiff to require of the defendant to answer on oath to such claims, etc. *Carna v. Litchfield*, 2 Mich. 340, 342.

The words "account or claim," as used in the Michigan statute providing that no account or claim or contract shall be received by a city for audit or allowance unless it shall be accompanied by an affidavit of the person rendering it, are not enough to cover unliquidated claims for personal injuries in an action ex delicto. *Griswold v. City of Ludington*, 74 N. W. 663, 667, 116 Mich. 401 (citing *Lay v. City of Adrian*, 75 Mich. 438, 42 N. W. 959). The word "claim," when used in some relations, may be broad enough to include a claim for damages in an action ex delicto, but, as used in a charter providing that no suit shall be maintained against the city on any account or claim unless the same be presented to the council, does not apply to actions ex delicto. *Snyder v. City of Albion*, 71 N. W. 475, 113 Mich. 275.

The judicial construction given to the words "claim or demand," as used in Wisconsin laws, providing that no action on any claim or demand shall be maintained against a city until such person shall have presented his claim or demand to the common council for allowance, etc., is that they include only claims arising on contract. *Mason v. City of Ashland*, 74 N. W. 357, 358, 98 Wis. 540. See, also, *Nance v. Falls City*, 20 N. W. 109, 16 Neb. 85; *Bradley v. City of Eau Claire*, 14 N. W. 10, 11, 56 Wis. 168; *Van Frachen v. City of Ft. Howard*, 60 N. W. 1062, 1063, 88 Wis. 570; *Jung v. City of Stevens Point*, 43 N. W. 518, 514, 74 Wis. 547; *Vogel v. City of Antigo*, 51 N. W. 1008, 81 Wis. 642; *Sommers v. City of Marshfield*, 62 N. W. 937, 90 Wis. 59. See, also, *Ellith v. City of Wausau*, 67 N. W. 731, 93 Wis. 446; *Kelley v. City of Madison*, 43 Wis. 638, 645, 28 Am. Rep. 576.

The word "claim," as used in section 37 of chapter 18, Comp. St. 1897, requiring a claimant to verify his claim by affidavit before it shall be allowed against a county, refers to demands arising ex contractu and not to those founded on torts, and, taken in con-



nection with section 23, conferring on the board the power to examine and settle all claims against the county, is limited to accounts. *Perkins County v. Keith County*, 78 N. W. 630, 631, 58 Neb. 323.

The word "claim," as used in the charter of a city providing that no claim against the city shall be sued on until a statement thereof shall have been filed for consideration by the general council, and either rejected or held for a certain period without action, is comprehensive enough to include charges against the city arising in tort as well as ex contractu. The legislative intention was to protect the city from expenses of unnecessary litigation by affording it opportunity to settle and discharge its liabilities without suit, and the same necessity exists for such protection in respect to torts as in other claims. *Barrett v. City of Mobile*, 30 South. 36, 38, 129 Ala. 179, 87 Am. St. Rep. 54.

A claim for damages against a municipal corporation on account of negligence is not covered by the provisions of section 8245, Code Civ. Proc., providing that costs cannot be awarded to the plaintiff in an action against a municipal corporation in which the plaintiff demands a judgment for a sum of money only, unless the claim upon which the action is founded was presented for payment to the chief fiscal officer of the corporation. *Hunt v. City of Oswego*, 14 N. E. 97, 107 N. Y. 629; *Gage v. Village of Hornellsville*, 12 N. E. 817, 106 N. Y. 667.

The words "claim or account," used in speaking of the statutory requirement that claims or accounts be presented to a city before suit is brought thereon, were said, in *Harrigan v. City of Brooklyn*, 23 N. E. 741, 119 N. Y. 630, to naturally indicate claims on contract which can in ordinary course be adjusted by the comptroller or chief financial officers or officer of the city. In *Cavan v. City of Brooklyn*, 23 N. E. 741, 119 N. Y. 630, the court, in passing on the same question, stated that the construction adopted was controlled by the fact that the word "account" was used as well as "claim," and it was said that when they are associated together the latter is restricted to the genus of demands to which the former belongs—those on contracts. *Pulitzer v. City of New York*, 62 N. Y. Supp. 587, 588, 48 App. Div. 6; *Cavan v. City of Brooklyn*, 5 N. Y. Supp. 758, 760; *Cavan v. City of Brooklyn*, 2 N. Y. Supp. 21, 22. The term "account or claim," as used in Laws 1888, c. 5583, tit. 22, § 30, declaring that the comptroller may require any person presenting for settlement an account or claim against a city to be examined regarding it, is construed to mean accounts or claims arising ex contractu. *Harrigan v. City of Brooklyn*, 5 N. Y. Supp. 673, 674, 52 Hun, 615.

"Claim," as used in Consolidation Act, c. 410, § 123, providing that the controller

may require any person presenting for settlement an account or claim against the corporation to be sworn as to any facts relative to its justness, includes claims for damages for personal injuries. In *re Dasent*, 2 N. Y. Supp. 609.

"Claim or demand," in Greater New York Charter, § 262, providing that no action for any cause whatsoever shall be maintained against the city unless the complaint shows that 30 days have elapsed since the demand or claim upon which such action was founded was presented to the city, includes claims or demands arising in tort, as well as claims arising in contract. *Pulitzer v. City of New York*, 62 N. Y. Supp. 587, 588, 48 App. Div. 6.

*Buffalo City Charter*, Act April 13, 1853, tit. 5, § 1, provides that no liquidated account or claim shall be received for audit unless accompanied by an affidavit to the effect that the person presenting the claim verily believes the services or property therein charged for have been actually performed or delivered. Held that, since the word "claim" was used in connection with the word "account," whatever signification might be given to it under other circumstances, it was qualified and limited by the language with which it was connected, and meant claims for services performed or property furnished under contract, and that the prices, quantity of the property, and the extent of the services, should be set forth in the affidavit. *Howell v. City of Buffalo*, 15 N. Y. 512, 517.

An action on the case against a common carrier to recover damages for goods lost in transit is founded on a contract or engagement, and is technically a "claim." *Campbell v. Perkins*, 8 N. Y. (4 Seld.) 430, 439.

Code, §§ 227, 229, declares that an attachment may be issued whenever it shall appear by affidavit that a cause of action exists against the defendant, specifying the amount of the claim and the grounds thereof, etc. Held, that the word "claim" is used as equivalent to "debt" or "demand" which defendant is bound to pay or discharge by contract, and hence no attachment for a tort is authorized. *Saddlesvene v. Arms* (N. Y.) 32 How. Prac. 280, 285.

#### Confession implied.

"Claimed and demanded," as used in a plea by the defendant referring to the amount by the plaintiff claimed and demanded to be due to him from the defendant for work done, etc., are equivalent to the word "supposed," and constitute a sufficient confession. *Scadding v. Eyles*, 9 Adol. & E. 858, 860, 862.

#### Contingent claims.

Dower interest on the part of the wife is an inchoate or contingent right, which may be released, but cannot be the subject of

grant or assignment. And so, where one agreed with the husband to indemnify him against any "claim of dower" by his wife, no breach could happen until the contingency arose which would legally vest in the wife a substantial claim. The agreement would not enable the husband to maintain an action on account of money which he had been obliged to pay his wife to secure her signature to a deed to land which he had sold. *Durrett v. Piper*, 58 Mo. 551, 554.

2 Wag. St. p. 1022, § 53, relating to actions to quiet title, and providing that any person having a claim adverse to the estate of the petitioner may be summoned into court to show cause, etc., means every right, title, and claim in conflict with petitioner's title, whether the right or claim amounts to a technical title or not; and hence an unassigned dower interest is a claim adverse to the estate of the petitioner within the statute. *Benolst v. Murrin*, 47 Mo. 537, 539.

#### **Debt synonymous.**

See "Debt."

#### **Demand distinguished.**

The word "claim" means "a challenge of ownership," says Plowden. A challenge of interest in a thing which another hath in possession, or at least out of the possession of the claimant. The word implies that the right is in dispute or in doubt; therefore "claim" may be made by two or more at the same time. It differs from "demand," in that the latter presupposes that the person making the demand is the sole owner of the property demanded. Demand is peremptory, while claim supposes debate, litigation, and decision of the right. *Prigg v. Pennsylvania*, 41 U. S. (16 Pet.) 539, 573, 575, 10 L. Ed. 1060.

#### **Forfeiture.**

The word "claim," as used in Rev. St. § 829 [U. S. Comp. St. 1901, p. 636], which declares that, when a debt or claim in admiralty is settled by the parties without the sale of the property, the marshal shall be entitled to a commission of 1 per cent. on the first \$500 by the claim or decree, and  $\frac{1}{2}$  of 1 per cent. on the excess of the sum thereafter from \$500, is not employed to mean a personal demand alone, but embraces a case where the government is seeking to enforce a forfeiture against a vessel for a violation of the custom laws. *United States v. The Captain John* (U. S.) 41 Fed. 147, 150.

#### **Gratuities.**

The legal meaning of the word "claim," without other qualifying language, is a demand for something as a right, something that could be in law the subject of a demand; and hence, as used in the statute providing that any person who shall speculate

or purchase for a less sum than that to which each may be entitled the claim of any pensioner shall be guilty of a misdemeanor, the word "claim" refers alone to the warrant issued for a pension, and until the warrant has been issued the legislative provision for a pension is not a contract between the state and the pensioner, pension legislation being largely founded on charitable considerations, on an idea of a gift to the pensioner for his future support. *Gill v. Dixon*, 42 S. E. 538, 539, 131 N. C. 87.

"Claim" is defined to be a demand of a right or alleged right, a calling on another for something due or asserted to be due, as a claim of wages for services, and does not include a mere request or petition for gratuities or appropriations based on sentimental or moral grounds. *Allen v. Board of State Auditors*, 81 N. W. 113, 114, 122 Mich. 324, 47 L. R. A. 117, 80 Am. St. Rep. 573. See, also, *Gill v. Dixon*, 42 S. E. 538, 539, 131 N. C. 87.

Const. art. 9, § 9, declares that the Legislature shall provide by law that all claims on the treasury shall be examined and adjusted by the Auditor, and approved by the Secretary of State, before any warrant for the amount allowed shall be drawn. Held, that the term "claims on the treasury" should be construed to mean claims which the state is or may be under legal obligation to pay, such as the salaries of the officers and employees, the costs of erecting buildings, and the expense attendant on the maintenance of its prisons, asylums, schools, and other institutions, and does not include the appropriation of a specific sum by the Legislature to a particularly named person as a donation, gift, or reward for which the state was under no legal obligation. *State v. Moore*, 59 N. W. 755, 757, 40 Neb. 854, 25 L. R. A. 774.

#### **Incumbrances on land.**

"Claims," as used in a deed conveying real property, and warranting the same against all claims whatsoever, includes incumbrances. "'Claims' is a broad term, and to the common understanding would embrace incumbrances, at least where they are in the nature of money charges." *Hollingsworth v. Johnson*, 11 N. W. 843, 844, 48 Mich. 140.

#### **Judgment distinguished.**

See "Judgment."

#### **As liability.**

"Claim," as used in a deed declaring that the grantor agrees to indemnify the grantee against the claim or demand of a third person, did not mean, and could not be construed to import, an agreement to indemnify against a liability, but only imported an agreement to indemnify after the grantee had been damaged or suffered damage from such claim, which was a necessary element

of an action to recover on such agreement. *Aberdeen v. Blackmar* (N. Y.) 6 Hill, 324, 326.

#### **As offer to vote.**

The word "claims," as used in Const. art. 2, § 1, providing that every white male citizen of the United States of the age of 21 years who shall have been a resident of the state six months next preceding the election, and of the county in which he claims his vote 60 days, shall be entitled to vote at all elections authorized by law, means to demand a right or a supposed right. When the right is asserted it is "claimed," though it may not be granted. It may be asserted by words or other means. Etymologically, it by no means implies that place or presence are essential to its potency or completeness. On the other hand, to offer to do is to bring to or before; to present for acceptance or rejection; to exhibit something that may be taken or received or not. While it may be true that to offer to vote by ballot is to present one's self with proper qualifications at the time and place appointed and make manual delivery of the ballot to the officers appointed by law to receive it, it by no means necessarily follows that the same would be the meaning of the word "claims" as used in the Constitution. The one does not imply so conclusively as the other the idea of a personal presence in order to assert the right. In substance the word "claims" means that the person cannot claim to be an elector in any other county than where he has a 60 days' residence. *Morrison v. Springer*, 15 Iowa, 304, 346.

#### **Order of restitution.**

The word "claim," as used in the bankruptcy law of July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], authorizing appeals from a judgment of the District Court allowing or rejecting a debt or claim of \$500 or over, is used in the sense of a moneyed demand or debt, and not to enlarge the statute so that an order of restitution made in favor of an intervener claiming property in the hands of an assignee is not a claim. In *re Whitener* (U. S.) 105 Fed. 180, 187, 44 C. C. A. 434.

#### **As owns or claims to own.**

Rev. St. § 2767, provides that, when the answer of a garnishee discloses that any other person than defendant claims the indebtedness or property in his hands, the court may order such person to be interpleaded as a defendant to the garnishee action. Held, that the word "claim," as used in such statute, was used in its ordinary meaning and with its ordinary force. "It is the active transitive verb, and has the force of 'asks for' or 'demands as his due,' and is not equivalent to the phrase 'has a right to' or 'owns.'" *John R. Davis Lumber Co. v. First Nat. Bank*, 58 N. W. 743, 744, 87 Wis. 435.

The disclosure of a garnishee declaring that the property in his hands "was the property of" certain persons was not synonymous with the word "claims," as used in Rev. St. § 2767, providing that, when the answer of a garnishee discloses that any other person than defendant claims the indebtedness or property in his hands, the court may order such claimant interpleaded, the term "claims" in the statute being used in the sense of "asks for" or "demands as his due," and not being equivalent to the phrase "has a right to" or "owns." *John R. Davis Lumber Co. v. First Nat. Bank*, 58 N. W. 743, 744, 87 Wis. 435.

Wag. St. p. 192, § 52, providing that in attachment proceedings "any person claiming property, etc., may interplead," means only such persons as claim to own the property by a title in their own right, and does not include a garnisher of a debt of the attachment debtor. *Abernathy v. Whitehead*, 69 Mo. 28, 31.

#### **As personality.**

See "Personal Property."

A power of attorney to sell "claims and effects" means personal property, and cannot be construed to embrace real estate. *De Cordova v. Knowles*, 37 Tex. 19, 20.

#### **Security included.**

In a writing that in consideration of having and receiving three notes (describing them), all said notes to be fully paid in accordance with their terms, "I hereby discharge and relinquish all claims I have upon you and upon the estate," the word "claim" should probably be interpreted as referring to indebtedness merely, and not to the collaterals securing the notes. *Shipman v. Lord*, 44 Atl. 215, 217, 58 N. J. Eq. 380.

"Claims of the state," as used in the Constitution of New York of 1846 forbidding the release or compromise of claims of the state against any incorporated company, means, with reference to a railroad company, a lien on the road, as well as the mere liability of the corporation, the security for its payment, as well as the debt itself. *Darby v. Wright* (U. S.) 6 Fed. Cas. 1187, 1189.

#### **Stockholder's liability.**

Whenever the words "claim," "demand," and "liability" have been the subject of judicial construction, it has always been agreed that they have a broader signification than the word "debt," and hence an assessment on a stockholder made after an assignment for creditors is provable as a claim or demand against the assigned estate. *Hill v. Graham*, 53 Pac. 1060, 1063, 11 Colo. App. 536.

The word "claim" in its ordinary use has a broad meaning, and has been construed as

synonymous with "cause of action," and, as used in a statute relating to the presentation of claims against an estate, it will be held to include every species of liability which the executor or administrator can be called on to pay or to provide for the payment of out of the general fund belonging to the estate, and thus includes a claim on account of the liability of decedent as a stockholder, though the amount, if any, which will have to be paid, is not known as a claim. *Barto v. Stewart*, 59 Pac. 480, 481, 21 Wash. 605.

#### Taxes.

Within a contract providing for the purchase of a mechanic's lien if it was a first claim on the property, the term "claim" was broad and comprehensive enough to include taxes. *Dodson v. Crocker* (S. D.) 94 N. W. 391, 393.

A tax bill which the taxpayer has promised the sheriff to pay, being a cause of action, is a claim within Code, c. 50, § 148, making a constable's bond liable for any claim intrusted to him to sue upon or collect. *State v. Barnes*, 43 S. E. 131, 132, 52 W. Va. 85.

#### As valid claim.

By the word "claim" in a bond a valid claim for an actual indebtedness is meant, where, to extinguish a debt to the assignee, claims are assigned, and a bond given conditioned "that the said claims are not less than the amounts so set forth as aforesaid," the claims being severally described in the assignment and bond as "a claim \* \* \* for money due and to become due shortly for sprinkler equipments and appliances, said claim being not less than" a certain amount. *Mallers v. Crane Co.*, 60 N. E. 804, 805, 191 Ill. 181.

In an action on an indemnity bond which indemnified an insurance company against the claims of a certain person upon certain insurance moneys, it was said it will be seen that the question is whether the word "claims" as used in the bond was intended to include only such as were valid and which were in fact enforced by legal proceedings, or was intended to embrace such as were asserted by legal proceedings, causing the necessary expenditure to the conveyance, although ultimately adjudged invalid. It was held that the word "claims" embraced not only valid claims, but any claims, whether valid or otherwise, that might subject the party indemnified to costs, delay, or expense. *Home Ins. Co. v. Watson*, 59 N. Y. 390, 394.

#### Witness' certificate against county.

The term "claim," in Cr. Code, § 3931, providing that any public officer who deals in claims against the county shall be fined, includes a witness' certificate, commonly known as "a grand jury ticket," issued under the

statute, by the foreman of the grand jury, which recites the amount due such grand juror. *Scruggs v. State*, 20 South. 642, 643, 111 Ala. 60.

#### Wrongful acts of revenue officers.

Comp. St. c. 18, § 87, requiring the presentation of claims to a county for audit and allowance before bringing suit thereon, includes a cause of action against the county under Revenue Act 1869, § 71, providing that when, by the mistake or wrongful act of the treasurer or other officer, land has been sold on which no tax is due at the time, the county shall hold the purchaser harmless by paying him the amount of the principal and interest. *Richardson County v. Hull*, 45 N. W. 53, 28 Neb. 810; *Fuller v. Colfax County*, 50 N. W. 1044, 1047, 83 Neb. 716.

The word "claim," as used in Rev. St. c. 13, §§ 40, 42, providing that an appeal may be taken from any disallowance of a claim against the county board of supervisors, means only those claims which arise in some matter of debt and credit on the score of contract or some fiduciary relation, and does not embrace a claim for taxes paid through the wrongful or illegal conduct of the assessor. *Stringham v. Winnebago County Sup'rs*, 24 Wis. 594, 602.

Judgments against collectors for an excess of duty collected are not claims against the United States, within the meaning of Rev. St. § 3477 [U. S. Comp. St. 1901, p. 2320], which makes void transfers and assignments of any "claim" upon the United States unless executed in a certain manner. *Burke v. Davis* (U. S.) 63 Fed. 456, 458.

The cause of action against a city to recover money paid on a wrongful assessment of property for local improvements is based upon tort, and is not a "claim or demand" within the meaning of a provision of the charter declaring that "it shall be a sufficient bar and answer to any action or proceeding in any court for the collection of any demand or claim that it has not been presented to the common council for audit or allowance, or if on contract, that it was presented without a proper affidavit and rejected for that reason." *Howell v. City of Buffalo*, 15 N. Y. 512, 516.

#### For patent to public land.

Act Cong. March 3, 1887, c. 359, § 1, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752], gives the Court of Claims jurisdiction over all claims founded on the Constitution of the United States, on any contract, express or implied, with the government of the United States, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable. Held, that the word "claim" is broad and

comprehensive in its signification, as comprehensive as any of its synonyms—demand, pretension, right, privilege, or title—and does not mean merely money demand. It embraces a claim to a patent to lands earned by a land-grant railroad company. *Southern Pac. R. Co. v. United States* (U. S.) 38 Fed. 55, 56.

The word "claim" in Rev. St. § 5421 [U. S. Comp. St. 1901, p. 3667], includes a claim to exercise the right of pre-emption, or a claim of right to bounty lands, and the claim to thereby acquire from the United States title to the public lands. *United States v. Spaulding*, 13 N. W. 357, 360, 3 Dak. 85.

"Claim," as used in Act March 3, 1887, c. 359, 24 Stat. 505 [U. S. Comp. St. 1901, p. 752], giving the United States Circuit Court jurisdiction over all claims founded on the Constitution or any law of Congress, except for pensions or on a contract with the United States, means a demand made of right by one on another, and is not limited to claims which are a money demand. It includes a claim by a purchaser or his assignee of timber land, under the act of 1878, to have a patent issue for the same. *Jones v. United States* (U. S.) 35 Fed. 561, 565.

"Claim," as used in 8 Stat. 771, making it criminal to transmit or present, or cause to be transmitted or presented, to any office or officer of the government of the United States any account or claim with intent to defraud the United States, "is not limited to a demand for money, but extends to a claim for bounty land." *United States v. Wilcox* (U. S.) 28 Fed. Cas. 597, 598.

#### Of exemption.

A claim or right to claim an exemption of property from execution is not a claim within a representation that the property is free from claims or incumbrances. *Robinson v. Wiley*, 15 N. Y. 489, 491.

#### To public land.

"Claim," as used in Act Cong. July 2, 1864, § 19, granting lands to a railroad company, was intended to include all claims to pre-emption or homestead formerly entered and recognized by the land department, without regard to their continuance or final protection as against the government, and did not mean merely that such an interest must have attached as should afterwards ripen into a perfect title or right to a patent. *Burlington & M. R. R. Co. v. Abink*, 15 N. W. 817, 14 Neb. 95.

"Claim," as used in a written instrument for the sale of a claim on a certain section of government land, being used in connection with public lands, has a known and definite signification, and refers and relates to a settler's right on a tract of land the fee of which is in the government. *Bowman v. Torr*, 3 Iowa (3 Clarke) 571, 573.

#### In various uses.

The term "claims," as used in Cherokee Treaty, providing for the payment of money to the Cherokees, and declaring that they should receive their due proportion of all personal benefits accruing under the treaty for their claims, improvements, and per capita, had reference to demands for spoiliations of their property, which existed prior to the treaty. *Eastern Band of Cherokee Indians v. United States*, 6 Sup. Ct. 718, 723, 117 U. S. 288, 29 L. Ed. 880.

Act Cong. July 4, 1864, § 13, prohibiting any agent or attorney from withholding any part of the pension recovered from a "claim," means a person who under the act has a claim pending before the Pension Office. *United States v. Benecke*, 98 U. S. 447, 449, 25 L. Ed. 192.

Plaintiff and defendant agreed to terminate a lease, and defendant agreed to pay plaintiff a balance of rent then due. Subsequently they both signed an agreement terminating the lease, which contained the words "in full of all claims, rents or demands or amount of either party against the other." Held, that since the business in hand was the termination of the lease, and the damages sustained by reason of it, the words "claims, rents or demands" should be construed as meaning only those growing out of the termination of the lease, and not the rent due prior to its termination. "Any other construction," says the court, "would include the settlement of claims not contemplated by the parties." *Schork v. Moritz*, 6 N. Y. Supp. 554, 555.

"Claims," as used in Code, § 188, providing that when a claim shall be placed in the hands of any sheriff for collection he shall be liable for not using due diligence, means such claims as are within the jurisdiction of a justice of the peace and may be collected by judgment and process of execution granted by that magistrate, and does not apply to execution issuing from a superior or other court of record. *Brunhild v. Potter*, 12 S. E. 55, 56, 107 N. C. 415.

"Claims," as used in a contract of a stock exchange, authorizing an arbitration and decision of all "claims" and matters of difference between members of the exchange which may be brought before them, and arising from transactions in bonds, bullion, stocks, or other securities, or from any transaction in money, means such claims only as involve stock-exchange transactions, and not transactions having no reference thereto. *Bernheim v. Keppler*, 69 N. Y. Supp. 803, 805, 34 Misc. Rep. 321.

Gen. St. (Rev. 1875, tit. 18, c. 11, pt. 2) provides that commencement of proceedings in insolvency shall dissolve attachments of the debtor's property, and the attaching creditors shall be allowed the amount of

their legal costs accruing before the appointment of a trustee, which shall be paid before any other claims. Held, that the word "claims" meant not only debts contracted by the debtor personally before the appointment of the trustee, but expenses incurred by the trustee in the protection and care of the property, his compensation for services, and the fees of the court. *Appeal of Emerson*, 14 Atl. 295, 297, 56 Conn. 98.

#### CLAIM (In Patent Law).

"Claim," as used in patent law, is the specification, by the applicant for a patent, of the particular things in which he insists his invention is novel and patentable. The claim in the application is required and designed to make the patentee define precisely what his invention is, and the specifications of the patent outside of the claim cannot be resorted to to alter or enlarge it, though they are admissible to explain it. *White v. Dunbar*, 7 Sup. Ct. 72, 73, 119 U. S. 47, 30 L. Ed. 303.

The purpose of a claim to a patent is to designate the limits of the machinery or combination which the patentee has invented, or discovered. A claim for a machine or for a combination of mechanical devices is insufficient or invalid because it does not include mechanical devices for uniting and operating the elements of a machine or combination which would readily suggest themselves to mechanics skilled in the art, or which are described in the specifications and drawings. *Brammer v. Schroeder* (U. S.) 106 Fed. 918, 930, 46 C. C. A. 41.

#### CLAIM AGAINST ESTATE.

"Claim," as used in Code 1871, § 758, making a person incompetent as a witness to establish his own claim against the estate of a deceased person which originated during the lifetime of such deceased, includes any demand or right asserted and relied on in the action against the estate. *Jacks v. Bridewell*, 51 Miss. 881, 887. As used in Code 1871, § 758, providing that no person shall testify as a witness to establish his "claim" against the estate of a deceased person which originated during the lifetime of the deceased, it includes any demand or right asserted and relied on as against the estate of a deceased person. *Rothschild v. Hatch*, 54 Miss. 554, 560 (citing *Lamar v. Williams*, 39 Miss. 342).

As used in Code 1876, § 2597, providing that all claims against the estate of a deceased person must be presented within a certain time after they have accrued, or after the granting of letters testamentary or of administration, or be barred, the word "claim" is almost the synonym of "money demands," for it is required to be presented only when money is claimed to be due. It has no refer-

ence to property alleged to be withheld. It must be payable in money, although it is not necessary that it should be due and payable presently. A debt not yet due is a "claim" within the meaning of the statute. It is the asserted liability of decedent and his estate to pay a sum of money (*Bouv. Law. Dict.*); "a demand as of right" (*Worcester Dict.*); "a demand of a right or supposed right" (*Webster's Dict.*); "a calling on another for something due or supposed to be due" (*Imperial Dict.*). *McDowell v. Brantley*, 80 Ala. 178, 177.

The term "claim," as used in Probate Act, § 138, declaring that any claim against a decedent's estate must be presented to the administrator before an action may be brought thereon, has reference only to such duties or demands against the decedent as might have been enforced in his lifetime by personal actions for the recovery of money, and of which only a money judgment could have been rendered. *Fallon v. Butler*, 21 Cal. 24, 29, 81 Am. Dec. 140; *Toulouse v. Burkett*, 10 Pac. 26, 28, 2 Idaho (Hasb.) 184. And such is its use in Comp. Laws, p. 1647, which is a like statute. *O'Doherty v. Toole* (Ariz.) 15 Pac. 28, 32. Such also is its use in Code Civ. Proc. § 1880, providing that parties to an action or proceeding against an executor or administrator on a "claim or demand" against the estate of the deceased cannot be witnesses. In re *McCausland's Estate*, 52 Cal. 568, 577. See, also, In re *Swain's Estate*, 8 Pac. 497, 500, 67 Cal. 637.

"Claims," as used in Code, §§ 147, 151, requiring that creditors shall present their claims for allowance to the administrator of a decedent, etc., means and applies only to such claims and demands as were debts against a decedent during his life which might have been enforced against the deceased by an action during his life, and does not include nor apply to expenses incurred nor disbursements made by the administrator in his management of the estate, which latter claims are conclusive only after having been allowed by the probate court on settlement of the accounts of the administrator after notice to the parties interested. *Dobson v. Nevitt*, 6 Pac. 358, 360, 5 Mont. 518, 520.

A statute requiring an administrator to file an itemized account of claims "against the estate" does not include his expense in conducting an unauthorized business with the estate funds. In re *Rose's Estate*, 22 Pac. 86, 87, 80 Cal. 166.

"The term 'claims' in Rev. Code, § 2239, providing that all claims against the estate of a deceased person must be presented within 18 months after the grant of letters testamentary or of administration, and if not presented within that time are forever after barred, includes every demand to which a personal representative can or ought to re-

spond." *Fretwell v. McLemore*, 52 Ala. 124, 145.

#### **Balance on account.**

A balance struck on an account between parties is such a demand as would constitute a cause of action or claim against deceased; so a suit brought on such a cause of action against a deceased in his lifetime would have been maintainable, and a statement of such a cause of action in the complaint would have been sufficient to support a judgment against him, and be sufficient for that purpose. It would also be sufficient after his death, if presented to his administrator properly verified, to constitute a valid claim against his estate. In *re Swain's Estate*, 8 Pac. 497, 500, 67 Cal. 637.

#### **Contingent claims.**

The "claims" referred to in a statute requiring probate and registration of "claims" against the estates of decedents are those arising out of matter of private contract—debts contracted by the decedent; and a contingent liability, though springing from a contract, such as that of a surety upon the bond of a guardian, is not required to be propounded for probate; nor does the claim of the creditor of a corporation against the estate of a stockholder, under the statute, to recover the balance unpaid on the stocks owned by him. *Robnett v. Starling*, 18 South. 421, 422, 72 Miss. 652.

Within the meaning of an act providing that no action shall be maintained against an estate unless commenced within one year from the time the claim is allowed or established, the word "claim" will not include a claim allowed and established against a guardian on whose bond the decedent was surety, but means a claim allowed and established against the decedent's estate itself. *Holden v. Turrell*, 90 N. W. 395, 396, 86 Minn. 214.

#### **Establishment of conveyance or trust.**

The term "claim or demand," as used in Rev. St. § 5957, providing that parties to an action against an executor or administrator upon a claim or demand against the estate of deceased persons are incompetent to testify as to any matter or fact occurring before the death of such person, embraces all rights of action for the establishment of a trust in land, as well as claims or demands for debts or damages against the estate of the deceased person. *Rice v. Rigley*, 61 Pac. 290, 296, 7 Idaho, 115.

An action by a wife against the administrator of her husband's estate to establish a conveyance of certain land from her husband to her, and to quiet the title, is not an action to enforce a "claim," within Code Civ. Proc. § 1880, making incompetent as witnesses parties or assignors of parties or persons in

whose behalf an action or proceeding is prosecuted upon a claim against the estate of a decedent as to any matter occurring before his death. *Poulson v. Stanley*, 55 Pac. 605, 606, 122 Cal. 655, 68 Am. St. Rep. 73.

#### **Partnership matters.**

St. 361, § 55, relating to the settlement of estates, and providing that the creditors shall exhibit their "claims" to the commissioners for allowance within a certain time, should be construed to include a debt due from a company or partnership, though a member of the partnership is surviving. It is a debt or claim against the estate of the deceased partner, because, first, it is within the fair and just construction of the language and the object of the statute; secondly, because a partnership debt is several as well as joint. *Camp v. Grant*, 21 Conn. 41, 53, 54 Am. Dec. 321.

"Claim," as used in a statute to regulate the settlement of estates of deceased persons, prescribing the manner in which a claim against the estate shall be presented and disposed of, means a legal demand for money to be paid out of the estate. "The word 'claim' is certainly a very broad term when used in certain connections and in reference to certain matters. Lord Coke truly says that the word 'demand' is the largest word known to the law, save only 'claim'; and a release of all demands discharges all right of action." Chief Justice Nelson says: "The word 'claim' is of much broader import than the word 'debt,' and embraces rights of action belonging to the debtor beyond those which may appropriately be called 'debts.'" "But, however broad may be the general meaning of this term, we must look to the statute to ascertain the sense in which it is there used." A suit in equity for dissolution of a partnership, partition of the partnership property, and adjustment and payment of the debts of the concern, is not a suit on claims against the estate of a deceased partner. *Gray v. Palmer*, 9 Cal. 616, 636.

#### **Secured claims.**

The word "claim," as used in Probate Act, § 136, providing that no action shall be maintained upon any claim against an estate unless it has been presented to the executor or administrator, or is rejected by him or by the probate court, means only such a demand or liability as might by action be reduced to a simple money judgment, and does not embrace a mortgage lien. *Fallon v. Butler*, 21 Cal. 24, 29, 81 Am. Dec. 140. Such, also, is its use in Code Civ. Proc. § 1880, declaring that a party cannot be a witness in an action against an executor or administrator on a "claim" against the estate of a deceased person. *Booth v. Pendola*, 23 Pac. 200, 201, 88 Cal. 36. But as used in Code Civ. Proc. § 1493, providing that "claims" must be presented to an administra-

tor within the time limited in the notice, it is not limited to demands or liabilities such as might be reduced to simple money judgments, but is broad enough to embrace a mortgage or other lien. *Verdier v. Roach*, 31 Pac. 554, 556, 96 Cal. 467. The mortgage, as distinct from the note secured by it is within the scope of the word "claim" as used in that section. *Pitte v. Shipley*, 46 Cal. 154, 160. So, also, as used in the act concerning the estate of deceased persons (section 131), providing that in case an estate is insolvent no "claim" contracted after the passage of the act shall bear greater interest than 10 per cent. *Ellis v. Polhemus*, 27 Cal. 350, 354.

Under Comp. Laws S. D. § 5790, requiring "claims" against the estate of deceased to be presented to the administrator, a claim secured by a mechanic's lien is not included. *Fish v. De Laray*, 66 N. W. 465, 466, 8 S. D. 320, 59 Am. St. Rep. 764.

#### CLAIM AGAINST LAND.

Claims against the land "are liens which bind the realty. They are described as 'claims against the land' because the land is the debtor, and may be sold to discharge the debt without regard to the personal liability of the owner. Such a claim fastens upon the land, and follows it into the hands of all purchasers who take it with notice of their existence." *Gordon v. McCulloch*, 7 Atl. 457, 458, 66 Md. 245.

#### CLAIM AGAINST THE STOCK.

A contract to convey a general stock of goods "subject to claims against the stock" means debts contracted for the purchase of stock. *Whiting v. Root*, 3 N. W. 134, 141, 52 Iowa, 292.

#### CLAIM AND DELIVERY.

See, also, "Replevin."

Claim and delivery is an action at law for the recovery of specific personal chattels wrongfully taken and detained, or wrongfully detained, with damages which the wrongful taking or detention has occasioned. It is what is usually termed a "mixed action," being partly in rem and partly in personam—in rem so far as the specific recovery of the chattels is concerned, and in personam as to the damages. *Fredericks v. Tracy*, 33 Pac. 750, 751, 98 Cal. 658.

An action of claim and delivery has been held to be only a modification of the common-law remedy of replevin. *Gila Valley, G. & N. R. Co. v. Gila County (Ariz.)* 71 Pac. 913, 914 (citing *Carroll v. Byers (Ariz.)* 36 Pac. 499).

#### CLAIM AS LOCATOR.

"The phrase 'claim as locator' has been uniformly understood by the people of Ken-

tucky to signify the compensation of a portion of the land located agreed to be given by the owner of the warrant to the locator of it for his services." "In early times many contracts were made between warrant holders and others by which those others agreed to locate the warrants for the portion of the land secured by the location, and in many other cases one man located the warrants of another, without any special agreement as to compensation, but with an expectation of receiving as compensation the portion of land usually given for such services." *Hollingsworth v. Barbour*, 29 U. S. (4 Pet.) 466, 473, 7 L. Ed. 922.

#### CLAIM CASES.

"Claim cases," as used in Act 1870, providing that in all cases where claimants are unable to give bond and security as now required by law in claim cases it shall be the privilege of such claimant to file, in addition to the oath required, an affidavit, cannot be construed to include claim cases which arise from levies by tax executions. *Lingo v. Harris*, 73 Ga. 28, 30.

#### CLAIM FOR MONEY.

An absolute guaranty for the payment of a note is a "claim for money," within the purview of the statute requiring claims for money to be presented to the administrator of the estate for allowance. *National Guarantee Loan & Trust Co. v. Fly*, 69 S. W. 231, 232, 29 Tex. Civ. App. 533.

#### CLAIM OF OWNERSHIP.

To constitute adverse possession the possession must be with claim of ownership. The expression "claim of ownership" means nothing more than the intention of the disseisor to prepare and use the land as his own, to the exclusion of all others. It is not necessary that the disseisor should enter under color of title, or should either believe or assert that he had right to enter. *Carpenter v. Coles*, 77 N. W. 424, 75 Minn. 9.

"Claim of ownership," as used in a definition of "adverse possession," was not erroneous, since it was synonymous with "actual, continued, visible, and notorious possession," which makes up such adverse possession claimed by the party in his own right as can amount to a claim of ownership. *Shearer v. Middletown*, 50 N. W. 737, 88 Mich. 621.

#### CLAIM OF RIGHT.

To constitute adverse possession, the possession must be with claim of right. The expression "claim of right" means nothing more than the intention of the disseisor to prepare and use the land as his own, to the exclusion of all others. It is not necessary



that the disseisor should enter under color of title, or should either believe or assert that he had right to enter. *Carpenter v. Coles*, 77 N. W. 424, 75 Minn. 9.

Continuous and uninterrupted possession will not alone establish a "claim of right" which is required to make possession adverse, nor will payment of taxes, but when, with these circumstances, it also appears that the party has set out trees, erected a house and outbuildings, inclosed the premises by a fence, cultivated the land, and in all respects treated it precisely as his own, a claim of right may be inferred and treated as fully established as though shown by oral declarations of such claim. *Wilbur v. Cedar Rapids & M. R. R. Co.*, 89 N. W. 101, 102, 116 Iowa, 65.

#### CLAIM OF TITLE.

The phrase "claim of title," as used in Rev. St. Wis. § 4213, relating to adverse possession, and providing that entry and occupation must be under a claim of title exclusive of any other right, means only a claim of right—a claim to the right of possession. Mere possession is a degree of title, although the lowest and most imperfect. *City of Lacrosse v. Cameron* (U. S.) 80 Fed. 264, 271, 25 C. C. A. 399.

"Claim of title," as used in Sand. & H. Dig. § 3443, making any person detaining realty without claim of title guilty of forcible detainer, means a claim having some appearance of legality, not a bare mere claim without the appearance or pretense of anything to base it upon. Where an accretion which was not expressly included in a conveyance of realty had attained a sufficient elevation above the water to be susceptible of private ownership, and was occupied by another, the vendee, by taking possession of the accretion with the realty, had no claim of title thereto. *Towell v. Etter*, 59 S. W. 1096, 1097, 69 Ark. 34.

"Claim of title," as used in a statute defining "adverse possession" as being a possession commenced under claim of title, does not require that the disseisor should think that the land belonged to him before entry, but it is sufficient if the entry be hostile to all the world and he intends to hold the land as his own. *Chicago & N. W. Ry. Co. v. Groh*, 55 N. W. 714, 715, 85 Wis. 641.

It is not essential to the jurisdiction of equity, in a suit brought under Code, § 550, to determine an adverse claim to real property, that such claim should constitute a technical "cloud on title," as the term is understood in general equity jurisprudence, it being enough if the claim is such as is calculated to create doubt and uncertainty in respect to the title of the true owner, or if operating injuriously in any way to his enjoyment of or beneficial domain over the property. Any

attempt persisted in to have such property sold on execution against a third person amounts to an adverse claim "or cloud on the title" within the meaning of such section. *Murphy v. Sears*, 4 Pac. 471, 472, 11 Or. 127.

#### As color of title.

In a finding that certain improvements were made upon the premises by defendants in good faith and while claiming title there-to adverse to the plaintiff, the term "claiming title" is not equivalent to "color of title," as used in Comp. Laws, § 5455, providing that in an action for the recovery of real property upon which permanent improvements have been made by the defendant, or those under whom he claims, holding under color of title adverse to the claim of plaintiff, the value of such improvements must be allowed as a counterclaim by such defendant. *Parker v. Vinson*, 77 N. W. 1023, 1024, 11 S. D. 381.

To constitute adverse possession, the possession must be with claim of title. The expression "claim of title" means nothing more than the intention of the disseisor to prepare and use the land as his own, to the exclusion of all others. It is not necessary that the disseisor should enter under color of title, or should either believe or assert that he had right to enter. *Carpenter v. Coles*, 77 N. W. 424, 75 Minn. 9.

The term "claim of title" is not synonymous with "color of title." The former may exist wholly by parol, while "color of title" has reference to a paper title. *Hamilton v. Wright*, 30 Iowa, 480.

In Act Cong. Feb. 25, 1885, c. 149, 23 Stat. 321 [U. S. Comp. St. 1901, p. 1524], entitled "An act to prevent unlawful occupancy of the public lands and prohibiting all enclosures of such lands by any person who has no 'claim or color of title,'" these words mean the same as "color of title." The possession must be under a deed purporting to convey the lands claimed. *United States v. Cameron* (Ariz.) 21 Pac. 177, 179.

"Claim and color of title made in good faith," as used in Rev. St. c. 24, § 8, providing that hereafter every person in the actual possession of land or tenements under claim and color of title made in good faith, continuing in possession for seven successive years, paying the taxes, shall be adjudged the legal owner to the extent and according to the purport of his paper title, means such title as tested by itself would appear to be good; not a paramount title capable of resisting all others, but such a one as would authorize the recovery of land when unattacked, as no better title was shown; that is, a prima facie title. Such a title, connected with seven years' actual possession and payment of taxes, becomes invincible, the Legislature intending to protect those who had been in possession of land and paying taxes upon it under the belief that they had

a good title. *Irving v. Brownell*, 11 Ill. (1 Peck) 402, 411.

Claim or color of title may be shown by any paper purporting to convey the land or the right of its possession into the party asserting adverse possession, however and for whatever reason such paper might be lacking in the essentials of a muniment of title, provided the party claims under it in good faith. *Goodson v. Brothers*, 20 South. 443, 445, 111 Ala. 589.

#### CLAIM TO REAL ESTATE.

The word "claim," as used in Revenue Act 1861 (St. 1861, § 5, p. 421), providing that the term "real estate" whenever used in the act shall be deemed and taken to mean and include the ownership of or claim to, or possession or right of possession to, land, "means something more than mere assertion by the party assessed that he owns or is entitled to possess the lands described in the list. While the word carries with it the idea of such assertion, it involves also the idea of an actual possession of the land claimed." *People v. Frisbie*, 31 Cal. 146, 148.

"Setting up a claim," as used in Rev. St. c. 141, § 29, providing that any person having the possession and legal title to land may institute an action against any other person setting up a claim thereto, means some assertion of rights or interest in real estate, the effect of which is necessarily to throw a cloud over the title, and which claim is liable to be used by the party asserting it for an improper purpose, to the injury of the real estate owner. *Walker, Ch., in Stockton v. Williams*, Walk. Ch. 120, 126, says: "The manifest object of the statute seems to be to enable a person having the legal title to possession of real estate to remove all doubts and uncertainty in regard to his title arising from the claims of third persons who are taking no steps to test the validity of their claims either at law or equity, and who by their refusal and neglect to institute proceedings for that purpose keep the party in possession in a state of suspense. One holding a certificate of sale of land on execution is 'setting up a claim' to the real estate of the plaintiff within the meaning and intent of the statute. While that certificate of sale exists it necessarily tends to throw some doubt upon the plaintiff's title, while the mere fact that a deed may be issued upon the certificate which is capable of being used as a means of vexatious litigation will prevent the sale of the property for its full value." *Maxon v. Ayers*, 28 Wis. 612, 613.

A contingent remainder may be conveyed under Code, § 2418, as an interest or claim to real estate. *Young v. Young*, 17 S. E. 470, 471, 89 Va. 675, 23 L. R. A. 642.

In a deed of mortgage purporting to convey all the creditor's right and claim to land which he had in certain towns, the words "right and claim" did not include, by their fair and natural import, land to which, at the time of the conveyance, he had no right or claim, and it not being certain at that time that he ever would have any. "They have a more limited meaning than the usual phrase which is adopted for the purpose of conveying all rights of every description, namely, 'all might, right, title, and interest in and to,' etc." *Richardson v. City of Cambridge*, 84 Mass. (2 Allen) 118, 121, 79 Am. Dec. 767.

#### CLAIMANT.

See "Bona Fide Claimant."  
All claimants, see "All."

The word "claimant," as used in an affidavit verifying a claim against an estate, stating that no payments have been made thereon which are not credited, and that there are no offsets of the same to the knowledge of said claimant, will be held to have been used in the sense of "affiant," used in the statute, though the person making the affidavit was the executrix of an estate; but, the affiant and claimant both being the same person, it was sufficient. *Davis v. Browning*, 27 Pac. 937, 91 Cal. 603.

The use of the word "claimant" in an affidavit on presentation of a claim against an estate, in place of the word "affiant," used in the statute relating thereto, is an immaterial error, where it appears that the claimant and affiant are the same person. *Warren v. McGill*, 37 Pac. 144, 145, 103 Cal. 153.

"Claimant," as used in a statute to regulate the settlement of the estate of deceased persons (section 131), providing that every claim presented to the administrator should be supported by the affidavit of the claimant that the amount is justly due, and that no payments have been made thereon, and that there are no set-offs, is synonymous with "creditor." *Gray v. Palmer*, 9 Cal. 616, 636.

The word "claimant," in P. L. 1896, p. 301, providing that all creditors and claimants of an insolvent corporation failing to make proof of their claims within a time fixed by the court shall be barred, includes one having a claim sounding in tort, as well as a claim arising from contract. *Lehigh & W. Coal Co. v. Stevens & Condit Transp. Co.*, 51 Atl. 446, 63 N. J. Eq. 107.

The word "claimant," as used in the mechanic's lien laws, means the person who has filed or may file the claim as a lien against the property. *P. & L. Dig. Laws Pa.* 1897, vol. 4, col. 1150, § 5.

The word "claimant," as used in an act relating to municipal liens, means the plaintiff or use plaintiff in whose favor the claim is filed as a lien. *P. & L. Dig. Laws Pa.* 1897, vol. 4, col. 1269, § 55.

#### **In admiralty.**

The word "claimant" in all admiralty proceedings in rem is used to denote the person who makes claim to the property seized as the owner thereof, and, by virtue of such ownership or other interest therein, is admitted to defend the suit. In a broader sense, however, it might be used to designate the owner of property, whether prosecuting or defending his right to such property, though this does not agree with the ordinary legal meaning of the term "claimant." *The Conqueror*, 17 Sup. Ct. 510, 514, 166 U. S. 110, 41 L. Ed. 937.

#### **Of attached property.**

"Claimant," as used in Act Oct. 13, 1870, authorizing the claimant of attached property to file a counter affidavit and put in a claim for the property in the attachment proceeding, means a person who has filed a claim to the property as authorized by the section, and not merely one who has alleged a claim to the property but done nothing to support or enforce it. *Adams v. Worrell*, 46 Ga. 295, 296.

#### **Of land sold for taxes.**

"Successful claimant," as used in Rev. Laws 1872, § 220, providing that if the holder of a tax deed, or the party claiming under him by virtue of a tax deed, be defeated in an action by or against him for the recovery of the land sold, the successful claimant shall be adjudged to pay such party under the tax deed the full amount of all taxes paid by the tax purchaser on such land at the time of sale, means one who claims adversely to the government, which undertakes to subject the land to the demands of the revenue, and not the claimant under a subsequent tax title. *Smith v. Laumeler*, 12 Mo. App. 546, 549.

#### **Of public land.**

The word "claimant," as used in 13 Stat. 356, § 3, providing that in case the owner or claimant of lands through which the right of way of a railroad shall extend and the company cannot agree as to the damages, etc., means one having some interest in the land which is recognized by the law of the United States, and hence a pre-emptor who has entered on public land and improved it, without having taken any step toward the acquisition of the title, cannot be regarded as a "claimant" within the meaning of the statute. *Western Pac. R. Co. v. Tevis*, 41 Cal. 459, 494.

#### **Under insurance policy.**

The term "claimant," in an accident policy providing that unless the claimant gives written notice within seven days, stating the date and cause of injury, all claims shall be forfeited, applies to the injured, and not to his legal representatives; and, where the injured person dies on the seventh day after an injury, the policy is not forfeited by failure of his legal representatives, who do not take out letters of administration for several months thereafter, to give the required notice, as there is no claimant within seven days of the date of the injury. *Globe Acc. Ins. Co. v. Gerisch*, 45 N. E. 563, 565, 163 Ill. 625, 54 Am. St. Rep. 486.

#### **CLANDESTINE.**

The words "clandestinely introduce" are synonymous in the common-law with "smuggling." In the English statutes the words "smuggling," "clandestine importation," and "clandestinely running and landing" were constantly made use of, one for the other, as convertible terms relating to the actual passing of goods across the line, where the obligation to pay duty existed, and which passing could not be accomplished except in defiance of the duty which the law imposed. *Keck v. United States*, 19 Sup. Ct. 254, 261, 172 U. S. 434, 43 L. Ed. 506.

#### **CLASH.**

Articles of trade and personal clothing given to native Africans by the master of a ship for their services on shipboard are called "clash." *Sunday v. Gordon* (U. S.) 23 Fed. Cas. 408, 410.

#### **CLASS.**

As used in Bankr. Act, § 60, par. "a" (Act July 1, 1898, c. 541, 30 Stat. 562 [U. S. Comp. St. 1901, p. 8445]), providing that a person shall be deemed to have given a preference if, being insolvent, he has made a transfer of any of his property the effect of which will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of his creditors of the same class, the word "class" will not be construed as indicating a line running between secured and unsecured creditors, for to do so would put workmen, clerks, and servants and others entitled by the laws of the state to priority in the same class with general creditors. The word "class" is defined as a number of persons or things ranked together for some common purpose or possessing some attribute in common, so that a claim of a bank indorsed by a third person has an attribute not possessed by a claim against the bankrupt alone. Hence the payment of an indorsed

claim by a bankrupt does not constitute a preference as to general creditors. In re Harpke (U. S.) 116 Fed. 295, 297, 54 C. C. A. 97.

While it is true that the bankrupt act does not define the word "class," nor in terms state what creditors are in the same class, it creates some classes and specifies others, and it seems that the meaning of the word "class" in the act should, if possible, be derived from the statute itself. Section 64, Act July 1, 1898, c. 541, 30 Stat. 563 [U. S. Comp. St. 1901, p. 3447], after directing the payment of certain expenses of administration, creates three classes of creditors, parties to whom taxes are owing, employees holding claims for certain wages, and those who by the laws of the states or of the United States are entitled to priority. Sections 56b, 57e, and 57h (30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]) provide for the treatment and disposition of claims secured by property, and of claims which have priority. The creditors who hold these claims, and the general creditors of the estate, constitute the classes of creditors of which the bankrupt act treats, and the test of classification of creditors is the percentage of their claims they are entitled to draw out of the estate of the bankrupt, and not the relations of the creditors to parties other than the bankrupt. If they are entitled to receive the same percentage, they are in the same class; if different percentages, in different classes. *Swarts v. Fourth Nat. Bank of St. Louis* (U. S.) 117 Fed. 1, 6, 54 C. C. A. 387.

A "class," as used in the law of wills, is where several persons answering the same description sustain the same relation to the legacy, so that one word describes them all. Each takes an equal share in the property, and each takes originally, and not by way of substitution or derivatively, and each takes absolutely. *Farnam v. Farnam*, 2 Atl. 325, 333, 53 Conn. 261.

A number of persons are said to form a class when they can be designated by the same general name, as children, grandchildren, nephews, etc., but in legal language the question of whether a gift is to a class depends not on these considerations, but on the mode of gift itself, namely, that it is a gift of an aggregate sum to a body of persons, uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take equally, or in some other definite proportion, the share of each being dependent for its amount on the ultimate number of persons. *Dulany v. Middleton*, 19 Atl. 146, 149, 72 Md. 67.

An immediate gift to a class, only to take effect at the death of the testator, comprehends only those in being at the time. A number of persons are properly said to form a class when they can be designated by

some general name, as "children," "grandchildren," "nephews"; but in legal language the question whether a gift is one to a class is dependent, not upon these constructions, but upon the mode of the gift itself, namely, that it is a gift of an aggregate sum to a body of persons, uncertain in number at the time of the gift, to be ascertained at a future time, and who are all to take in equal or in some other definite proportions, the share of each being dependent for its amount on the ultimate number of persons. *Martin v. Martin*, 44 S. E. 198, 203, 52 W. Va. 381 (citing 1 Jarm. Wills [6th Ed.] 262).

A gift to a "class," as the term is used in the law relevant to wills, has been defined by a recent decision of this court to be a gift of an aggregate sum to a body of persons uncertain in number at the time of the gift, to be ascertained at a future time, who are all to take in equal or in some other definite proportion, the share of each being dependent for its amount upon the actual number. But where there is a bequest to a widow or children of the testator, expressed in general terms, and there is no intention shown that they shall take as a class, they shall take distributively. In re *Russel*, 61 N. E. 166, 167, 168 N. Y. 169.

"A bequest to a number of persons not named, but answering a general description, is a gift to them as a class." In re *Harrison's Estate*, 51 Atl. 976, 977, 202 Pa. 331.

#### CLASS LEGISLATION.

Class legislation is of two kinds, namely, that in which the classification is natural and reasonable, and that in which the classification is arbitrary and capricious. Enactments of the former kind are uniformly recognized by the Supreme Court of the United States and by the Supreme Court of Tennessee as constitutional and valid, while those of the latter kind are by the same courts, and with equal uniformity, condemned as unconstitutional and invalid. In the case of *Magoun v. Illinois Trust & Savings Bank*, 170 U. S. 283, 294, 18 Sup. Ct. 594, 42 L. Ed. 1037, the court said that the state may distinguish, select, and classify objects of legislation, and necessarily the power must have a wide range of discretion. After quoting these words with approval in *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 562, 19 Sup. Ct. 281, 43 L. Ed. 552, the court remarked: "And this because of the function of legislation, and the purposes to which it is addressed. Classification for such purposes is not invalid because not depending on scientific or marked differences in things or persons, or in their relations. It suffices if it is practical, and is not reviewable unless palpably arbitrary." An act of the Legislature condemning and punishing all arrangements, contracts, agreements, trusts, or com-

binations between persons or corporations, made with a view to lessen or which tend to lessen full and free competition in the importation or sale of articles imported into the state, or in the manufacture or sale of articles of domestic growth or of domestic raw material, and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed or which tend to advance, reduce, or control the price or cost to the producer or to the consumer of any such product or article, except such as may be entered into by the owners in reference to agricultural products or live stock while in the possession of the producer or raiser, while class legislation, is valid, for the classification which excepts farmers and stock-raisers is not arbitrary and capricious, but natural and reasonable. *State v. Schlitz Brewing Co.*, 59 S. W. 1033, 1036, 104 Tenn. 715, 78 Am. St. Rep. 941.

It is not required that all general laws shall be equally general. A law legislating for a class is a general law, when it is for a class requiring legislation peculiar to itself in the matter covered by the law. A law relating to particular persons or things as a class is said to be general, while a law relating to particular persons or things of a class is deemed special and private. Whether such laws are to be deemed general laws or special laws depends very much upon whether the classification is appropriate. All classifications must be based upon substantial distinctions which make one class really different from another. The classification adopted must be germane to the purpose of the law. The classification must not be based upon existing circumstances only. It must not be so constituted as to preclude addition to the number included within a class. To whatever class a law may apply, it must apply equally to each member thereof. *Wagner v. Milwaukee County*, 88 N. W. 577, 578, 112 Wis. 601 (citing *Johnson v. City of Milwaukee*, 88 Wis. 383, 390, 392, 60 N. W. 270-272).

"Class legislation" prohibited by the federal Constitution is legislation which discriminates against some in favor of others. It does not relate to and include legislation which affects with equal force all persons of the same class to which the subject of legislation applies, though it may be a detriment or benefit only to that class included, and not granted to all persons generally not within the class. *In re Hang Kie*, 10 Pac. 327, 329, note, 69 Cal. 149.

Where, for the purposes of legislation, the subjects upon which the law is to operate are divided into different classes, if the division is arbitrary, and not based on differences which are apparent and reasonable, the laws relating to the classes thus made is called "class legislation." *State v. Garbroski*, 82 N. W. 959, 111 Iowa, 496, 56 L. R. A. 570, 82 Am. St. Rep. 524.

The term "class legislation" is properly applied to the discriminating against some and favoring others. Class legislation is in violation of the constitutional guaranty of equal protection of the laws, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operations it affects all persons similarly situated, is not within the amendment. *Hawkins v. Roberts*, 27 South. 327, 332, 122 Ala. 130.

"Class legislation" is legislation which selects particular individuals from a class, and imposes upon them special burdens from which others of the same class are exempt, and thus denies them the equal protection of the laws. *State v. Cooley*, 56 Minn. 540, 58 N. W. 150. But a statute relating to commission merchants who are engaged in the business of receiving agricultural products and farm produce for sale is not class legislation, since the particular characteristics of the agricultural products and farm produce, and the liability to peculiar abuses resulting from the sale thereof on commission, are such as to suggest the practical necessity for distinctive legislation on the subject. *State v. Wagener*, 80 N. W. 633, 636, 77 Minn. 483, 46 L. R. A. 442, 77 Am. St. Rep. 681.

#### CLASS LOTTERY.

The American Encyclopædia says that "lottery" may be distinguished into the Genoese or numerical, and the Dutch or class lottery. The former is described as a scheme by which, out of 90 consecutive numbers, 5 are to be selected or drawn by lot. The players have fixed on certain numbers, wagering that 1, 2, or more of them would be drawn among the 5, or that they would appear in a certain order. In the Dutch or class lottery, the number and value of the prizes are regularly estimated. All the ticket holders are interested at once in the play, and chance determines whether a prize or a blank shall fall to a given number. *Fleming v. Bills*, 3 Or. 286, 291.

#### CLASSIFICATION.

With reference to the classification of cities for school purposes, "classification" means the grouping together for purposes of legislation of communities or public bodies, which by reason of similarity of situation, circumstances, requirements, and convenience will have their public interests best subserved by similar regulations. *Commonwealth v. Gilligan*, 46 Atl. 124, 195 Pa. 504.

#### CLAUSE.

A "clause" is one of those distinct and generally numbered subdivisions into which wills are frequently aperted, or an entire

unconnected provision making disposition of property. *Appeal of Miles*, 36 Atl. 39, 41, 68 Conn. 237, 36 L. R. A. 176.

"Clause," as used in Code, art. 93, § 802, providing that no devise, in writing, of lands, tenements, or hereditaments, or any clause thereof, shall be revocable except in the manner designated, means one of the subdivisions of the instrument, and hence the names of one or two devisees did not constitute a clause of the will. *Eschbach v. Collins*, 61 Md. 478, 499, 48 Am. Rep. 123.

## CLEAN BILL OF LADING.

It is settled law in the federal courts that a "clean bill of lading" imports that the goods are to be safely and properly stowed under deck. *The Delaware*, 81 U. S. (14 Wall.) 596, 20 L. Ed. 783; *The Kirkhill* (U. S.) 99 Fed. 575, 578, 39 C. C. A. 658; *The Wellington* (U. S.) 29 Fed. Cas. 626, 627. So that, where a cargo was to be stowed in places called "alleyways," which, though covered over, could not be permanently closed in, as the doors and the end had to be opened by the crew in passing in and out, and the spaces could not be made watertight, the master of the ship was justified in refusing to give a clean bill of lading for the cotton stored in the alleyways. *The Kirkhill* (U. S.) 99 Fed. 575, 578, 39 C. C. A. 658.

## CLEAN HANDS.

The maxim that one who comes into equity must come with "clean hands" is based on conscience and good faith. The maxim is confined to misconduct in regard to, or at all events connected with, the matter in litigation, so that it in some measure affects the equitable relation subsisting between the parties and arising out of the transaction. "Clean hands" means a clean record with respect to the transaction with defendant, and not with respect to any third person. *American Ass'n v. Innis*, 60 S. W. 388, 391, 106 Ky. 596.

## CLEAR.

The phrase "to clear from obscurity" is synonymous with the word "liquidated." *Parris v. Hightower* 76 Ga. 631, 634.

In the conditions for an auction sale providing that all small remnants must be cleared at the measure stated in the catalogue, "cleared" meant "taken away." *Pettitt v. Mitchell*, 4 Man. & G. 819, 838.

### In relation to land.

"Clear," as used in a contract providing that a party should clear, grub, and pile the brush on all of a described piece of land, is not synonymous with the word "grub," but

applies to the underbrush too small to be grubbed. *Holmes v. Stummel*, 15 Ill. (5 Peck) 412.

In a contract by which land was rented to a person who was to clear out a certain field, and also to clear and fence certain other fields, and to take no timber off of the land except where he was to clear, "clear" means to take off all the timber of every size, but does not include taking out the stumps. *Harper v. Pound*, 10 Ind. 32, 33.

The term "clearing land," in the absence of words of limitation, means removing therefrom all the timber of every size, but does not include taking out the stumps. *Seavey v. Shurick*, 11 N. E. 597, 598, 110 Ind. 494.

In the description of seated lands, "cleared" and "unimproved" express opposite conditions in the same tract. The former conveys the idea of cultivation, while the latter the absence of it. *Hathaway v. Elsbree*, 54 Pa. (4 P. F. Smith) 498, 505.

## CLEAR ANNUAL OR YEARLY VALUE.

In a statute declaring that a settlement may be gained in a town by one having an estate of inheritance therein of the "clear yearly value" of \$10 for a period of three consecutive years, the term "clear yearly value" means a yearly value clear to the possessor, and where he mortgages a freehold, and, after paying the interest on the mortgage out of the income, less than \$10 remains, the estate is not of sufficient clear yearly value. *Inhabitants of Groton v. Inhabitants of Boxborough*, 6 Mass. 50, 56.

Gen. St. c. 134, § 15, relating to the taxation of land in the possession of tenants, provides that the rents and profits for which the tenant shall be liable to be taxed shall be "the clear annual value of the premises for the time during which he is in possession." Held, that the term "clear annual value" meant "annual value" free from charges and deduction, but did not make the tenant liable for the gross rentable value of the premises. In determining this value, reference must be had to the nature and extent of the estate of the tenant and the character of his possession. If the estate is an absolute one, free from charge or incumbrance, the gross rentable value is a fair test of the clear annual value, but if it is a qualified or limited one such rule could not apply. *Marsh v. Hammond*, 103 Mass. 146, 149.

## CLEAR ANNUITY.

A devise of an annuity "clear" means an annuity free from taxes. *Hodgworth v. Crawley*, 2 Atk. 376.

A gift of a "clear sum or annuity" is a gift clear of legacy duty, but a gift of a fund to produce a clear annual sum, and to pay

the dividends of the stock, and not the exact sum to the legatee, is not a gift free from legacy duty, the term "clear" having reference to the costs of investment. In *re Blispham's Estate*, 24 Wkly. Notes Cas. 79, 80.

### CLEAR DAYS.

"Clear days," as used in a statute requiring the court to allow three clear days in a criminal case to intervene between the verdict and the rendition of the judgment, "mean days exclusive of the day the verdict was rendered and the day upon which judgment should be pronounced." *State v. Marvin*, 12 Iowa, 499, 502.

In 49 Geo. III, c. 68, § 5, requiring ten clear days' notice of the intention to appeal, "clear days" means 10 days exclusive both of the day of the service of the notice and of the day of holding the session. *Rex v. Justices of Herefordshire*, 3 Barn. & Ald. 581.

In Practice Rule of Hil. Term 4, Will. IV, § 7, providing that, four clear days before the day appointed for argument, plaintiff shall deliver copies of the demurrer book, etc., to the Lord Chief Justice of the King's Bench, "four clear days" include Sunday, unless it is the last day. *Hodgins v. Hancock*, 14 Mees. & W. 120, 121.

A charter party which requires "three clear working days" notice to be given by the master to the shipper before lay days commence means that the days do not begin to run until such notice reaches the shipper. *The India* (U. S.) 49 Fed. 76, 78, 1 C. C. A. 174.

### CLEAR DEED.

A contract by which a party bound herself to give a clear deed cannot be construed to mean that she was to give a deed in fee, but only to convey such title as she had, though it may be but a life estate, the title being equally well known to both the vendor and vendee. *Rohr v. Kindt* (Pa.) 3 Watts & S. 563, 565, 39 Am. Dec. 53.

### CLEAR EVIDENCE OR PROOF.

In speaking of the meaning of the words "clear and decisive proof," "clear and satisfactory evidence," "clear and convincing evidence," "clear and conclusive proof," and "conclusive proof," the court quotes with approval the statement of Ballinger in his work on Community Property, where it is said that it is not believed that these terms should be considered as going to the length that their general meaning might import, and that it is certainly not required that the proof should be any more than sufficient to satisfy the mind of court or jury that its weight is enough to cause a reasonable per-

son, under all the circumstances, to believe in its sufficiency. *Freeze v. Hibernia Sav. & Loan Soc.*, 73 Pac. 172, 173, 139 Cal. 392.

"Clear and convincing," as used in the statement that the party alleging fraud or mistake is bound to prove his allegation by clear and convincing evidence, means that the evidence which tends to prove the alleged fraud or mistake, if standing alone and uncontradicted, would establish a *prima facie* case of fraud or mistake. *Ward v. Waterman*, 24 Pac. 930, 934, 85 Cal. 488.

"Clear," as used in a statement that evidence that an instrument purporting to be a deed was intended as a mortgage only must be clear, means a clear preponderance of the evidence. *Winston v. Burnell*, 24 Pac. 477, 478, 44 Kan. 367, 21 Am. St. Rep. 289.

Clear, precise, and indubitable evidence, within the meaning of the rule that a parol exchange of land must be established by clear, precise, and indubitable evidence, means no more than that there must be precision in the terms of the agreement set up, and that the evidence to support it must be of a high order, carrying conviction, to a moral certainty, of its truth. *Jermyn v. McClure*, 45 Atl. 938, 942, 195 Pa. 245.

A higher and more satisfactory character of proof is required to establish that an instrument or conveyance is not what it purports to be than is necessary in ordinary civil cases; some of the courts declaring that in some cases the proof must be "clear," some that it must be "convincing," some that it must be "satisfactory," and still some that it must be "clear of all reasonable doubt." These substantially convey the same idea, and require the same degree of proof. And a general rule that facts must be established "by a fair preponderance of the proof" means that the proof must be clear of all reasonable doubt. *Winston v. Burnell*, 24 Pac. 477, 478, 44 Kan. 367, 21 Am. St. Rep. 289.

"Clear, precise, and indubitable," as used in a charge that in considering an alleged contemporaneous agreement concerning certain bonds the bonds are primarily regarded as the voluntary and lawful contract of the parties, and before this presumption could be overthrown it was incumbent on the defendants to prove the alleged contemporaneous parol agreement or stipulation by evidence that was clear, precise, and indubitable, means that a conviction should be fastened in the minds of the jurors as strong as verbal testimony was able to convey. "It is meant that witnesses shall be found to be credible, that the facts to which they testify are distinctly remembered, that details are narrated exactly and in due order, and that their statements are true. Absolute certainty is of course out of the ques-

tion. Terms are used with relation to their subject-matter. The apparently distinct testimony of the most intelligent witness may possibly be fabricated; the clear statement of the most upright witness may possibly be mistaken. It has been in view of considerations like these that in certain classes of cases proof is required that is clear, distinct, and entirely satisfactory." *Spencer v. Colt*, 89 Pa. 314, 318.

The law that an oral agreement to vary a written instrument must be established by "clear, precise and indubitable proof" means that it must be found that the witnesses are credible, that they distinctly remember the facts to which they testify, and that they narrate the details exactly, and that their statements are true. *Ferguson v. Rafferty*, 18 Atl. 484, 485, 128 Pa. 337, 6 L. R. A. 33.

The expression "clear and satisfactory," in the rule that, if the testimony is clear and satisfactory that a mistake was committed, a written instrument ought to be reformed so as to express the real intention of the parties, does not mean that the mistake should be established beyond a reasonable doubt, and such a test as to certainty of proof is not required in such a case. The expression "clear and satisfactory," in the sense in which it is here used, should be taken to mean that it should be "clear" in the sense that the evidence upon which reformation is based is not ambiguous, equivocal, or contradictory, and should be perspicuous and pointed to the issue under investigation, and "satisfactory" in the sense that the source from which it comes is of such a credible nature that the court and jury, as men of ordinary intelligence, discretion, and caution, may repose confidence in it. *American Freehold Land Mortg. Co. v. Pace*, 56 S. W. 377, 391, 23 Tex. Civ. App. 222.

#### CLEAR INCOME.

The words "clear yearly income," within St. 1793, c. 34, § 2, cl. 4, giving a settlement to any citizen having a freehold of the clear yearly income of three pounds and taking the rents and profits thereof three years successively, does not require that the income shall be the sum of three pounds over and above all charges. *Inhabitants of Pelham v. Inhabitants of Middleborough*, 70 Mass. (4 Gray) 57, 58.

#### CLEAR OF REASONABLE DOUBT.

A higher and more satisfactory character of proof is required to establish that an instrument or conveyance is not what it purports to be than is necessary in ordinary civil cases; some of the courts declaring that in some cases the proof must be "clear," some that it must be "convincing," some

that it must be "satisfactory," and some that it must be "clear of all reasonable doubt." These substantially convey the same idea, and require the same degree of proof. And a general rule that facts must be established "by a fair preponderance of the proof" means that the proof must be clear of all reasonable doubt. *Winston v. Burnell*, 24 Pac. 477, 478, 44 Kan. 367, 21 Am. St. Rep. 289.

#### CLEAR OUT.

"Clear out," as used in Rev. St. 521, § 21, making it the duty of the overseers to open, clear out, etc., the highways within their respective districts, means nothing more than to clear it out for all the purposes to which it is dedicated. *Winter v. Peterson*, 24 N. J. Law (4 Zab.) 524, 528, 61 Am. Dec. 678.

#### CLEAR PREPONDERANCE.

See, also, "Clearly Preponderating Evidence."

"Preponderate" means to outweigh; to weigh more. A "clear preponderance" may mean that which may be seen, is discernible, and may be appreciated and understood. In this sense the expression in an instruction in trespass de bonis, where the defendant justified the asportation, "that it is incumbent upon the defendant to show, by a 'clear preponderance' of the evidence and by convincing proof, their right to do so," might be unobjectionable, but it may convey the idea under emphasis of certainty, beyond a doubt, and very likely would do so to the common mind. At any rate, the expression is equivocal and mischievous. *French v. Day*, 36 Atl. 909, 89 Me. 441.

#### CLEAR PROCEEDS.

Const. art. 10, § 2, providing that the clear proceeds of all fines collected for the breach of any penal laws shall go into the school funds, does not mean entire proceeds. "Clear" implies that something is to be or may be deducted, so that the balance is clear from all charges or demands, and hence in this place "clear proceeds" means the amount left of such fines after making authorized deductions. *State v. De Lano*, 49 N. W. 808, 809, 80 Wis. 259.

#### CLEAR PROFITS.

The term "clear profits" in a complaint in an action between partners for a balance due, which contains an allegation that at the time of dissolution of said partnership there was in the hands of defendant clear profits from said business in a certain sum, was construed not to have the meaning of the words "ascertained balance." "The lan-



guage of the complaint, by a reasonable construction, rather excludes the idea of intention to aver a settlement. The averment that there were clear profits to a certain amount in the hands of defendant is not such as the most inexperienced pleader would be likely to use in stating that a settlement had been made by the parties and an ascertained balance agreed upon." *Bean v. Gregg*, 4 Pac. 903, 904, 7 Colo. 499.

#### **CLEAR TITLE.**

See "Good and Clear Title."

"Clear title," as used in a contract to convey by a deed conveying a clear title to certain land, means that there are no incumbrances on the land. *Roberts v. Bassett*, 105 Mass. 409.

#### **CLEAR VALUE.**

The "clear value" for which an estate is liable for an inheritance tax means net value after the payment of all debts and expenses of administration or execution of the will in case of testacy, and in cases where the will is contested, and expenses for attorney's fees, etc., are incurred by the executor in attempting to sustain the will, these fees must be treated as expenses of administration, and deducted from the amount of the estate to reach its "clear value." *Shelton v. Campbell*, 72 S. W. 112, 113, 109 Tenn. 690.

#### **CLEARANCE CARD.**

A "clearance" is a card given by the master to a servant, showing the place of employment, kind of employment, the time, and whether the service was satisfactory or not. A master is under no legal obligation to give to his discharged servant a clearance, and the servant cannot maintain an action for damages against him for his failure to do so, although he may be unable to obtain employment elsewhere by reason of such refusal. *N. Y. C. & St. L. R. v. Schaffer*, 62 N. E. 1036, 1038, 65 Ohio St. 414, 62 L. R. A. 931, 87 Am. St. Rep. 628.

#### **Recommendation distinguished.**

A distinction is to be made between what is known in terms as a "clearance card" and a "letter of recommendation," the former being merely a letter, be it good, bad, or indifferent, given to an employé at the time of his discharge or end of service, showing the cause of such discharge or voluntary quittance, the length of time of service, his capacity, and such other facts as would give to those concerned information of his former employment. A "letter of recommendation," on the contrary, is, as the term implies, a letter commending the former services of the holder, and speaking of him in such terms as would tend to bring such

services to the favorable notice of those to whom he might apply for employment. *Cleveland, C., C. & St. L. Ry. Co. v. Jenkins*, 51 N. E. 811, 812, 174 Ill. 398, 62 L. R. A. 922, 66 Am. St. Rep. 296; *McDonald v. Illinois Cent. R. Co.*, 58 N. E. 463, 466, 187 Ill. 529.

#### **CLEARING HOUSE.**

A "clearing house" is an ingenious device to simplify and facilitate the work of banking, and reaching an adjustment and payment of the daily balance due to and from banks at one time and place on each day. In practical operation it is a place where the representatives of all the national banks of a city meet, and, under the supervision of a competent committee or officer selected by the associated bankers, settle their accounts with each other and make and receive payments of balances, and so clear the transactions of the day for which the settlement is made. *Crane v. Fourth St. Nat. Bank*, 34 Atl. 296, 297, 173 Pa. 566, 38 Wkly. Notes Cas. 113.

A "clearing house" is an association, the object of which is to effect at one time and place the daily exchanges between the several banks which are members, and the payment of the balances resulting from such exchanges. *National Exch. Bank v. National Bank of North America*, 182 Mass. 147, 149.

A "clearing house association" is nothing more nor less than an agreement among banks to make their daily settlements at a fixed time and place each day. Where a suitable room is secured fitted up with desks and other necessary appliances at the expense of the associated banks, and a manager chosen to preside over it and direct the actions of the clerks and runners when in session, it is a clearing place. It is the place where the representatives of the several banks meet, and where all balances are struck and settled daily between the banks composing the association. At the close of each meeting the amount due to and from each bank is definitely ascertained. The debtor banks then pay over to the manager the gross balances due from them to settle their account with all the members of the association, and he makes distribution of the sums so received among the creditor banks entitled to receive them. *Philler v. Patterson*, 32 Atl. 26, 168 Pa. 468, 47 Am. St. Rep. 896.

#### **Duebill.**

A clearing house duebill differs from an ordinary promissory note in many particulars. This instrument is not payable to order or bearer, but to banks, and disregarding the superadded words, "This duebill is only good when signed by one and countersigned by another authorized person," in

giving a fair construction to the instrument, it may be read for our present purpose thus: "Due by the M. Nat. Bank to Banks, \$1900.00, payable only in exchange through the clearing house the day after issue." This is not, therefore, a mere certificate of deposit on special terms, but an agreement to pay so much money on demand. The place of payment is named. The amount is fixed and the time at which the paper is payable is also certain, and it is also payable in dollars—that is, legal currency—and is negotiable as a check payable to bearer. *Dutton v. Merchants' Nat. Bank (Pa.)* 16 Phila. 94, 40 Leg. Int. 110.

#### **CLEARLY.**

"Clearly," according to Webster's definition of it, means "in a clear manner; without obscurity; without obstruction; without entanglement or confusion; without uncertainty"; and that is doubtless the sense in which it is popularly understood. *People v. Wreden*, 59 Cal. 392, 395.

#### **CLEARLY ESTABLISH.**

An instruction that the insanity of a defendant must be "clearly established by satisfactory proof" is not saying that the evidence must more than preponderate, but only that the preponderance must be plainly apparent. Such must be the case in every instance where the affirmative of an issue is sought to be established, and a peculiar presumption be overcome. Such instruction is not erroneous when coupled with another instruction stating that the burden of proving insanity is on the defendant, but that he is not obliged to prove his insanity beyond a reasonable doubt. *People v. Hamilton*, 62 Cal. 377, 384.

Where the court instructs the jury that the good faith of certain transactions must be clearly established, the word "clearly" means without uncertainty. *McEvony v. Rowland*, 61 N. W. 124, 125, 43 Neb. 97.

The phrase "clearly established by satisfactory proof" is equivalent to the phrase "established by satisfactory proof beyond a reasonable doubt." *People v. Wreden*, 59 Cal. 392, 395.

#### **CLEARLY EXPRESSED.**

"Clearly," as used in Const. art. 5, § 21, providing that the subject of every legislative enactment shall be clearly expressed in the title, means not dubiously or obscurely, but in such a manner that its relation to the subject shall not rest upon a merely possible or doubtful inference. "The connection must be so obvious that ingenious reasoning will not be necessary to reveal it. The connection should be such as to be within the comprehension of the ordinary intellect

as well as the trained legal mind. Nothing unreasonable in this respect is required, however, and a matter is clearly indicated by the title when it is clearly germane to the subject mentioned therein." In *re Breene*, 24 Pac. 3, 4, 14 Colo. 401.

Const. art. 4, § 28, providing that no bill shall contain more than one subject, which shall be clearly expressed in its title, cannot be construed to mean that the title shall not be broader than the act itself, unless the title is comprehensive enough to admit of disconnected and incongruous subjects. The Legislature may select its own language and may use few or many words. It is sufficient that the title fairly embraces the subject-matter covered by the act. Mere matters of detail need not be stated in the title. *State ex rel. Wolfe v. Bronson*, 21 S. W. 1125, 1128, 115 Mo. 271.

#### **CLEARLY PREPONDERATING EVIDENCE.**

An instruction in a homicide case declaring that, to establish the defense of insanity, it must be proved by clearly preponderating evidence, is practically saying it must be proved beyond all doubt and uncertainty. Such instruction is erroneous, as "it is not necessary that the evidence be so conclusive as to remove all doubt." *Coyle v. Commonwealth*, 100 Pa. 573, 580, 45 Am. Rep. 397.

#### **CLEARLY PROVEN.**

The term "clearly and fairly proven" requires a higher degree of evidence than a mere preponderance of proof, and hence it is error to use it in an instruction to express the meaning of the latter phrase. *Hall v. Wolff*, 16 N. W. 710, 711, 61 Iowa, 559.

"Clearly proven" does not mean "beyond reasonable doubt." *State v. Stewart*, 3 N. W. 99, 101, 52 Iowa, 284.

"Clearly proven," as used with reference to the amount of evidence required to establish the guilt of a defendant in a criminal case, is synonymous with, and has been held to mean, "beyond a reasonable doubt." *Leonard v. Washington Territory*, 7 Pac. 872, 882, note, 2 Wash. T. 381.

An instruction in a criminal case that the existence of a certain condition, upon which the guilt of the accused depended, was sufficiently established if it was fully and clearly proven, was not equivalent to saying that it must be established beyond a reasonable doubt, and was error. *State v. Stewart*, 3 N. W. 99, 101, 52 Iowa, 284.

#### **CLEARNESS.**

It has been held that by the term "clearness," as applied to the degree of proof re-

quired, is meant generally that there must be sufficient positive facts proved to take the matter out of the realm of conjecture and presumption. *Reynolds v. Blaisdell*, 49 Atl. 42, 43, 23 R. I. 16 (citing 15 Am. & Eng. Enc. Law [2d Ed.] 1174); *Marshall v. Fleming*, 53 Pac. 620, 621, 11 Colo. App. 515.

## CLEPSYDRA.

The clepsydra was an instrument used by the Greeks "by which they measured time by means of a flowing of water through it, and so frequent and common was the practice of limiting the time to the speakers by water flowing through these instruments that the word 'water' was used metaphorically for 'time.' When a speaker was allowed to speak so long, they said he was allowed so much water." It was used in the Grecian courts of justice, where the time for argument was limited, and from whence the custom of limiting the time was carried to Rome. *State v. Page*, 21 Mo. 257, 259, 64 Am. Dec. 229.

## CLERGYMAN.

See "Minister."

As laborer, see "Laborer."

## CLERICAL.

"Clerical service" means strictly a service that involves writing. *Post v. United States*, 27 Ct. Cl. 244, 254.

## CLERICAL ASSISTANCE.

A statute authorizing the Secretary of State to expend certain money for clerical assistance does not mean official assistance, "but such as aids in the execution of official authority by the secretary himself, such as writing letters, making entries of record and like services." "The word 'clerical,' as employed in the statute to designate the kind of help, has no definite meaning. It is not very apt for the meaning intended, but it is obvious that the Legislature did not intend to extend its meaning so as to imply official aid." *Beam v. Jennings*, 2 S. E. 245, 246, 96 N. C. 82.

## CLERICAL ERROR.

A clerical error, as its designation imports, is an error of a clerk or subordinate officer in transcribing or entering an official proceeding ordered by another. *Marsh v. Nichols, Shepherd & Co.*, 9 Sup. Ct. 168, 171, 128 U. S. 605, 32 L. Ed. 538.

A clerical error is an error made by a clerk or a transcriber; a mistake in copying or writing. In *re Stewart*, 48 N. Y. Supp. 957, 966, 24 App. Div. 201.

*Brooklyn City Charter*, tit. 10, § 10, making it the duty of a board to rectify any errors committed in the laying of any tax and assessment where the error was clerical, meant an insertion by mistake. An admission that a lot was put in by mistake naturally excludes any idea that it was inserted in the exercise of any judgment or discretion, in pursuance of any determination that the lot was included within the district of assessment. *People v. Wilson*, 23 N. E. 1064, 119 N. Y. 515.

In both *Burrill's* and *Black's Law Dictionaries* "clerical error" is defined as "a mistake in copying or writing; the mistake of a clerk in writing." In *Rapalje*, the definition is "a mistake in copying or transcribing a written instrument." In *Horton*, "a mistake in copying." The act of a clerk in erroneously entering a judgment for cost against an administrator personally instead of against the estate is not a mere clerical error. *Leonis v. Leffingwell*, 58 Pac. 940, 941, 126 Cal. 369.

### As error of form.

"Clerical errors" in making and entering a tax assessment is used in contradistinction to errors of substance, of judgment, or of law, which are described as errors affecting the merits of the assessment, and not mere errors of form. *People v. Forrest*, 96 N. Y. 544, 548; *Hermance v. Ulster County Sup'rs*, 71 N. Y. 481, 485.

A statute providing that proof of authority of town commissioners to sign for stock of a railroad and issue bonds in payment—that is, the consent of the taxpayers thereto—shall not be invalidated by "clerical or other defects," means clerical or formal, or defects of like description, and will not cure material deficiencies in the affidavits which are filed in proof of such authority. *Town of Duanesburgh v. Jenkins* (N. Y.) 40 Barb. 574, 584.

## CLERICAL MISTAKE.

A clerical mistake is a mere omission to preserve of record, correctly in all respects, the actual decision of the court, which in itself was free from error. *Bostwick v. Van Vleck*, 82 N. W. 302, 303, 106 Wis. 387.

## CLERK.

See "Articled Clerk"; "Competent Clerk"; "Proper Clerk"; "Regular Clerk"; "Town Clerk"; "Ward Clerks."

Code, art. 47, § 15, providing that when any person or body corporate shall make an assignment, or be adjudicated insolvent, or have his or its property taken possession of

by a receiver, in the distribution of the property or estate, all moneys due for wages or salaries to clerks, servants, or employes shall be first paid in full, the term "clerks" means persons rendering mere clerical services. *Boston & A. R. Co. v. Mercantile Trust & Deposit Co.*, 34 Atl. 778, 782, 82 Md. 535, 38 L. R. A. 97.

The term "clerk, servant, or agent," in Gen. St. c. 257, § 8, providing a punishment for embezzlement of any officer, agent, or servant of any corporation, public or private, or the clerk, servant, or agent of any person, is not to be restricted in meaning by authorities relating to statutes of a narrower purpose. The phraseology of this statute shows that the Legislature intended not to exempt from its operation agents who receive no compensation for their services, or agents not employed in a general, continuous, or prolonged service, or agents over whose actions their principals do not exercise an extensive control. *State v. Barter*, 58 N. H. 604, 605.

The officers, agents, or clerks mentioned in article 3, § 42, of the act concerning crimes and punishments, which provides a punishment for any officer, agent, clerk, or servant of any incorporated company for embezzlement, etc., means officers, agents, or clerks of corporations, and the statute only authorizes a conviction in cases where the embezzlement is committed by such officers, agents, or clerks while exercising their corporate employment. *Hamuel v. State*, 5 Mo. 260, 264.

#### Agent.

As an agent, see "Agent."

In indictments relating to embezzlement, the terms "clerk," "agent," and "servant" may be used interchangeably, meaning, as they do, a person having custody of the goods or funds of another, which he was thereby enabled to convert to his own use without authority. *State v. Roubles*, 9 South. 435, 436, 43 La. Ann. 200, 26 Am. St. Rep. 179.

Mr. Wharton, in speaking of the introduction of the word "agent" in the embezzlement statute in reference to embezzlement by agents, servants, or clerks, says: "As used in the Massachusetts statute, the term 'agents' is much wider in its significations than 'servants' or 'clerks.' The latter are restricted to the performance of specific acts in a specific way. The former may or may not be restricted, and may in fact be clothed with full power to represent their principal, with the same discretion as he might exercise himself." *Territory v. Maxwell*, 2 N. M. 250, 262 (citing 1 Wharton's Cr. Law, § 1022).

The term "clerk," "servant," or "employé," within the meaning of a statute making it criminal for any clerk, servant, or other person in the employ of another to em-

bezzle moneys received by virtue of such employment, does not include an independent agent for the solicitation of newspaper subscriptions and job work, who is charged on the books of the newspaper company at a definite price with the papers and bills of job work sent him, and therefore his collection and appropriation of the moneys paid him for the same only renders him liable as a debtor. *Commonwealth v. Behle* (Pa.) 1 Lack. Leg. N. 803.

#### Assistant, deputy, or stenographer.

"Clerk," as used in Rev. St. 181, § 14, providing that, in the service of writs on corporations, the copy shall be left with the "clerk" unless absent from the state cannot be construed in the case of town clerk to include also the assistant clerk which each town clerk is authorized to appoint. The assistant town clerk is not an officer of the town in any sense. He is appointed, not by the town, but by the town clerk, removable at his pleasure, and the town clerk is responsible for all his acts. He is, in fact, the mere clerk or servant of the town clerk. *Town of Charleston v. Town of Lunenburg*, 21 Vt. 488, 490.

"Clerk," as used in Const. art. 5, § 24, providing that there shall be no allowance for clerk hire in the office of the Attorney General, means one who is to register in proper form the transactions of the tribunal or body to which he belongs, and does not include a deputy, or assistant, or a stenographer. "The word 'clerk' is defined by Bouvier as a person employed in an office, public or private, for keeping records or accounts. His business is to write or register in proper form the transactions of the tribunal or body to which he belongs." In re Appropriations for Deputy State Officers, 41 N. W. 643, 645, 25 Neb. 662.

In the construction of statutes, the terms "sheriff," "coroner," "constable," "clerk," or other words used for an executive or ministerial officer, may include any deputy or other person performing the duties of such officer, either generally or in special cases. *Hurd's Rev. St. Ill.* 1901, p. 1719, c. 131, § 1, subd. 8.

The words "sheriff," "county attorney," "clerk," or other words used to denote an executive or ministerial officer, may include any deputy or other person performing the duties of such officer, either generally or in special cases. *Rev. St. Utah* 1898, § 2498.

#### Attorney.

"Clerk," as used in Code, art. 47, § 15, providing that the wages or salaries to clerks, servants, or employes of a person or corporation making an assignment for the benefit of creditors shall be first paid, cannot be construed to include an attorney at law.

Lewis v. Fisher, 30 Atl. 608, 609, 80 Md. 139, 26 L. R. A. 278, 45 Am. St. Rep. 327.

#### **Bank teller.**

In a bond reciting that if the principal, who had been appointed clerk of said bank, shall faithfully and honestly discharge his duties as such clerk, then the obligation should be void, it was intended by the use of the word "clerk" to apply to all the positions which employes of the bank occupy, and would include the position of teller. Union Dime Sav. Inst. v. Neppert, 3 N. Y. Supp. 797, 799, 51 Hun, 640.

The term "clerk" is of such varied import that it cannot be held that clerk, and especially clerk of the individual ledger in a bank, is equivalent to an officer, agent, or servant of the bank, within a statute authorizing the punishment of such persons on embezzlement of its funds. Budd v. State, 22 Tenn. (3 Humph.) 483, 489, 39 Am. Dec. 189.

#### **Bookkeeper.**

The clerk referred to in the rule excluding books of account kept by a party who keeps a clerk is one who had something to do with and had general knowledge of the business of his employer in reference to goods sold or work done, so that he could testify on that subject. "It means an employe whose duty it is to attend to the details of business, and thus is able to prove an account, and not one who from his isolated position as a bookkeeper can have but little means of personal knowledge as to the transactions done, or information relating thereto, except what is mainly derived from others." McGoldrick v. Traphagen, 88 N. Y. 334, 338.

"Clerk," as used in Civ. Code, § 68, authorizing the service of process of a corporation by service on its clerk, means "the person who holds the office of clerk or secretary, as the case may be. It is true a bookkeeper is in one sense a clerk. A person who performs clerical duties is in one sense a clerk. But the service of a summons on a corporation cannot be made on every person who may in some remote sense be styled a 'clerk' of the corporation. It could not be made on a deputy or under clerk. It must be made on the clerk, the principal clerk of the corporation, if made on a clerk at all." Chambers v. King Wrought-Iron Bridge Manufactory, 16 Kan. 270, 276.

#### **Broker distinguished.**

See "Broker."

#### **As clerk of court.**

In a statement for a mechanic's lien, verified before the clerk of the court, who signed his name to the jurat, adding the word "Clerk," the word designated him as the clerk of the court in whose office the claim

for the lien was filed. Wetmore v. Marsh, 47 N. W. 1021, 1022, 81 Iowa, 677.

The word "clerk," when attached to an official certificate or document, executed and signed by the clerk of the county court, will be construed to mean clerk of the county court. Keith v. Freeman, 43 Ark. 298, 305.

"Clerk," as used in the bankruptcy act, shall mean the clerk of a court of bankruptcy. U. S. Comp. St. 1901, p. 3419.

The word "clerk," as used in the Code of Procedure, signifies the clerk of the court where the action is pending, and, in the Supreme Court, the clerk of the county mentioned in the title of the complaint, or in another county to which the court may have changed the place of trial, unless otherwise specified. Code Civ. Proc. S. C. 1902, § 447.

The word "clerk," when used in statutes, means clerk of the court in which the action or proceeding is brought or is pending; and the words "clerk's office" mean his office. Code Iowa 1897, § 48, subd. 25.

The word "clerk" means the clerk of the court in which the action is brought or is pending, or in which the proceeding is had; and the words "clerk's office" mean his office. Sand. & H. Dig. Ark. 1893, § 7210.

The word "clerk," as used in the civil procedure act, means the clerk of the court, or any person authorized to perform his duties in any case. Horner's Rev. St. Ind. 1901, § 1285.

The word "clerk" signifies the clerk of the court wherein the action or special proceeding is brought, or wherein or by whose authority the act is to be done, which is referred to in the provision in which it is used. If the action or special proceeding is brought, or the act is to be done, in or by the authority of the Supreme Court, it signifies the clerk of the county wherein the action or special proceeding is triable, or the act is to be done. Code Civ. Proc. N. Y. 1899, § 3343, subd. 4.

The word "clerk," as used in the Probate Code, is to be understood as referring only to the exercise of the jurisdiction and powers conferred by the Code. Rev. Codes N. D. 1899, § 6166.

#### **City officers.**

A "clerk" is an assistant, a subordinate, and includes a health warden, who is an official in the health department. Demarest v. City of New York (N. Y.) 42 Barb. 186, 192.

The term "clerk," or "employe," in New York Charter 1873, c. 755, § 2, giving the police board power to fix the salaries and compensation of all clerks appointed by the board, and of all employes whom they may be authorized to appoint, does not include a

police surgeon, as he is an officer, within the meaning of the charter. Certainly such surgeons are not clerks, and as employes are usually considered as embracing laborers and servants and those occupying inferior positions, they can scarcely be included in that class of persons. *People v. Board of Police*, 75 N. Y. 38, 41.

The terms "officers," "clerks," "subordinate officers," and "employes," in Act June 1, 1885, relating to cities of the first class, in reference to the appointment of officers, clerks, subordinate officers, and employes, does not include the medical staff or the board of visiting physicians of the Philadelphia Hospital, consisting of specialists or experts in the various departments of medical science, who perform gratuitous services. *Commonwealth v. Fittler*, 23 Atl. 568, 571, 147 Pa. 288, 15 L. R. A. 205.

New York Charter, § 28, declares that the number and duties of all officers, clerks, employes, and subordinates shall be such as the heads of the respective departments shall designate and approve. In its popular sense "clerks" denotes those whose duties are clerical, and they may be very various. The term does not include every employe and subordinate of the department. A clerk in an office is defined to be a person employed in an office, public or private, for keeping records or accounts, whose business is to write or register in proper form the transactions of the tribunal or body to which he belongs. Persons employed to assist as a surveyor in the execution of the laws regulating the storage, sale and use of combustible materials, and assist the fire marshal in the investigation of the cause of fires, are not clerks within the meaning of the charter. Their duties are not clerical in any sense. *People v. Fire Com'rs of City of New York*, 73 N. Y. 437, 442.

#### **Deliveryman.**

An employe who attends to sales no further than merely delivering goods manufactured and keeping a memorandum of the delivery for temporary purposes is not a clerk, within the rule requiring proof of original entries. *Sickles v. Mather* (N. Y.) 20 Wend. 72, 73, 32 Am. Dec. 521.

#### **As laborer or servant.**

See "Laborer"; "Servant."

#### **Merchant appraiser.**

Act Cong. Jan. 16, 1883, c. 27, § 6, declares that all clerks, agents, or persons employed in the customs department of the government shall undergo a competitive examination before appointment, and shall be selected by the collector as prescribed by Rev. St. § 2930. Held, that the words, "clerks, agents, or persons employed," as so used,

meant persons having a regular employment in the customs department, and hence did not include a merchant appraiser who is appointed as an expert in particular instances to reappraise particular goods. *Auffmordt v. Hedden*, 11 Sup. Ct. 103, 107, 187 U. S. 310, 34 L. Ed. 674.

#### **Salesman.**

One employed as a salesman in a store or shop is a clerk, within the meaning of Bankr. Act 1898, § 64b, subd. 4, giving priority to claims for wages due to workmen, clerks, or servants, which have been earned within three months before the date of commencing the proceedings. In re *Flick* (U. S.) 105 Fed. 503.

#### **Secretary.**

The terms "clerk" and "secretary," as applied to subordinate ministerial functionaries, are by popular usage synonymous terms, and are frequently used interchangeably. "Secretary" is defined as "a person employed to write orders, letters, dispatches, public or private papers, records, and the like; an official scribe, amanuensis, or writer." A clerk is defined as "one who is employed to keep records and accounts, a scribe, a penman, an accountant; as the clerk of the court." *State v. Currie*, 3 N. D. 310, 315, 55 N. W. 858.

In an action against a railroad company, the secretary, as provided by Gen. St. Conn. § 3455, and not the president, is the one to whom notice should be given, under section 2673, making the right to maintain an action against a corporation conditional on notice to its clerk. *Mack v. New York, N. H. & H. R. Co.*, 51 N. E. 1076, 1077, 172 Mass. 185.

"Clerk," as used in Rev. St. 1874, c. 77, § 52, declaring that, in order to effect a levy upon the shares of a stockholder in a corporation, the sheriff shall leave a copy of the execution with the clerk, treasurer, or cashier of the corporation, means that officer who usually has the custody of the books and records of the corporation; and hence such service on the secretary of a corporation was sufficient. *People v. Goss & Phillips Mfg. Co.*, 99 Ill. 355, 361.

A clerk is defined as "one who is employed to keep records and accounts; a scribe, penman, or accountant," and is practically synonymous with "secretary," so that a town authorized to employ a clerk may under such authority employ a secretary. *Griffin v. Town of Corydon*, 44 S. W. 629, 19 Ky. Law Rep. 1872.

The term "clerk," within the meaning of Act Pa. April 20, 1858, relating to boats navigating certain rivers, does not include the secretary of a corporation who has charge of the fitting and building of a boat for such

corporation. *The Short Cut* (U. S.) 6 Fed. 630, 631.

#### **School teacher.**

A school teacher is neither a laborer, clerk, servant, nurse, or other person, within the meaning of the statute providing that in all cases within the jurisdiction of a justice of the peace, where any action is brought by any laborer, clerk, servant, nurse, or other person for compensation claimed due for personal services performed, the plaintiff, if successful, shall be entitled to recover as part of the costs a judgment against the defendant for an attorney's fee. *School Dist. No. 94, Grant County, v. Gautier*, 73 Pac. 954, 957, 13 Okl. 194.

#### **Superintendent.**

The superintendent of a mine is not a laborer, servant, clerk, or operative of a company, within the meaning of a provision of its charter making its stockholders individually liable for the wages of such persons in case the company becomes insolvent. *Cocking v. Ward* (Tenn.) 48 S. W. 287, 289.

One who was secretary and superintendent of a corporation, and had charge of the building and fitting of a boat, was not a clerk, within the meaning of an act giving liens on boats navigating certain rivers. *The Short Cut* (U. S.) 6 Fed. 630, 631.

#### **Telegraph operator.**

The term "clerk," in Brooklyn city charter, providing that the fire commissioner may remove clerks under certain conditions, but that no person on the force for extinguishing fires shall be removed without cause, etc., does not include a telegraph operator of the fire department, but he is a member of the force for extinguishing fires. *People v. Ennis*, 7 N. Y. Supp. 630, 631.

#### **Tradesman.**

The term "servant or clerk," in the embezzlement statute, making any servant or clerk who embezzles property received in the course of his employment guilty, etc., does not include a tradesman to whom raw materials are given to be converted into manufactured articles, and who contracts and receives them in good faith. *People v. Burr* (N. Y.) 41 How. Prac. 293, 297.

#### **Traveling salesman.**

The term "clerk" has come to include, not only a subordinate who writes letters or keeps books, but also a salesman in a retail store. A traveling salesman is not a clerk of his employer, within the meaning of Bankr. Act 1898, § 64b, cl. 4, according a priority of payment out of bankrupts' estates to wages due to workmen, clerks, or servants. In re *Greenwald* (U. S.) 99 Fed. 705. A creditor of a bankrupt, who is employed as a traveling salesman by a bank-

rupt at an annual salary, is not a clerk, within the meaning of Bankr. Act 1898, § 64b, according priority of payment out of bankrupt estates to clerks. In re *Scanlan* (U. S.) 97 Fed. 26, 27.

The original meaning of the word "clerk" has become so enlarged that in modern usage it may include a salesman in a retail store. It cannot, however, be extended to include one whose business is to travel and secure customers, and whose compensation is by commission on sales effected by or through him. *Mulholland v. Wood*, 31 Atl. 248, 249, 166 Pa. 486.

A traveling salesman, who spends about one-half of his time on the road selling goods and collecting, and the rest in shipping and selling goods and making collections in the city, is a clerk, within Act Tenn. 1875, § 11, making stockholders of a corporation liable for money due laborers, clerks, servants, etc. *Hand v. Cole*, 12 S. W. 922, 923, 88 Tenn. (4 Pickle) 400, 7 L. R. A. 96.

The term "clerk," as designating an occupation or business, must be understood in its ordinary acceptation, and that is, not a writer or one performing clerical functions only, but a salesman in a store or shop as well. The business of a traveling agent is quite distinct from that of a clerk, and the fact that the traveling agent receives a fixed salary, instead of a commission on sales or other varying compensation, does not make him a clerk. *State v. Chapman*, 35 La. Ann. 75, 76.

The term "clerk, laborer, or tradesman," in a statute giving a preference out of a fund raised by execution against his employer to a clerk, laborer, or tradesman, does not include a traveling salesman, who sells on commission for a furniture manufacturer. *Witmer v. Miller*, 12 Pa. Co. Ct. R. 363, 364.

The term "clerk" does not include a person engaged under a contract to make sales of goods dealt in by a firm in a particular state, with agreement that he shall receive half the profits and bear half the losses of the business done, so as to be entitled to a preference in the distribution of an insolvent's estate, under Rev. Civ. Code, art. 3191, authorizing the giving of a preference to clerks, secretaries, and other persons of that kind. *Brierre v. His Creditors*, 9 South. 640, 641, 43 La. Ann. 423.

The term "clerk," within the meaning of the law creating a privilege in favor of a clerk in respect to the payment of salaries, does not include an agent employed to solicit sales of the goods of a manufacturer at a monthly salary and commission. *Weems v. Delta Moss Co.*, 33 La. Ann. 973, 975.

#### **CLERK OF COUNTY.**

See "County Clerks."

**CLERK OF CORPORATION.**

The term "clerk of a corporation," as used in the chapter relating to private corporations, shall mean the recording officer, whether he is styled "clerk," "secretary," "cashier," or however designated. *V. S.* 1894, 3878.

**CLERK OF COURT.**

See "Clerk."

A clerk of the court is included in the term "officer of the law." *Gordon v. State*, 2 Tex. App. 154, 158 (citing Pen. Code, art. 351).

A clerk of court "is an officer of the court, and a part of his duties consists in recording the will, direction, and judgment of the court. To that extent he is the amanuensis of the court." *Ross v. Heathcock*, 15 N. W. 9, 11, 57 Wis. 89.

The clerk is an officer of a court, who keeps its minutes, or records its proceedings, and has the custody of its record and seal. *Peterson v. State*, 45 Wis. 535, 540.

The clerk is not the court. He is simply the scribe and custodian of its records. He is not an agent of the court, nor has he any authority to act for or represent the court in its absence, so that a payment of money by a railroad company to the clerk, without the court's knowledge, by a clerk of the county, under a statute authorizing it to take possession of land condemned and pay into the circuit court the amount found due as compensation, confers no rights on the company. *National Docks & N. J. J. Connecting Ry. Co. v. United New Jersey R. & Canal Co.*, 28 Atl. 673, 674, 52 N. J. Eq. 366.

The United States statutes relative to naturalization provides that the preliminary declaration for naturalization might be made before the supreme, superior, district, or circuit court of some one of the states, and further provides that, as doubts have arisen whether certain courts of record are included within the description of district or circuit court, any court having common-law jurisdiction and a seal and a clerk shall be considered as a district court, within the meaning of the act. Under this statute it is held that a police court, in which the justice was the recording officer and acted as clerk, was not a "court having a clerk" within the act. *State v. Whittemore*, 50 N. H. 245, 251, 252, 9 Am. Rep. 196.

Rev. St. U. S. § 2165, providing that an alien who desires to become a citizen of the United States shall declare on oath before a circuit or district judge or a district or Supreme Court of the territories, or a court of record of any of the states, having a clerk, means a clerk distinct from the judge

of such court. "Judge Curtis, in his opinion in the case of Michael Cregg, 2 Curt. 98, says that 'a court in which the justice was the recording officer was not a court having a clerk within the meaning of the act of Congress.'" *State v. Webster*, 7 Neb. 469, 471.

Under Code, § 795, cl. 6, authorizing the judge of probate to employ at his own expense a clerk, for whose official acts he shall be responsible, it is held that the clerk of a probate judge is not an independent officer, clothed with distinct official power and duty, to be exercised on his own responsibility, but is a mere agent or deputy, acting for and in the name of a principal, and hence all his official acts must be performed in the name of the judge, so that a certificate of the acknowledgment of the mortgage before one as clerk of the probate court is not a sufficient certificate. *Pioneer Savings & Loan Co. v. Barclay*, 19 South. 808, 809, 108 Ala. 155.

The term "clerk," as used in a rule of court providing that all process shall be served by the marshal, and that the clerk shall at the time of issuing every process make as many copies of the same as there are persons to be served, will be construed to include a commissioner, since, when he issues process, his duties are exactly analogous to those of the clerk. *McGourin v. United States* (U. S.) 102 Fed. 553, 557.

The clerk of the district court is an officer authorized by Congress, appointed by a federal officer, recognized as an officer of the United States, his duties prescribed, and his compensation fixed by congressional enactment. He is required to attend upon the sessions of the court. He constitutes a component part of the court, and must attend it daily and record its proceedings. He gives his bond to the United States, takes the oath required by the United States, and is entitled to the emoluments provided by the United States. *United States v. Warren*, 71 Pac. 685, 687, 12 Okl. 350.

In the construction of statutes the words "county clerk" shall be held to include clerk of the county court, and the words "clerk of the county court" to include "county clerk." *Hurd's Rev. St. Ill.* 1901, p. 1719, c. 131, § 1, subd. 8.

**As city or municipal officer.**

See "City Officer"; "Municipal Officer."

**CLERKSHIP.**

"A clerkship to an attorney imports the office of assistant to an attorney, an actual occupation in and about the attorney's business and under his control. The services are to be rendered, not solely or mainly by the study of law books, but chiefly by attending to the work of the attorney under his direction." The purpose of the rule that every



applicant for an examination for an attorney's license must first serve a regular clerkship with some practicing attorney for four years "is that the clerk shall be actually engaged in the practice of law under the guidance of his master for the stated period, so that by direct contact with the attorney's duties he may acquire the skill and facility in the profession which are necessary for enabling him to protect and promote independently the interest that clients may afterwards commit to him." *In re Dunn*, 43 N. J. Law (14 Vroom) 359, 361, 39 Am. Rep. 600.

## CLIENT.

"A client is one who applies to a lawyer or counselor for advice and direction in a question of law, or commits his cause to his management in prosecuting a claim or defending against a suit in a court of justice." *McCreary v. Hoopes*, 25 Miss. (3 Cushman.) 428, 429.

"A client is one who applies to an advocate for counsel and defense; one who retains the attorney, is responsible to him for his fees, and to whom the attorney is responsible for the management of the suit." *McFarland v. Crary* (N. Y.) 6 Wend. 297, 312.

The term "client," as used in Wag. St. p. 1374, § 8, disqualifying an attorney to testify concerning any communication made by his "client" to the attorney in a professional capacity, will be construed in its most enlarged sense, as including all who communicate facts to attorneys expecting professional advice. The prohibition "should close the mouths of all who have listened to disclosure looking to professional aid." *Cross v. Riggs*, 50 Mo. 335, 337.

## CLIMATE.

In a bill of lading exempting from liability a steamer on which perishable goods were shipped from loss occasioned by the effect of climate, the word "climate" did not include the effect of a temporary frost. *The Aline* (U. S.) 19 Fed. 875, 876.

## CLOCK.

See "Stock Clock."

## CLOSE.

Ky. St. c. 21, § 28, providing that, when the law requires any writing to be signed by a party thereto, he shall not be deemed to be a party thereto, unless the signature be subscribed at the end or close of such writing, does not require that no words whatever shall follow the signature; but, where a date and the name of the place of making a will follow testator's signature, the statute was com-

plied with, since neither the date nor place of making are a part of the will. *Flood v. Prago*, 79 Ky. 607, 614.

### As inclosure.

Inclosure distinguished, see "Inclosure."

The word "close," as used in a complaint alleging the breaking of plaintiff's close, means, as defined by Blackstone, "a portion of lands, as a field, inclosed, as by a hedge, fence, or other sensible inclosure." This definition is approved in *Burrill's Law Dictionary*, and it is added that in common acceptance "close" means an inclosed field. *Locklin v. Casler* (N. Y.) 50 How. Prac. 43, 44.

The word "close," as it was used at common law, is purely technical, and relates to the interest in the soil and to its invisible boundaries, which the owner has, and not to those artificial barriers often erected around land. The whole duty of erecting boundary or division fences, in the absence of agreement or prescription, is regulated by statute, in the absence of which there is no duty on the part of the owner of the close to erect division fences. *Meade v. Watson*, 8 Pac. 311, 312, 67 Cal. 591.

### As interest in soil.

"Close" is purely technical, and relates to the interest in the soil and to its invisible boundaries, and not to those artificial barriers often erected around land. *Meade v. Watson*, 67 Cal. 591, 593, 8 Pac. 311; *Peck v. Smith*, 1 Conn. 103, 139, 6 Am. Dec. 216; *Richardson v. Brewer*, 81 Ind. 107, 108.

A close is a weir of certain defined limits, or a particular defined area of land to which a certain person claims title. The term is generally used with reference to trespass, by which is described in common-law pleading a trespass on land, as an allegation that a defendant with force and arms broke and entered the plaintiff's close, which is an allegation of trespass to a particular lot of land belonging to the plaintiff. *Matthews v. Treat*, 75 Me. 594, 600.

"The term 'close,' in its common acceptance, means an inclosed field; but in law it rather denotes the interest of the party in the land, whether inclosed or not. It signifies any interest which will enable the party to maintain trespass for an injury to the real property or to the mere possession. In such actions, which may be brought as well by a person having a possessory right as by a person having a legal estate, the declaration alleges an injury to the plaintiff's close." *Wright v. Bennett*, 4 Ill. (3 Scam.) 258, 259.

The word "close," in an action of trespass, has a technical meaning, signifying the interest in the soil, and is a sufficient description of the plaintiff's interest, however temporary that interest may be. If it be a term for years, or even a less estate, it is

sufficiently described by calling it a "close." *Blakeney v. Blakeney* (Ala.) 6 Port. 109, 115, 30 Am. Dec. 574.

The term "close" means the land owned or rightfully possessed by a party, although it may be inclosed only by the imaginary boundary line that defines its territorial limits. *Dudley v. McKenzie*, 54 Vt. 685, 687.

#### **CLOSE (verb).**

##### **An account.**

"Close," as used in a letter acknowledging an unsettled account and stating that the writer would write again and give information as to when he would return to the city and put a "close" to this affair, means "pay the account," if any balance should be found against him, and is sufficient to authorize the jury to presume a new promise within the period of limitation. *Patton's Adm'r's v. Ash* (Pa.) 7 Serg. & R. 116, 128.

##### **A bargain.**

"A bargain is closed when nothing mutual between the parties remains to be done to give either a right to have it carried into effect, but when either can enforce it against the other, or recover damages for the non-fulfillment of it." *Mactier's Adm'r's v. Frith* (N. Y.) 6 Wend 103, 114, 21 Am. Dec. 262.

Authority to a real estate broker to close a bargain for the sale of property did not authorize him to sign a contract for the sale in the name of his principal and agree to give a warranty deed, with full covenants and a perfect title, on demand, within 30 days from the date of the contract, but only authorized him to bring the parties together. *Coleman v. Garrigues* (N. Y.) 18 Barb. 60, 67.

##### **Books of assessment.**

The closing of books of assessment is not a physical act, but is a simple limitation of the time during which those interested can apply to have mistakes in the assessments of property for taxes corrected. Putting the book away in the safe at 4 o'clock on April 30th was not a closing of the book, nor was the opening of the book on the 1st day of May an opening of the book; and when the statute says that on the 1st day of May the books shall be closed, it means that on the 1st day of May applications for correction of assessments will not be received. *Clarke v. City of New York*, 13 N. Y. St. Rep. 290, 292.

##### **The business of a bank.**

The changing of a state bank into a national bank is not "a closing of its business," within the meaning of St. N. Y. 1859, providing for the redemption of a state bank's circulation and releasing it from lia-

bility on such notes as are not presented within six years after the giving of prescribed notice. *Metropolitan Nat. Bank v. Claggett*, 12 Sup. Ct. 60, 62, 141 U. S. 520, 35 L. Ed. 841.

##### **Estate.**

The word "closed," as used in Bankr. Act July 1, 1898, c. 541, § 11, cl. "d," 30 Stat. 549 [U. S. Comp. St. 1901, p. 3420], providing that suits shall not be brought by or against a trustee in bankruptcy two years after the estate has been closed, means properly and finally closed; and if it appears that the order closing the estate was made under a mistake, and that an order should be entered reopening the estate for further administration, it should be held that the estate is open for the purpose of bringing suits, though more than two years have elapsed since the entry of the erroneous order. *Balfafsky v. Abraham*, 67 N. E. 318, 319, 183 Mass. 401.

##### **In reference to saloons.**

"Closed," as applied to saloons on Sundays, requires the proprietor to see that they are not open for any purpose. *People v. Blake*, 18 N. W. 360, 361, 52 Mich. 566.

"Closed," as used in Act No. 259 of 1881, requiring saloons to be closed on Sunday, is employed in a strict sense, and the law is violated if the place used as a saloon is open for any purpose whatever on Sunday. *People v. Waldvogel*, 13 N. W. 620, 49 Mich. 337. The law is violated if the saloon be open, even for the purpose of cleaning it out. *People v. Higgins*, 22 N. W. 309, 311, 56 Mich. 159.

A saloon is not closed, within the meaning of the law, when, after locking up, there remains in the saloon with the saloon keeper and his barkeeper a third person not in his employ, and where these three, after scrubbing out and cleaning up, take a "night-cap" before leaving. *People v. James*, 59 N. W. 236, 100 Mich. 522.

A statute requiring the doors of a saloon to be "closed" at and after a certain hour meant that no one should be inside or get inside thereafter before lawful hours, at least with the consent of the proprietor or his agents, and a saloon is not closed when people can go in and purchase liquor, no matter if the front door is closed, or by what means they gain admittance. *People v. Cummerford*, 25 N. W. 203, 205, 58 Mich. 328.

"Closed," as used in a statute requiring saloons to be closed on Sunday, means "absolutely closed; the front, sides, and rear of that part or room which is used for tipping purposes. It makes no difference as to whether any liquors be sold or not. The offense consists in its being open, not in

\* selling or offering to sell, or giving away. The law is in force as well at the back as at the front door. It surrounds such a house if the whole be used for such a purpose, and if only one room then that room, and commands that all its doors be closed." *Harvey v. State*, 65 Ga. 568, 570.

A saloon is not closed, within the meaning of the law, where the public, or any part of it, are allowed to stay in the saloon. If the doors are closed, and drinking takes place, it cannot be said that such a saloon is closed. *People v. James*, 59 N. W. 236, 100 Mich. 522.

The term "closed," in the statute of 1875, providing that all saloons and places of public resort where intoxicating liquors are sold shall be closed on Sunday and between 11 and 6 in the nighttime, means that the sale shall be entirely stopped and the traffic effectually shut off during such hours, so that drinking and the conveniences for drinking shall be no longer accessible, and that those who frequent the places for that purpose shall be dispersed. *Kurtz v. People*, 33 Mich. 279, 282.

Under a statute which requires the closing of saloons at 11 o'clock at night, where a billiard room, connected with a saloon by an open arch, was without doors, though it is provided with a canvas curtain, with buttons on the sides and at the floor, is kept open after the prescribed hour, the saloon is not closed. *People v. Hughes*, 56 N. W. 942, 97 Mich. 543.

#### A trust.

"Closed," as used with reference to a trust under which a mine held by trustees was to be operated, did not mean when the trustees ceased working by reason of lack of money to pay the expenses. The trust cannot be "closed" until the work is accomplished. To say that the trust has run its course and is completed, because there are no rents, issues, and profits, is simply to say that the trust is accomplished because it could not be accomplished. *Charter Oak Life Ins. Co. v. Gisborne*, 15 Pac. 253, 254, 260, 5 Utah, 319.

#### CLOSE CONFINEMENT.

A verdict finding a person guilty of murder in the first degree and assessing his punishment at "close confinement in the penitentiary" is equivalent to "imprisonment to hard labor for life," as used in Const. 1869, art. 5, § 8, empowering juries to assess imprisonment to hard labor for life as punishment for murder in the first degree. One of the definitions of "close" given by Mr. Webster is "pent up, which we take as tantamount to imprisonment." *Gladden v. State*, 2 Tex. App. 508, 509.

Where one surrendered himself to the control of the jailer at the jail house, he must be regarded as having gone into close confinement, within the meaning of a bond given to procure his release from arrest on execution, conditioned that he should deliver himself into the custody of the keeper of the jail and go into close confinement. *Rollins v. Dow*, 24 Me. (11 Shep.) 123, 124.

The words "close confinement," in chapter 99, Laws 1903, mean that the convict shall be safely and securely kept in confinement pending the execution of the judgment of death. They add nothing to the rigor of the former statute (section 8320, Rev. Codes 1899), which permitted the officer having in charge one under judgment of death, when he deemed the jail insecure or unsafe, to confine such person in any other jail of the state where he could be safely and securely confined; safety and security through confinement being the unchanged purpose of both statutes. These words are not used in this context as synonymous with solitary confinement. *State v. Rooney* (N. D.) 95 N. W. 513, 515.

#### CLOSE CORPORATION.

A "close corporation" is one in which the major part of the persons to whom the powers have been granted, on the happening of vacancies among them, have the right of themselves to appoint others to fill such vacancies, without allowing to the corporators in general any vote or choice in the selection of such new officers. *McKim v. Odom* (Md.) 3 Bland, 407, 416, note.

#### CLOSEHAULED.

Closehauled, as used in Merchants' Shipping Act 1854, § 296, providing that whenever any ship proceeding in one direction meets another ship proceeding in another direction, so that, if both ships were to continue their respective courses, they would pass so near as to involve any risk of a collision, the helms of both ships shall be put to port so as to pass on the port side of each other, and this rule shall be obeyed by all ships, whether on the port or starboard tack, and whether closehauled or not, does not necessarily mean literally as close as possible to the wind, but in the sense that a vessel may be more or less closehauled—may be closehauled, though a little off the wind. *Chadwick v. City of Dublin Steam Packet Co.*, 6 El. & Bl. 771, 778.

A vessel hove to, and making headway and leeway, is a vessel "closehauled," within the meaning of the rule of navigation that, where two vessels are approaching each other, one being closehauled on the port tack, and the other closehauled on the starboard tack, it is the duty of the former to

keep out of the way. *The Ada A. Kennedy* (U. S.) 33 Fed. 623, 624.

### CLOSE OUT.

As the term is used in reference to dealing in futures on margins in boards of trade, bucket shops, etc., "closed out" means the selling of the goods for the want of sufficient margins. *Fortenbury v. State*, 1 S. W. 58, 59, 47 Ark. 188.

"Closing out" a contract on the Cotton Exchange for the sale of cotton on the failure of the purchaser to comply therewith is done by going into the market and buying the cotton at the lowest price at the time that it can be bought, and using that in settlement of the contract with the buyer on the principal contract. *Kingsbury v. Kirwin*, 43 N. Y. Super. Ct. (11 Jones & S.) 451, 454.

### CLOSE PROXIMITY.

"Close proximity" is an equivalent term with "in the immediate vicinity," and both are indefinite terms, either of which, in an instruction regarding a railroad's negligence in allowing weeds to grow near the track, might have been understood as a declaration that it was negligence to leave weeds or bushes anywhere on the right of way. *Ward v. Wilmington & W. R. Co.*, 13 S. E. 926, 928, 109 N. C. 358.

### CLOSE SEASON.

The "close season" for hunting and fishing is a time in the year when all persons are prohibited from hunting and fishing. *State v. Theriault*, 41 Atl. 1030, 1031, 70 Vt. 617, 43 L. R. A. 290, 67 Am. St. Rep. 695.

"Closed season," as used in the game and fish act, means the season wherein the killing of game is prohibited. *Rev. St. Okl.* 1903, § 3076.

The term "close season," as used in the chapter relating to the preservation of fish, game, birds, etc., means that period of time during which an act is prohibited. *V. S.* 1894, 4562.

### CLOSELY GOVERNED.

An instruction that the jury were to be closely governed by the charge was no more than telling them that they were to take the law of the case from the court and be governed by it. *First Congregational Meeting House Soc. v. Town of Rochester*, 29 Atl. 810, 811, 68 Vt. 501.

### CLOTH.

"Fleeces, yarn, and cloth," within the meaning of a statute exempting from execu-

tion 10 sheep, their fleeces, and the yarn or cloth manufactured from the same, is to be construed as including fleeces, yarn, and cloth equal in amount to that grown on 10 sheep, even though the debtor never owned the sheep on which the wool was grown. *Hall v. Penney* (N. Y.) 11 Wend. 44, 45, 25 Am. Dec. 601; *Brackett v. Watkins* (N. Y.) 21 Wend. 68, 69.

### CLOTHING AND FURNISHING GOODS.

Under a chattel mortgage upon "all the stock of clothing and furnishing goods" in a certain store building, no goods will pass which do not come within the description of clothing or furnishing goods, as a description of the stock in a mortgage is restrictive. *Clement v. Hartzell*, 46 Pac. 961, 964, 57 Kan. 482.

### CLOUD ON TITLE.

"A cloud upon title" is a title or incumbrance apparently valid, but in fact invalid. *Bissell v. Kellogg* (N. Y.) 60 Barb. 617, 629; *Teal v. Collins*, 9 Or. 89, 92; *Goodkind v. Bartlett*, 26 N. E. 387, 136 Ill. 18, 21.

"A cloud upon one's title is something which shows prima facie some right of a third person to it." *Waterbury Sav. Bank v. Lawler*, 46 Conn. 243, 245; *Gilman v. Van Brunt*, 13 N. W. 125, 29 Minn. 271.

A cloud on a title is but an apparent defect, for the title sole and absolute in fee is really in the person moving against the cloud. The density of the cloud can make no difference in the right to have it removed. Anything of this kind that has a tendency, even in a slight degree, to cast doubt on the owner's title and to stand in the way of a full and free exercise of his ownership, is a cloud on his title which the law will recognize and remove. *Whitney v. City of Port Huron*, 50 N. W. 316, 317, 88 Mich. 268, 26 Am. St. Rep. 291.

A cloud on title is an outstanding claim or incumbrance which, if valid, would affect or impair the title of the owner of a particular estate, and which apparently and on its face has that effect, but which can be shown by extrinsic proof to be invalid or inapplicable to the estate in question. It may be a conveyance, a mortgage, a judgment, tax levy, etc. *Scofield v. City of Lansing*, 17 Mich. 437, 446.

"It has never been held that to constitute a cloud upon title there must be a title upon record apparently valid. It is sufficient if there be a deed valid upon its face, accompanied with a claim of title based upon facts showing an apparent title under such circumstances that a court of equity can see that the deed is likely to work mischief to the real owner of the property. Where defendant claims that a deed was

executed in such form and so delivered as to vest some interest in the land in the grantee, which interest defendant claims to have purchased at a sheriff's sale, under execution, against the grantee, and he threatens to perfect and enforce his title, his claim constitutes a cloud upon the title." *Fonda v. Sage*, 48 N. Y. 173, 181.

"Cloud on title" may be said to be the semblance of title, either legal or equitable, or a claim of an interest in lands appearing in some legal form, but which is in fact unfounded, or which it would be inequitable to enforce. If the claim sought to be removed is valid and may be enforced either at law or in equity, it cannot be said to be a cloud. *Rigdon v. Shirk*, 19 N. E. 698, 699, 127 Ill. 411.

"Cloud upon the title," as used in *Rev. St. Miss. 1871*, p. 191, § 975, authorizing the owner of real estate to file a bill in equity to remove a cloud from the title, will be construed to mean a pretended title or right which is clearly invalid or inequitable, but which may embarrass the real owner in controverting it either at the present or future time. *Phelps v. Harris*, 101 U. S. 370, 374, 25 L. Ed. 855.

#### **As requiring evidence to avoid.**

To Mr. Justice Field of the supreme bench of the United States is probably due the credit of first defining accurately and precisely the correct test of "cloud on title" which should govern in all cases. Discussing at length this question in *Pixley v. Huggins*, 15 Cal. 127, 133, he said: "The true test, as we conceive, by which the question whether a deed would cast a cloud on the title of the plaintiff may be determined, is this: Would the owner of the property in an action of ejectment brought by the adverse party, founded on the deed, be required to offer evidence to defeat a recovery? If such proof would be necessary, the cloud would exist. If the proof would be unnecessary, no shade would be cast by the presence of the deed. If the action would fall of its own weight without proof in rebuttal, no occasion could arise for the equitable interposition of the court, as in the case of a deed void on its face, or which was the result of proceedings void on their face, requiring no extrinsic evidence to disclose their illegality. All actions resting on instruments of that character must necessarily fail." *Thompson v. Etowah Iron Co.*, 17 S. E. 663, 664, 91 Ga. 538.

A cloud on title is something, such as a mortgage, deed, or judgment, etc., which shows prima facie some interest in a third person in or to the property adverse to the person vested with the real title to the same, or to one having an interest therein. Where an instrument upon its face shows prima facie such an adverse interest in a third party and is of such character as that, if put in

evidence in an action by the real owner, or by one having such an interest to quiet his title, he would be compelled in defense to prove his own title, it constitutes a cloud which a court of equity, if appealed to, will remove. Thus where, after giving a contract to a purchaser of land by which a deed is to be given after payment, the owner executes a trust deed to secure a note, such trust deed is a cloud on title. *Schenck v. Wicks*, 65 Pac. 732, 734, 23 Utah, 576.

In order that there may be a cloud upon the title, there must at least be something which can be pointed out, and which has some appearance of furnishing a valid objection to the petitioner's title. For examples, see *Parker v. Shannon*, 13 N. E. 153, 156, 121 Ill. 452; *Rea v. Longstreet*, 54 Ala. 291, 294; *Lytle v. Sandefur*, 9 South. 260, 261, 93 Ala. 396. And so, where a petition of one who had purchased under execution sale merely alleged that the former owner's whereabouts were unknown to the petitioner, who had reason to believe that he would not return, and that petitioner's title was clouded by the possibility that said former owner might maintain a claim adverse to him, based upon some alleged defect in the deed, no sufficient foundation was laid for the action. *Gilman v. Gilman*, 50 N. E. 452, 171 Mass. 46.

#### **Instrument defective on face.**

A cloud upon title is a title of such a character as that, if asserted by action and put in evidence, it would drive the other party to the production of his own title in order to establish a defense. If, on the other hand, the title be void on its face, if it be a nullity, a mere *felo de se* when produced, so that an action based upon it would fall of its own weight, it does not necessarily constitute a cloud upon the title. *Lick v. Ray*, 43 Cal. 83, 87.

"To constitute a cloud upon title of lands, there must be some color of title shown in the defendant. The conveyance of land by the grantor who sets up no title whatever does not cast any cloud over the title of the true owner." *Dunklin County v. Clark*, 51 Mo. 60, 62.

A "cloud upon title" is said to exist when a claim of title, which is made to land, appears to be valid upon the face of the record, and the defect therein can only be made to appear by extrinsic evidence, particularly if that evidence depends upon oral testimony to establish it. When a defect appears on the face of the record, through which the opposite party can alone claim the title, there is not a cloud upon the title. *Ward v. Dewey*, 16 N. Y. 519, 522.

#### **As applicable to personality.**

In legal parlance, "cloud upon title" arises with reference to real estate only. A cir-

cular letter of the state beer inspector, notifying merchants that they must submit their product for inspection, and his pretended right to enforce the act, will not constitute a cloud upon the title to their property and business. *State ex rel. Kenamore v. Wood*, 56 S. W. 474, 477, 155 Mo. 425, 48 L. R. A. 596.

#### **Tax proceedings.**

A tax roll which was delivered to the treasurer for collection, the tax being then declared to be a lien on the premises, was a cloud on the title, though the time when the tax was due had not yet arrived. *Scotfield v. Lansing*, 17 Mich. 437, 446.

Cooley, *Tax'n*, 542, says: "A cloud upon one's title is something which constitutes an apparent incumbrance upon it, or an apparent defect in it; something that shows prima facie some right of a third party either to the whole or some interest in it. An illegal tax may or may not constitute such a cloud. If the alleged tax has no semblance of legality, if upon the face of the proceedings it is wholly unwarranted by law, or for any reason totally void, so that any person inspecting the record and comparing it with the law is at once apprised of the illegality, the tax, it would seem, could neither constitute an incumbrance nor an apparent defect of title, and therefore in law could constitute no cloud." *City of Detroit v. Martin*, 34 Mich. 170, 173, 22 Am. Rep. 512; *Frost v. Leatherman*, 20 N. W. 705, 707, 55 Mich. 33. When the illegality or defect does not appear on the face of the record, but must be shown by evidence aliunde, it will constitute a cloud. *Montgomery v. Cowlitz County*, 44 Pac. 259, 260, 14 Wash. 230.

Cloud on title consists of any instrument purporting by its terms to convey land from the original source of title, however invalid it may be. It nevertheless creates a cloud on the title if it is valid on its face and requires extrinsic evidence to show its invalidity. Thus a tax deed emanating from the Auditor General, if it did not confer an absolute title, would cast a cloud on the title of the owner of the property, and would materially affect the market value and salability of the land. *Stoddard v. Prescott*, 25 N. W. 508, 510, 58 Mich. 542.

## **CLUB.**

As association, see "Association."

#### **As voluntary association.**

"A club is a definite association organized for indefinite existence, not an ephemeral meeting for a particular occasion, to be lost in the crowd at its dissolution." *Eichbaum v. Irons*, 6 Watts & S. 67, 69, 40 Am. Dec. 540.

A club is an association of individuals for pleasure or profit. *Martin v. State*, 59 Ala. 34.

#### **In relation to liquor selling.**

The word "club" has no very definite meaning. Clubs are formed for all sorts of purposes, and there is no uniformity in their constitutions and rules. It is well known that clubs exist which limit the number of members and select them with great care, which own considerable property in common, and in which the food and drink furnished to the members for money is but one of many conveniences which the members enjoy. If a club were really formed solely or mainly for the purpose of furnishing intoxicating liquors to its members, and any person could become a member by purchasing tickets which would entitle the holder to receive such intoxicating liquors as he called for, upon a valuation determined by the club, the organization itself might show that it was the intention to sell intoxicating liquors to any person who offered to buy, and the sale of what might be called a "temporary membership" in the club, with a sale of the liquors, would not substantially change the character of the transaction. One inquiry always is, whether the organization is bona fide a club with limited membership, into which admission cannot be obtained by any person at his pleasure, and in which the property is actually owned in common, with the mutual rights and obligations which belong to such common ownership under the constitution and rules of the club, or whether either the form of the club has been adopted for other purposes, with the intention and understanding that the mutual rights and obligations of the members shall not be such as the organization purports to create, or a mere name has been assumed without any real organization behind it. *Commonwealth v. Pomphret*, 137 Mass. 564, 567, 50 Am. Rep. 340.

#### **As a weapon.**

"Club," in an indictment charging a felonious assault with a club, is not a term sufficiently generic in its nature to include a pistol. *State v. Braxton*, 18 South. 745, 47 La. Ann. 158.

A club is a heavy staff or stick fit to be used in the hand as a weapon. *State v. Phillips*, 10 S. E. 463, 464, 104 N. C. 786.

## **CLUB CATERER.**

One may be an innkeeper without being a club caterer, or he may be a club caterer without being an innkeeper, or he may be both; but if he is, the two employments are so far separate and distinct in respect of duties and liabilities as not to make him responsible in the one capacity for liabilities incurred in the other. *Amey v. Win-*

chester, 39 Atl. 487, 488, 68 N. H. 447, 39 L. R. A. 760, 73 Am. St. Rep. 614.

## CO.

### As company.

"Co." is a well understood abbreviation of the word "company." West Chicago St. R. Co. v. People, 40 N. E. 599, 600, 155 Ill. 299 (citing Keith v. Sturges, 51 Ill. 142).

The abbreviation "& Co." added to a name does not necessarily give rise to the presumption of the existence of a partnership. Schroeder v. Turner, 13 Atl. 331, 332, 68 Md. 508.

### As county.

The fact that depositions were taken pursuant to a commission addressed "to any notary public within and for Dauphin Co., Pa.," was held not ground for suppressing such depositions. It is a matter of common knowledge that "Co." is used as an abbreviation of "county," and "Pa." is an abbreviation of "Pennsylvania," and proof of such facts was not required. The abbreviations were so used in the commission, but they could have had no other meanings than those names; hence there was no ambiguity, and no sufficient ground for objecting thereto. Gilman v. Sheets, 43 N. W. 299, 300, 78 Iowa, 499.

## COACH.

See "Hackney Coach"; "Mail Coach"; "Separate Coach"; "Stage Coach."  
As wagon, see "Wagon."

"Coach" is a generic term. It is a kind of carriage, and is distinguished from other vehicles chiefly as being a covered box hung on leathers, with four wheels. 3 Enc. Amer. 271, tit. "Coach." As used in the charter of a toll road fixing a rate of toll for every "coach," etc., the term includes mail coaches and stage coaches. Cincinnati, L. & S. Turnpike Co. v. Neil, 9 Ohio (9 Ham.) 11, 12.

"Coach or other four wheel spring carriage," as used in St. 1804, c. 125, § 4, providing that a certain toll should be paid for each "coach or other four wheel spring carriage" passing over turnpikes, should be construed to include a stage carriage, the body of which was suspended on thorough-braces attached to four-braced iron jacks. The words "other four wheel spring carriage" do not by necessary implication qualify the preceding word "coach," so that no coach would be chargeable with the toll unless it was also a spring carriage. A species of carriage which was and is well known by the name of "coach" is chargeable with toll, whether known to the trade or coachmakers as a

"spring carriage" or not. Housatonic River Turnpike Corp. v. Frink, 32 Mass. (15 Pick.) 443, 444.

A city ordinance required the defendant to pay the annual license fees for each "car" now allowed by law, and the only license fees at the time allowed were those for "coaches." Held, that the term "car" was a sufficient synonym of the term "coach," so that defendant was liable for the tax previously required of coaches. City of New York v. Third Ave. R. Co., 1 N. Y. Supp. 397, 400, 48 Hun, 621; City of New York v. Third Ave. Ry. Co., 22 N. E. 755, 117 N. Y. 404.

## COADJUTOR BISHOP.

A "coadjutor bishop" is a bishop who is appointed to perform the functions of a regular bishop who is old or infirm. Olcott v. Gabert, 23 S. W. 985, 987, 86 Tex. 121.

## COAL.

As a mineral, see "Mineral."

The term "coal," in an order to a miner for coal, is to be construed to mean coal of a merchantable character. Edwards v. Hathaway (Pa.) 12 Leg. Int. 58.

"Coals," as used in St. 1 & 2 Wm. IV, c. 76, §§ 23, 60, imposing a duty upon coals imported into London, does not include an article composed of coal dust mixed with 13 per cent. of pitch and lime, though there was no purpose to which the ordinary pit coal could be applied to which coal dust, without the admixture of pitch and lime, could not also be applied. City of London v. Parkinson, 10 C. B. 228.

On an issue as to whether the term "coal" in a marine policy included a substance called "patent fuel," it was held that a witness acquainted with the composition and mode of preparation of the fuel was competent to testify whether it was included in the term "coal," though he had never dealt in patent fuel or in coal, either as a merchant or an underwriter. The court say that "if coal were broken by a patented machine, and thereby had a peculiar shape, it might well be called 'patent fuel.'" Howard v. Great Western Ins. Co., 109 Mass. 384, 388.

## COAL BARGE.

A "coal barge" is a rough square-cornered box from 156 to 180 feet long, about 26 feet wide and 8 to 10 feet deep, specially made for the transportation of coal down the Mississippi river and its tributaries. It is usually sold with the coal, and when the coal is unloaded is broken up for old lumber and firewood, but sometimes when in good condi-

tion, and if such boats are in demand, is towed back up the river and used once more. It is not a "ship" or "vessel" within the admiralty laws. *Wood v. Two Barges* (U. S.) 46 Fed. 202, 204.

### COAL LEASE.

A coal lease is an instrument conveying coal, with the right to mine the same. *Montooth v. Gamble*, 16 Atl. 594, 595, 123 Pa. 240.

### COAL MINE.

"A 'going coal mine' is not merely a hole in the ground. It is made up of shafts, drifts, slopes, engines, machinery, platforms, cars, tracks, scales, etc." *Central Trust Co. v. Sheffield & B. Coal, Iron & Ry. Co.* (U. S.) 42 Fed. 106, 110, 9 L. R. A. 67.

The term "coal mine," in a statute making it the duty of the owners or operators of coal mines to fence the top of each and every shaft of the mine by gates, does not include a pit intended to be used, when completed, as a shaft of a coal mine which it is intended to open and work. In *Appeal of Westmoreland Coal Co.*, 85 Pa. 344, it was ruled that the term "mine," when applied to coal, is equivalent to a worked vein, for it is there said that by working a vein it becomes a mine. In *Astry v. Ballard*, 2 Mining Rep. 291, it was held that a seam of coal unmined was not a "coal mine" in the natural, obvious, or popular meaning of those words. *Springside Coal Min. Co. v. Grogan*, 53 Ill. App. 60, 65.

The term "coal mine," as used in the acts relating to mines and mining, includes the shafts, slopes, drifts, or inclined planes connected with the excavations penetrating coal stratum or strata, which excavations are ventilated by one general air current or division thereof, and connected by one general system of mine railroads over which coal may be delivered to one or more parts outside the mine. *P. & L. Dig. Laws Pa. 1897*, vol. 4, col. 1249, § 33.

The term "coal mine or colliery," as used in an act relating to mines and mining, includes every operation and work, both underground and aboveground, used or to be used for the purpose of mining and preparing coal. *P. & L. Dig. Laws Pa. 1894*, vol. 2, col. 3110, § 193.

### COAL OIL.

"Kerosene" is a term originally employed as a trade-mark for a mixture of certain liquid hydrocarbons used for purposes of illumination. It has been prepared from bituminous coal, bituminous shales, asphaltum, malthus, wood, resin, fish oil, and coal tar, but it is doubtless true that at the pres-

ent time its practical business source is petroleum, from which it is obtained by a process of distillation and refinement. It is therefore, in a commercial sense, a refined coal or earth oil. *Bennett v. North British & Mercantile Ins. Co.*, 81 N. Y. 273, 275, 37 Am. Rep. 501.

Naphtha, benzine or benzol, and kerosene are all refined coal or earth oils, not differing in their nature, but only in the degree of inflammability, kerosene being much less inflammable than either of the others. *Morse v. Buffalo Fire & Marine Ins. Co.*, 30 Wis. 534, 536, 11 Am. Rep. 587.

### COAL PRIVILEGE.

A "coal privilege" is a grant by the owner of coal lands of the right "of mining and taking out of the coal lying under a certain piece of ground, or a given number of acres, either at a specified rate per bushel or so much per acre." In such case the grantee has a right to mine and remove to the pit's mouth, if necessary, all minerals or other substances found in his way, no matter how valuable they may be. *Peterson v. Kier* (Pa.) 2 Pittsb. R. 191, 199.

### COAL-TAR PREPARATIONS.

"Coal-tar preparations," as used in *Tariff Act* Oct. 1, 1890, par. 19, does not include antipyrine, a patented medicine, ready for administration in the condition as imported, made of the aniline from coal tar, alcohol being chemically used and broken up in the manufacture. *Schulze-Berge v. United States* (U. S.) 66 Fed. 748, 749.

"Coal-tar preparations," as used in *Act* Oct. 1, 1890, par. 19, include sulphotoluic acid, a remote derivative of coal tar by a combination with sulphuric acid, its dominant element being derived from coal tar, and the chief use of the article being in the construction of coal tar dyes by combining with a base. *William J. Matheson & Co. v. United States* (U. S.) 65 Fed. 422.

### COAST.

The "coast" is the shore. *United States v. Pope* (U. S.) 28 Fed. Cas. 629, 630.

The definition of the term "coast" or "seashore" as "the contact of the mainland with the main sea, where no bay intervenes, and with the latter wherever it exists," is substantially correct. The term "coast" undoubtedly suggests to the mind the place of meeting between the mainland and the water of the sea, where no bay intervenes, but it does not so readily suggest also the shores of the bay. It is rather by a process of reasoning than suggestion that it is made to comprehend the shores of the ocean and of



the bays as one broken line. *Hamilton v. Manifee*, 11 Tex. 718, 751.

### COAST-TRADE LICENSE.

A coasting trade license is a warrant to traverse the water washing or bounding the coasts of the United States. Such a license conveys no privilege to use, free of tolls or of any condition whatsoever, the canals constructed by a state, or the water courses partaking of the character of canals, exclusively within the interior of a state, and made practicable for navigation by the funds of the state. *Veazie v. Moor*, 55 U. S. (14 How.) 568, 574, 14 L. Ed. 545.

### COAST WATERS.

Within the navigation act "coast waters" are tide waters navigable from the ocean by ocean craft, and the term embraces all waters opening directly or indirectly into the ocean, and navigable by ships, foreign or domestic, coming in from the ocean, of draft as great as is drawn by the larger ships which traverse the open seas. *The Victory* (U. S.) 63 Fed. 631, 636; *Id.*, 68 Fed. 395, 397, 15 C. C. A. 490 (citing *The Britannia*, 153 U. S. 130, 14 Sup. Ct. 795, 38 L. Ed. 660; *The John King* [U. S.] 49 Fed. 469, 1 C. C. A. 819).

"Coast waters," as used in Act March 3, 1885, c. 354 (23 Stat. 438), providing that the international regulations shall apply to navigation on the high seas in all "coast waters" of the United States, manifestly embrace not merely the waters that face the open sea, but the bays, the passages, the inlets, and sounds formed by the islands that skirt the coast. *The Garden City* (U. S.) 26 Fed. 766, 773.

### COASTER.

"Coaster" is a term applied to vessels plying exclusively between domestic ports, and usually to those engaged in domestic trade, as distinguished from vessels engaged in the foreign trade, or plying between a port of the United States and a port of a foreign country. The mere fact that an ocean-going steamer may touch at some other port of the United States after leaving her port of departure would not make her a "coaster." Pleasure yachts, designed as models of naval architecture, are not coasters, for they are not allowed to transport merchandise or carry passengers for pay. *Belden v. Chase*, 14 Sup. Ct. 264, 271, 150 U. S. 674, 37 L. Ed. 1218.

### COASTING.

By "coasting," as used by a motorman who testified that his car was coasting when the accident occurred, was meant that the current of electricity was turned off and

no power applied to the car other than the force of gravity on the downgrade. *Peterson v. Minneapolis St. Ry. Co.*, 95 N. W. 751, 752, 90 Minn. 52.

### COASTING TRADE.

"Coasting trade" means a commercial intercourse carried on between different districts in different states, between different districts in the same state, and between different places in the same district, on the sea coast or on a navigable river." *North River Steamboat Co. v. Livingston* (N. Y.) 3 Cow. 713, 747.

The phrase "vessel in coasting trade" indicates "vessels engaged in the domestic trade or plying between port and port in the United States, as contradistinguished from those vessels engaged in the foreign trade or plying between a port of the United States and a port of a foreign country." *City and County of San Francisco v. California Steam Nav. Co.*, 10 Cal. 504, 507.

#### Coastwise trade synonymous.

The term "coasting trade" as used in the United States statutes relating to commerce, navigation, and revenue, is synonymous with the term "coastwise trade" as used in such statutes. *Ravesies v. United States* (U. S.) 37 Fed. 447.

#### Use of rivers or canals.

"Coasting trade," as used in Act Cong. 1838, requiring a license to carry on the coasting trade, means the trade along the shore. The coast is the shore. To coast is to navigate along the shore. A license to carry on the coasting trade is not required for a ferryboat which merely crosses a river, for it cannot in any proper sense be said to be engaged in any trade, nor can it be said to "coast" or be "employed in coasting trade." *United States v. Pope* (U. S.) 28 Fed. Cas. 629, 630; *United States v. Morrison* (U. S.) 28 Fed. Cas. 579, 584.

### COASTING VESSEL.

"Coasting vessel" is a term applied to vessels plying exclusively between domestic ports, and usually to those engaged in domestic trade, as distinguished from vessels engaged in the foreign trade or plying between a port of the United States and a port of a foreign country. The mere fact that an ocean-going steamer may touch at some other port of the United States after leaving her port of departure would not make her a coasting vessel. Pleasure yachts, designed as models of naval architecture, are not coasting vessels, for they are not allowed to transport merchandise or carry passengers for pay. *Belden v. Chase*, 14 Sup. Ct. 264, 271, 150 U. S. 674, 37 L. Ed. 1218.

(reversing *Chase v. Belden*, 9 N. E. 852, 854, 104 N. Y. 86, 22 N. E. 963, 117 N. Y. 637).

### COASTWISE TRADE.

"Vessels plying coastwise," as used in St. 1852, p. 104, § 6, providing certain pilotage duties on vessels plying coastwise, "indicate vessels engaged in the domestic trade, or plying between port and port in the United States, as contradistinguished from those vessels engaged in the foreign trade, or plying between a port in the United States and a port of a foreign country." *City and County of San Francisco v. California Steam Nav. Co.*, 10 Cal. 504, 507.

The term "coastwise trade" in Act June 1, 1872, 17 Stat. 238, authorizing the importation in bond of certain materials which may be necessary for the construction and equipment of vessels built in the United States for the purpose of being employed in the foreign trade, including the trade between the Atlantic and Pacific ports of the United States, and the use thereof for such purposes, free of duty, but providing that the vessels receiving the benefits of the section shall not be allowed to engage in the coastwise trade of the United States more than two months in any one year except upon the payment of such duties, does not include trade between the Atlantic and Pacific ports of the United States, but such trade, according to the definition of the statute, is "foreign trade." *United States v. Patten* (U. S.) 27 Fed. Cas. 460, 461.

To be "engaged in the coastwise trade" means to be employed, to be occupied. The coast is the seashore, coastwise by way of the coast, alongshore. "Coastwise trade" means trade or intercourse carried on by sea between two ports or countries belonging to the same country. Coastwise trade may be a part of the commerce among the several states, but commerce among the several states is not necessarily coastwise trade. *Ravesles v. The United States* (U. S.) 35 Fed. 917, 919.

A vessel engaged in the carrying trade on a navigable river is engaged in the "coastwise trade" within the meaning of Act June 19, 1886, c. 421, 24 Stat. 79 [U. S. Comp. St. 1901, p. 2991], entitling the shipping commissioner to fees for shipping seamen on vessels engaged in the coastwise trade. *Ravesles v. United States* (U. S.) 37 Fed. 447.

### COBBLESTONE.

"Cobblestone" is defined in the *Century Dictionary* as a cobble or rounded stone, especially such a stone as used in paving; and a "cobble" is defined as a stone rounded by the action of water, and of the size suitable for use in paving. *Doyle v. City of New York*, 69 N. Y. Supp. 120, 122, 58 App. Div. 588.

### COCOA.

"Cocoa manufactured," as used in the Tariff Act 1890, providing for the taxation of cocoa manufactured, "is not a commercial term, and is broad enough to include the preparations of chocolate which are not more specifically mentioned in the act." In re *Schilling* (U. S.) 53 Fed. 81, 84, 3 C. C. A. 440.

### CODE.

See "Black Code"; "Probate Code."

A code is "a system of law; a systematic and complete body of law." *Johnson v. Harrison*, 50 N. W. 923, 924, 47 Minn. 575, 28 Am. St. Rep. 382.

"There is quite a difference between a code of laws for a state and a compilation in revised form of its statutes. The code is broader in its scope, and more comprehensive in its purposes. Its general object is to embody, as near as practicable, all the law of the state, from whatever source derived. When properly adopted by the law-making power of the state, it has the same effect as one general act of the Legislature containing all the provisions embraced in the volume that is thus adopted. It is more than evidentiary of the law; it is the law itself. Whenever the Legislature, therefore, employs such words as 'adopting a code,' no other legitimate or reasonable construction can be given the language itself than an intention to enact and make of force as a statute every provision in the entire work which it has under consideration. In 6 Am. & Eng. Enc. Law (2d Ed.) p. 173, it is declared that the word 'code' is used frequently in the United States to signify a concise, comprehensive, systematic re-enactment of the law, deduced from both its principal sources—the pre-existing statutes and the adjudication of courts—as distinguished from compilations of statute law only. We quote the following from *Black on Interpretation of Laws*, p. 363: 'Although a code or revision may be made up of many provisions drawn from various sources, though it may include the whole or parts of many previous laws and reject many others in whole or in part, though it may change or modify the existing law, or though it may add to the body of law previously in force many new provisions, yet it is to be considered as one homogenous whole, established 'uno flatu.' All its various parts or sections are to be considered and interpreted as if they were parts of a single statute. And hence, according to a well-known rule, the various provisions, if apparently conflicting, must, if possible, be brought into harmony and agreement. In order to bring about this harmony and agreement, the court which is called upon to interpret the code will look through the entire work, and gather

such assistance as may be afforded by a complete survey of it." *Central of Georgia Ry. Co. v. State*, 31 S. E. 531, 534, 104 Ga. 831, 42 L. R. A. 518.

A "code" is defined by lexicographers to be a general collection or compilation of laws by public authority. In its more restricted sense, as intended by the act of June 9, 1870, authorizing the compilation of a revised code, "It means a collection and compilation of the general statutes. Manifestly the intent was that the body of the statute of law upon all general subjects should be embraced in the revision." *Mobile & O. R. Co. v. Weiner*, 49 Miss. 725, 739.

### CODE OF CIVIL PROCEDURE.

"The 'Code of Civil Procedure' is a name given to a large part of the general laws of the state. The part of the great body of our laws which is to be found under that name is not confined to any particular subject or subjects, but includes substantive law, criminal law, and legislation that might properly be classed under any category as well as under civil procedure." *Lewis v. Dunne*, 66 Pac. 478, 480, 134 Cal. 291, 55 L. R. A. 833, 86 Am. St. Rep. 257.

### CODICIL.

As included in will, see "Will."

"A codicil is a part of the will. It is executed with the same formalities, and the testamentary disposition sought by it to be made is treated and is the same as though the provisions were actually incorporated in the body of the will itself." A codicil, in fact, is a will, and is to be carried out by the executors named in the will, and therefore the same rules apply as would apply to the rights of the parties acquired under a will. In *re Stapelton's Will*, 75 N. Y. Supp. 637, 659, 71 App. Div. 1.

A codicil is a part of a will, and the two are to be construed together as one instrument. If the codicil expressly revoked any part of the will, then the part revoked must be treated as stricken out. If any part or clause of the codicil be irreconcilably repugnant to the clause or clauses of the will, then to that extent the codicil supplants the will, and the latter becomes inoperative. But it supplants a will only to the extent that the repugnancy is irreconcilable. *Grimball v. Patton*, 70 Ala. 626, 631.

A codicil "is some addition to or qualification of a last will and testament. A codicil is part of the will to which it is attached or refers, and both must be taken and construed together as one instrument. The codicil recognizes the existence of the original, changing it in part and affirming it in those parts in which it is not altered, and

hence it has been well established that a codicil, executed with the solemnities required by the statute for passing lands, is a republication of the will, and both taken together make but one will." *Proctor v. Clarke* (N. Y.) 3 Redf. Sur. 445, 448.

When a codicil is executed with those formalities of execution prescribed by the statute, it is a final testamentary disposition, and the will to which it is shown to be the codicil, if itself an existent and a completed instrument according to the statute, is taken up and incorporated, so that the two taken together are deemed to, and necessarily do, express the final testamentary intention. In such a case it must logically and manifestly follow that any other will or codicil prior in date to the codicil in probate is revoked, and the presence of express words to that effect in the codicil is unnecessary. In *re Campbell's Will*, 62 N. E. 1070, 1071, 170 N. Y. 84.

A codicil is a supplement to a will, or an addition made by the testator and annexed to, and to be taken as a part of, a testament—being for its explanation or alteration, or to make some addition to or subtraction from the former disposition of the testator. *Green v. Lane*, 45 N. C. 102, 113 (citing 2 Bl. Comm. 500; *Wms. Ex'rs*, 8).

A codicil is an addition or supplement to a will, either to add to, take from, or alter the provisions of the will. *Civ. Code Ga.* 1895, § 3263.

"A codicil is a clause added to the will after its execution, the purpose of which usually is to alter, enlarge, or restrain the provisions of the will, or to explain, confirm, and republish it. It does not supersede the will as an after-made will would do, but it is a part of it, to be construed with it as one entire instrument." *Lamb v. Lamb*, 28 Mass. (11 Pick.) 371, 376.

"A 'codicil' is defined to be some addition to or qualification of one's last will and testament. For certain purposes it brings the will to its own date. It is to be regarded as a part thereof. Both are to be construed as one instrument, and they are alike subject to the rules of law governing the admission of parol evidence for the purpose of adding to, varying, or explaining their respective contents. The authority of both rests upon the execution of a right in accordance to statutory requirements." *Dunham v. Averill*, 45 Conn. 61, 79, 29 Am. Rep. 642.

If a second will is not complete, but is only a variation or subtraction from a former will, it is in the nature of a codicil. The very meaning of the word "codicil," as now used, is something annexed, or added. In *re Purdy's Will*, 20 N. Y. Supp. 307, 308.

A codicil duly executed is said in *Tilden v. Tilden*, 79 Mass. (13 Gray) 103, to be as

addition or supplement to a will, and not to constitute a revocation thereof, except in the precise degree in which it is inconsistent therewith, unless there be words of revocation. *Pendergast v. Tibbetts*, 41 N. E. 294, 295, 164 Mass. 270.

A "codicil," within the meaning of the statute prohibiting witnesses to any will or codicil from taking, etc., cannot be limited to codicils devising real property only, but includes all codicils. *Lees v. Summersgill*, 17 Ves. 508, 511.

A codicil is at once amalgamated in the will and becomes a part of it. *Austin v. Oakes*, 1 N. Y. Supp. 307, 310, 48 Hun, 492.

## CO-EMPLOYEE.

See, also, "Fellow Servant."

The essential element of common employment is a common employer and payment from a common fund. The weight of authority is to the effect that all who work for a common master, or who are subject to a common control, or derive their compensation from a common source and are engaged in the same general employment, working to accomplish the same general end, though it may be in different departments or grades of it, are co-employees. *Snyder v. Viola Mining & Smelting Co.*, 26 Pac. 127, 129, 3 Idaho, 28.

Co-employees are persons engaged in the same general service of the same master; that is, engaged at work which may reasonably be regarded as the same; but if they are in different departments of the work they cannot be regarded as co-employees, though the work of all the departments may be said to be in a general sense conducive to the finishing and completion of the entire business. Thus, train dispatchers and trainmasters cannot be said to be co-employees of locomotive firemen. *Crew v. St. Louis, K. & N. W. Ry. Co. (U. S.)* 20 Fed. 87.

Co-employees are persons or servants employed by the same master, assisting each other in the same line of work. There are two classes of cases in which the employees of the same master are not co-employees. The first class is where the negligent employee is one who has the general management of and control over some portion or line of the master's business, and has control over the injured employee, and the employees engaged in that portion or line of business. The other class of cases is where two or more sets of employees are engaged in different lines of employment, as where one set of railroad employees has charge of a railroad train and its operation, while the other set keep the road in proper condition and repair. At common law, whenever a master delegates to any officer, servant, or employee, high or low, the performance of

any of the duties of the master, such as the duty to provide the servant with a reasonably safe place in which to work, with reasonably safe machinery, tools, and implements, and reasonably safe materials to work with, and with suitable and competent fellow servants, then such officer, servant, or agent stands in the place of the master, and becomes what is known in the law as a "vice principal," for whose acts the master is liable to the same extent as though the master had performed the acts or was guilty of negligence. *St. Louis & S. F. R. Co. v. Weaver*, 11 Pac. 408, 416, 35 Kan. 412, 57 Am. Rep. 176.

## COERCE—COERCION.

See, also, "Duress."

The word "coerce" means to restrain by force, especially by law or authority; to repress. The word "coerce" had at first only the negative sense of checking or restraining by force, as to coerce a bad man by punishments, or a prisoner with fetters; but it has now gained a positive sense, namely, that of driving a person into the performance of some act which is required of him by another, as to coerce a man to sign a contract, etc. In the latter sense, which is now a prevailing one, "coerce" differs but little from the word "compel," yet there is a distinction between them, "coercion" being usually accomplished by indirect means, as threats or intimidation, physical force being more rarely employed in coercing. *State v. Darlington*, 53 N. E. 925, 926, 153 Ind. 1; *Chappell v. Trent*, 19 S. E. 814, 342, 90 Va. 849.

To constitute coercion or duress which will be regarded as sufficient to make a payment involuntary, there must be some actual or threatened exercise of power, possessed or believed to be possessed by the party exacting or receiving the payment, over the person and property of another, from which the latter has no other means of immediate relief than by making the payment. *Radich v. Hutchins*, 95 U. S. 210, 213, 24 L. Ed. 409; *Buford v. Lonergan*, 22 Pac. 164, 166, 6 Utah, 301; *Union Ins. Co. v. City of Alleghany*, 101 Pa. 250, 252; *Shuch v. Interstate Building & Loan Ass'n*, 41 S. E. 28, 31, 63 S. C. 134; *Garrison v. Tillinghast*, 18 Cal. 404, 407. Money paid under protest does not make the payment a compulsory one, even though the party be under no legal obligation to pay. *Union Ins. Co. v. City of Alleghany*, 101 Pa. 250, 252.

"Compulsion" or "coercion" within the rule that a payment of money not owing was voluntary and cannot be recovered, unless its payment was procured by compulsion or coercion, is to be understood as importing some actual or threatened exercise of power possessed or supposed to be possessed by the

party receiving the payment over the person or property of the party making it, through which the latter has no other means of immediate relief than by advancing the money. *Brumagin v. Tillinghast*, 18 Cal. 265, 272, 79 Am. Dec. 176; *Garrison v. Tillinghast*, 18 Cal. 404, 407.

In *Peyser v. City of New York*, 70 N. Y. 497, 26 Am. Rep. 624, *Folger, J.*, speaking for the court, said: "I have spoken of coercion in fact and coercion by law; by the first I mean that duress of person or goods where present liberty of person or immediate possession of goods is so needful and desirable as that an action or proceeding at law will not at all answer the pressing purpose. Hence an instruction that if plaintiffs, in order to obtain possession of property mentioned in the contract, were compelled when making the final payment, to pay for any property to which they were entitled but which was not delivered to them, such payment was in law a payment under duress and might be recovered, was correct." *Burford v. Lonergan*, 22 Pac. 164, 166, 6 Utah, 301.

#### Of jury.

An attempt to influence the jury by referring to the time they are to be kept together or the inconvenience to which they are to be subjected in case they are so pertinacious as to adhere to their individual opinions, or an attempt to force a verdict by threats or intimidations, amounts to coercion sufficient as a ground for setting aside the verdict. *People v. Sheldon*, 50 N. E. 840, 843, 156 N. Y. 268, 41 L. R. A. 644, 66 Am. St. Rep. 564.

#### Of wife.

Coercion means "compulsion, force, and may be either actual, where physical force is used to compel a person to do an act against his will, or where the relation of the parties is such that one is under subjection to the other, and is thereby constrained to do what his free will would refuse. The common law presumes, for instance, that when husband and wife are together they have virtually but one will between them, which is the will of the husband, and consequently, if she commits an offense in his presence, it holds him *prima facie* responsible for it." *State v. Boyle*, 13 R. I. 537, 538.

#### COERCION BY LAW.

"Coercion by law" is where a court, having jurisdiction of the persons and the subject-matter, has rendered a judgment which is collectible in due course. There the party cast in judgment may not resist the execution of it. His only remedy is to obtain a reversal, if he may, for error in it. As he cannot resist the execution of it when execution is attempted, he may as well pay the amount

at one time as another, and save the expense of delay. *Peyser v. City of New York*, 70 N. Y. 497, 501, 26 Am. Rep. 624 (quoted in *Cowell v. Gregory*, 40 S. E. 849, 130 N. C. 80, and *Chapman v. Sutton*, 32 N. W. 683, 685, 68 Wis. 557); *Harrington v. City of New York*, 81 N. Y. Supp. 667, 670, 40 Misc. Rep. 165 (citing *Peyser v. City of New York*, 70 N. Y. 497, 501, 26 Am. Rep. 624).

#### COERULINE.

"Coeruleine" is a dye made by boiling gallein in sulphuric acid, and produces green shades. It is used for dyeing wool, cotton, and silks, as woods were formerly used, and is imported in petroleum barrels, in the form of paste suspended in water, and containing as much as 20 per cent. of the dyeing property. *Pickhardt v. United States (U. S.)* 67 Fed. 111, 112, 14 C. C. A. 341.

#### COFFEEHOUSE.

A keeper of a coffeehouse merely furnishes tea and coffee, and a person who furnishes beds and provisions to such persons as apply therefor is an innkeeper. *Thompson v. Lacy*, 8 Barn. & Ald. 283.

A coffeehouse is not an inn within the meaning of a policy of insurance against fire enumerating the trade of an innkeeper as doubly hazardous. *New York Equitable Ins. Co. v. Langdon (N. Y.)* 6 Wend. 623, 627; *Doe ex dem. Pitt v. Laming*, 4 Camp. 73, 77.

"Coffeehouse" is defined by *Worcester* to be a house of entertainment where coffee is sold. It is sometimes used to denote a hotel or tavern, but a license to keep a coffeehouse, whatever that term may mean, does not give a privilege to sell intoxicating liquors. *Commonwealth v. Woods*, 4 Ky. Law Rep. 262, 27 Albany Law J. 64.

#### COFFEE ROASTER.

In a case in which it was held that one who merely roasts coffee was not a manufacturer of coffee within the meaning of a statute exempting such manufacturer from certain taxes, there was evidence that a "coffee roaster" was simply a person who takes a sack of coffee and puts it in a roaster and turns the coffee out after it is roasted. *City of New Orleans v. New Orleans Coffee Co.*, 14 South. 502, 503, 46 La. Ann. 86.

#### COGNIZANCE.

"Cognizance," as used in St. 1844, c. 44, § 4, providing that the Supreme Judicial Court shall have full cognizance and jurisdiction over any crime punishable by death, "is a word of the greatest import, embracing all power, authority, and jurisdiction." *Web-*

ster v. Commonwealth, 59 Mass. (5 Cush.) 386, 400.

As used in a statute declaring that application for relief of any person to a hospital for the insane may be made to the court hereinafter named, or any judge thereof—that is, “to any judge learned in the law of any court within this commonwealth having immediate cognizance of the crime”—the word “cognizance,” as shown by the context, is used in the sense of “the right to take notice of and determine a cause.” That right exists only where the crime was committed, or in a county where the prisoner may be legally tried. *Clarion County v. Western Hospital for Insane*, 3 Atl. 97, 98, 111 Pa. 339.

#### Avowry distinguished.

See “Avowry.”

#### As recognizance.

The word “cognizance,” as used in Code, § 4385, authorizing changing of venue in criminal cases, and providing that, when any prosecution has been transferred, the court or judge may require all material witnesses in behalf of the prosecution to enter into cognizance for their appearance at the court to which the prosecution is transferred, should be held to mean “recognizance,” which is defined to be an obligation of record entered into before some court of record or magistrate, duly authorized, with condition to do some particular act, while “cognizance” means, in law, knowledge or notice, judicial knowledge or jurisdiction, an acknowledgment or confession, as an acknowledgment of a fine. *Comfort v. Kittle*, 46 N. W. 988, 989, 81 Iowa, 179.

### COGNOVIT.

A plea in an action which acknowledges that the defendant did undertake and promise as the plaintiff in its declaration has alleged, and that it cannot deny that it owes and unjustly detains from the plaintiff the sum claimed by him in his declaration, and consents that judgment be entered against the defendant for a certain sum, is called a “cognovit.” It is a judgment by confession. *Malory v. Kirkpatrick*, 33 Atl. 205, 207, 54 N. J. Eq. 50.

### COHABIT—COHABITATION.

See “Bigamous Cohabitation”; “Illicit Cohabitation”; “Matrimonial Cohabitation.”

“Cohabit” means, according to Webster, first, to dwell with another in the same place; second, to live together as husband and wife. *United States v. Griego* (N. M.) 72 Pac. 20, 22.

“To cohabit is to live or dwell together, to have the same habitation, so that where

one lives and dwells, there does the other live and dwell always with him. The Scotch expression conveys the true idea, perhaps better than our own—“the habit and repute of marriage.” In *re Yardley’s Estate*, 75 Pa. (25 P. F. Smith) 207, 211.

“Cohabitation” means to live together in the same house, claiming to be married, or, when used with reference to the relation of parties as husband and wife, merely to live together in the same house. *Cox v. State*, 23 South. 806, 117 Ala. 103, 41 L. R. A. 760, 67 Am. St. Rep. 166 (citing Bouv. Law Dict.); *State v. Chandler*, 33 S. W. 797, 798, 132 Mo. 155, 53 Am. St. Rep. 483; *Jones v. Commonwealth*, 80 Va. 18, 20; *Van Dolsen v. State*, 27 N. E. 440, 441, 1 Ind. App. 108.

Bishop, in his work on Marriage, Divorce, and Separation, § 1669, says to “cohabit” is to dwell together, so that matrimonial cohabitation is the living together of a man and woman ostensibly as husband and wife. *Turney v. State*, 29 S. W. 893, 60 Ark. 259.

The word “cohabit” is said to mean to dwell or live together as husband and wife. *State v. Sekrit*, 32 S. W. 977, 978, 130 Mo. 401; *State v. Chandler*, 33 S. W. 797, 798, 132 Mo. 155, 53 Am. St. Rep. 483; *Turney v. State*, 29 S. W. 893, 60 Ark. 259. Such is its meaning as used in Code 1891, c. 149, § 7, providing punishment for persons who “lewdly and lasciviously live and cohabit together.” *State v. Miller*, 24 S. E. 882, 42 W. Va. 215. And as used in Pub. St. c. 207, § 4, providing that whoever, having a former wife living, marries another or continues to cohabit with such second wife, is guilty of bigamy, etc. *Commonwealth v. Lucas*, 32 N. E. 1033, 158 Mass. 81.

The word “cohabiting,” as used in Code Civ. Proc. § 1962, providing that the issue of a wife cohabiting with her husband is presumed to be legitimate, means the living together of man and woman ostensibly as husband and wife. In *re Mills’ Estate*, 70 Pac. 91, 92, 137 Cal. 298, 92 Am. St. Rep. 175.

“Obviously the legal sense of the term, as used in Acts 1877–78, p. 302, c. 7, § 7, making it criminal for persons not married to cohabit together, is to live together in the same house as married persons living together or in the manner of husband and wife.” *Jones v. Commonwealth*, 80 Va. 18, 20.

To warrant a conviction under Rev. St. 1889, § 3798, punishing a man and woman who lasciviously abide and “cohabit” with each other, the evidence must show that they live together as man and wife. *State v. Chandler*, 33 S. W. 797, 798, 132 Mo. 155, 53 Am. St. Rep. 483.

The word “cohabit,” in Cr. Code, § 208, making it unlawful for any unmarried man to cohabit with a married woman in a state

of adultery, means dwelling together as husband or wife, or in sexual intercourse. *Sweeney v. State*, 80 N. W. 815, 816, 59 Neb. 269.

Cohabitation does not mean merely living together, but is used in the law as relating to the living together of a man and woman as husband and wife. A presumption of marriage may arise from matrimonial cohabitation, where the parties not only live together as husband and wife, but hold themselves out to the world as sustaining that honorable relation to each other. *Brinckle v. Brinckle* (Pa.) 12 Phila. 232, 234.

"Matrimonial cohabitation must certainly comprehend a living together as husband and wife, embracing relative duties as such, and does not mean merely living together in the same house." *Stein v. Stein*, 5 Colo. 55, 56.

Cohabitation means a living together in one house, a boarding or tabling together, and carries with it the idea of a fixed residence, and does not include persons who are merely traveling together through the country. *Ohio v. Connaway* (Ohio) Tappan, 90, 91.

Cohabitation may be lawful or illicit. It is lawful if preceded by consent, by words in the present, however such consent may be proved. When cohabitation follows consent, it is evidence that the parties have mutually assumed marital rights and duties, as it is evidence that the marriage has been completed by consummation. *Sharon v. Sharon*, 16 Pac. 345, 360, 75 Cal. 1.

#### **As continuous and public.**

"Cohabitation, in its usual sense, implies publicity, since two persons cannot secretly live together." *Granberry v. State*, 61 Miss. 440, 444.

To "cohabit," according to the sense in which the word is used in a penal statute, means dwelling together as husband and wife, or in sexual intercourse, and comprises a continued period of time. Hence the offense is not the single act of adultery; it is cohabiting in a state of adultery; and it may be a week, a month, a year, or longer, but still it is one offense only. "The defendant is charged with the crime from August 10, 1874, until July 15, 1875. According to the import of the words used in the statute, this is a continued offense, and, if it should be proved that he wantonly cohabited with the woman in a state of adultery during any portion of this time, such proof would be sufficient to establish the crime and fix the guilt of the party." *State v. Way*, 5 Neb. 283, 290.

#### **In relation to polygamous marriages.**

The term "cohabit," as found in the criminal codes of many of the states, is coupled with and qualified by the adverbs "lewdly,"

"lasciviously," "adulterously," or some other equivalent expression. No such word or expression, however, is found in Act Cong. March 22, 1882, c. 47, 22 Stat. 31 [U. S. Comp. St. 1901, p. 3633], providing that if any male person in a territory, or other place over which the United States has exclusive jurisdiction, therein cohabits with more than one woman, he shall be guilty of a misdemeanor, and therefore cannot be construed as necessarily meaning the same offenses as are intended to be defined by the state statutes. As defined by lexicographers, "cohabit" means to dwell with or reside together. It may mean residing in the same country, city, or neighborhood, or in the same family, or the dwelling together in lawful wedlock. This would be lawful cohabitation. Or it may mean the dwelling of a man and woman together ostensibly and apparently in wedlock, when in fact or in law no marriage exists; and without proof of adultery or fornication this would be merely unlawful cohabitation. Or it may mean the living together of a man and woman without lawful marriage in the practice of fornication or adultery, which would be lascivious, lewd, or adulterous cohabitation. "Cohabitation," as used in a matrimonial sense, means to dwell together as husband and wife. *United States v. Musser*, 7 Pac. 389, 4 Utah, 153.

Act Cong. March 22, 1882, c. 47, 22 Stat. 31 [U. S. Comp. St. 1901, p. 3633], declaring that if a male person cohabits with more than one woman he shall be deemed guilty of a misdemeanor, etc., should be given a broad meaning. It was the practice of unlawful cohabitation, or living together with more than one woman, that was aimed at by the act—a cohabitation classed with polygamy, and having its outward semblance. It is not, on the one hand, meretricious unmarital intercourse with more than one woman; nor, on the other hand, does the statute pry into the intimacies of the marriage relation. But it seeks not only to punish bigamy and polygamy, when direct proof of the existence of those relations can be had, but to prevent a man from flaunting in the face of the world the ostentation and opportunities of a bigamous household, with all the outward appearances of the continuance of the same relations which existed before the act was passed, and without reference to what might occur in the privacy of those relations. *United States v. Snow*, 9 Pac. 501, 505, 4 Utah, 280; *United States v. Clark*, 21 Pac. 463, 464, 6 Utah, 120.

"Cohabit," as used in the act of Congress making it a misdemeanor for a man to cohabit with more than one woman, means to dwell or live together as husband and wife. *United States v. Langford*, 21 Pac. 409, 2 Idaho (Hasb.) 561; *United States v. Kuntze*, 21 Pac. 407, 2 Idaho (Hasb.) 480; *Ex parte Nielson*, 9 Sup. Ct. 672, 675, 131 U. S. 176, 33 L. Ed. 118.

Act March 22, 1882, c. 47, 22 Stat. 81 [U. S. Comp. St. 1901, p. 3633], providing that if any male person hereafter cohabits with more than one woman he shall be deemed guilty of a misdemeanor, etc., means "to hold out to the world two women as a man's wives by his language or conduct, or both, and he is guilty of cohabitation if he lives in the house with them and eats at the table of each a portion of his time, although he may not occupy the same bed or sleep in the same room with either of them, or actually have sexual intercourse with either." *Cannon v. United States*, 6 Sup. Ct. 278, 116 U. S. 55, 29 L. Ed. 561; *United States v. Cannon*, 7 Pac. 369, 375, 4 Utah, 122. Extreme case, see *United States v. Harris*, 17 Pac. 75, 76, 5 Utah, 436, holding that if the legal wife live in the same vicinity with the husband, bearing his name, in a household maintained in part by him, that is "cohabitation."

#### Sexual intercourse implied.

To "cohabit" means to dwell together, inhabit or reside in company, or in the same place or country. Specifically, "to dwell or live together as husband and wife," often with reference to persons not legally married, and usually, but not always, implying sexual intercourse. *Cox v. State*, 23 South. 806, 117 Ala. 103, 41 L. R. A. 760, 67 Am. St. Rep. 166 (quoting Cent. Dict.).

Cohabitation implies sexual intercourse, and will be inferred from the fact of the living together of husband and wife. *Burns v. Burns*, 60 Ind. 259, 260.

Cohabitation does not mean simply the gratification of sexual passion, but to live or dwell together, to have the same habitation, so that, where one lives and dwells, there does the other live and dwell also. *People v. Lehmann*, 38 Pac. 422, 423, 104 Cal. 631 (citing *Kilburn v. Kilburn*, 89 Cal. 46, 50, 26 Pac. 636, 23 Am. St. Rep. 447; *Sharon v. Sharon*, 79 Cal. 633, 670, 22 Pac. 26, 131; *People v. Beevera*, 99 Cal. 286, 33 Pac. 844).

"Cohabit does not mean mere sexual indulgence, but it means a dwelling together as husband and wife." *Olson v. Peterson*, 50 N. W. 155, 156, 33 Neb. 358; *Taylor v. Taylor*, 50 Pac. 1049, 10 Colo. App. 303.

As used in Pub. St. R. I. c. 244, § 1, providing that every person who shall be convicted of cohabiting with another as husband and wife, having at the time a former husband or wife living, shall be punished, etc., the words "cohabit with" must mean to continue to live or dwell together as husband and wife ordinarily do, but according to the weight of authority the words do not necessarily imply actual sexual intercourse. In re *Watson*, 33 Atl. 873, 874, 19 R. I. 342.

The word "cohabits," in the Indiana statute declaring that "whosoever cohabits with

another in a state of adultery or fornication shall be fined," etc., is used in the sense of living together, but does not import that the parties are guilty of adultery or fornication. *State v. Chandler*, 96 Ind. 591, 593.

#### Merely visiting.

"Cohabit," as used in St. 1784, c. 40, § 6, providing that if any man and woman, either or both of them being then married, shall lewdly and lasciviously associate and cohabit together, means a dwelling or living together, and not a transient, single, and unlawful interview. *Commonwealth v. Calef*, 10 Mass. 153.

"Cohabit," as used in a statute relating to the offense of unmarried persons cohabiting together, means that the parties dwell together as if the conjugal relation existed between them—"a dwelling or living together, not a transient or single unlawful interview." *Luster v. State*, 2 South. 690, 691, 23 Fla. 339.

To cohabit is to live or dwell together, so that, where one lives and dwells, there does the other live and dwell with him. A common-law marriage is not shown by irregular cohabitation and partial reputation. *Taylor v. Taylor*, 50 Pac. 1049, 10 Colo. App. 303.

The "cohabitation" of a man and woman as husband and wife means dwelling together, and not a habit of visiting each other, however frequent. It is the living together in the usual manner resulting from marriage. *Robinson v. Robinson*, 58 N. E. 906, 908, 188 Ill. 371.

"The primary meaning of the word 'cohabit' is to dwell with some one, not merely to visit or see them. It includes more than that. Such, too, is the meaning as determined by its derivation, being compounded of 'con,' with, and 'habitare,' to dwell. The law presumes the husband to cohabit with his wife, even after a voluntary separation has taken place between them." *Calef v. Calef*, 54 Me. 365, 366, 92 Am. Dec. 549.

#### COHABIT AS HUSBAND AND WIFE.

"Cohabiting together as husband and wife" means living together publicly in the face of society as if the conjugal relation existed; living in the same house in like manner as marks the intercourse between husband and wife. *Bush v. State*, 37 Ark. 215, 218.

"Cohabitation as husband and wife," within a statute prohibiting persons not married from cohabiting together as husband and wife, means the living together in the same house and in a relation to each other as if they were married, and a deporting of them.



selves toward each other as though they were husband and wife; but it is not necessary that the parties themselves should claim to be husband and wife. *Lyerly v. State*, 36 Ark. 39, 40; *Sullivan v. State*, 32 Ark. 187, 190.

To constitute a "cohabiting together as man and wife," within the prohibition of the statute declaring that it shall be a crime for two persons not married to cohabit together as husband and wife, it is not necessary that the parties should sustain the relation of husband and wife toward each other. Inter-course, however, between them is not necessary, but the mere fact that they live in the same house without holding themselves out as husband and wife and having inter-course does not satisfy the statute. *Taylor v. State*, 36 Ark. 84.

The phrase "cohabit together as man and wife," in an indictment charging a married man and an unmarried woman with cohabiting together as man and wife, imports that the parties are cohabiting together in a state of fornication. *State v. Chandler*, 96 Ind. 591, 593.

## COIN.

### See "Counterfeit Coin."

The power "to coin money, regulate the value thereof and of foreign coin," has no reference to, and by no possibility can have any reference to, the rate of interest to be charged for money loaned. The power thus conferred upon Congress is the power to coin money, and regulate the value of the money so coined. It has been said that the power to coin money would doubtless include that of regulating its value, had the latter power not been expressly inserted. The power of regulating the value of money is a mere repetition of the words granting the power to coin money. 2 Story, Const. (4th Ed.) § 1117. By the power conferred, Congress may establish the value of domestic and of foreign coin. The object of the power thus conferred is to save the country from the embarrassments of a perpetually fluctuating and variable currency. The power to coin money is one of the ordinary prerogatives of sovereignty, and is almost universally exercised in order to preserve a proper circulation of good coin of a known value in the home market. 2 Story, Const. (4th Ed.) § 1118. The power to coin money and regulate the value thereof is the power to coin money and affix to it a public stamp and value. *Beach v. Peabody*, 58 N. E. 679, 680, 188 Ill. 75.

The words "one fifty cent piece in coin," in an indictment charging the taking thereof by defendant, will be construed to mean a 50-cent piece of the United States. *Kirk v. State*, 32 S. W. 1045, 35 Tex. Cr. R. 224.

### As chattel.

See "Chattel."

### As metallic money.

"When used as a noun, 'coin' means metallic money. 'Coin' is a collective word, including all manner of the several stamps and portraitures of money. A complaint for the larceny of 'copper coin of the value of \$2.75' does not mean a copper coin or one copper coin, but more than one, and as many as are necessary to constitute the alleged value." *Commonwealth v. Gallagher*, 82 Mass. (16 Gray) 240, 241.

Coins are pieces of metal of definite weight and value, stamped by the authority of the government. Per Field, J., dissenting, in *Legal Tender Cases*, 4 Sup. Ct. 122, 137, 110 U. S. 421, 28 L. Ed. 204.

A coin is a piece of gold or silver or other metal stamped by authority of the government in order to fix its value, and is commonly called "money," and "to coin" is to stamp metal as money. *Latham v. United States*, 1 Ct. Cl. 149, 150.

### Money distinguished.

The meaning of the noun "coin" is "the die used for stamping money" (Webster), and the meaning of the verb is "to stamp metal and convert it into coin." Strictly speaking, "coin" differs from "money" as the species differs from the genus. "Money" is any matter, whether metal, paper, beads, shell, etc., which has currency as a medium in commerce. "Coin" is a particular species, always made of metal, and struck according to a certain process, called "coining." *Borle v. Trott* (Pa.) 5 Phila. 368, 403 (quoting Whart. Law Lexicon).

### As to make paper money.

To "coin money," as used in the Constitution of the United States, delegating to Congress power to coin money, does not include the right to make coined money out of paper. *Thayer v. Hedges*, 22 Ind. 282, 301.

The right to "make" money means to fabricate it out of metallic substances. To emit stamped paper is not to "coin" money as the word is generally understood, nor as it was used in the Constitution. *Maynard v. Newman*, 1 Nev. 271, 278.

"Coining money," as used in the Constitution of the United States, means metallic money, gold, silver, or copper, or other metals used for coin, and nothing more. The phrase "coining" cannot without violence be applied to the use of paper money. To "coin money" is to make, stamp and issue coins as money. Coins are pieces of metal of a particular weight and standing, to which a particular value is given in accounting and payment. *Metropolitan Bank v. Van Dyck*, 27 N. Y. 400, 490.

**As stamping metal as money.**

Instrument adapted for coining, see "Adapted."

"Coin," as a verb, means to stamp metal and convert it into coin. *Borle v. Trott* (Pa.) 5 Phila. 366, 403.

Taking the verb "to coin" in its general sense as meaning to stamp, to impress, to fabricate, and the word "money" to denote everything that is used in current exchanges, and we have a clause empowering Congress to stamp money, to impress money, to fabricate money, and to regulate and determine its value. *Latham v. United States*, 1 Ct. Cl. 149, 154.

To "coin" means not only to shape and stamp or mint metals, but to make or fabricate other things as well. It is not claimed that it was the design of the Constitution, in granting the power to coin money, to have any other species of metal than gold or silver created money by law; and, as neither gold nor silver is mentioned as the substance to be coined, it must be held that the power granted is simply to determine by law what the money of the country shall consist of, and to regulate its standard value. *Hague v. Powers* (N. Y.) 39 Barb. 427, 466.

The power to coin money given to Congress by the Constitution does not limit such power to money made from gold and silver. *Shollenberger v. Brinton*, 52 Pa. (2 P. F. Smith) 9, 50.

The power to "coin money" given to the federal government by the Constitution is the power to mold metallic substances into forms convenient for circulation, and to stamp them with the impress of the government authority, indicating their value with reference to the unit of value established by law. *Per Field, J.*, dissenting, in *Legal Tender Cases*, 4 Sup. Ct. 122, 187, 110 U. S. 421, 28 L. Ed. 204.

In construing the constitutional provision authorizing the federal government to coin money, Chief Justice Chase in his dissenting opinion in the legal tender cases, says, that the words "coining money" must be understood as they were used at the time when the Constitution was adopted, and that there was no authority which at that time defined coining otherwise than as minting and stamping material for money. *Legal Tender Cases*, 79 U. S. (12 Wall.) 457-484, 20 L. Ed. 287.

To "coin money," as used in the United States Constitution, giving the federal government power to coin money, means "to mold into form a metallic substance of intrinsic value, and stamp on it its legal value, so as to encourage and facilitate its free circulation, and assure stability and curren-

cy." *Griswold v. Hepburn*, 68 Ky. (2 Duv.) 20, 29.

**COINAGE.**

"Coinage" means the stamping of metal in some way so as to give it currency, and is not applied to any other material. *Meyer v. Roosevelt* (N. Y.) 25 How. Prac. 97, 105.

The phrase "coinage of the United States" means "that which is coined at the mints of the United States." *United States v. Otey* (U. S.) 31 Fed. 68, 70.

**CO-INSURER.**

A clause in a fire policy provided that the assured should maintain insurance on the property to the extent of four-fifths of its cash value, and, in case of failure so to do, the assured should be a "co-insurer" to the extent of such deficit. Held, that the word "co-insurer" meant no more nor less than a fellow insurer, and was used to put the insured on the same footing with other insurers who issue policies and contribute ratably in case of loss. *Chesbrough v. Home Ins. Co.*, 28 N. W. 110, 111, 61 Mich. 333.

**COKE.**

"Coke" consists of coal, with some gases expelled. Coke is the produce of a mine within the meaning of an inclosure act giving the lord of a manor right to grant a way for the purpose of carrying the produce of mines. *Bowes v. Ravensworth*, 15 C. B. 512, 522.

**COKE OVEN.**

As building, see "Building (In Lien Laws)."

**COLABORER.**

See "Fellow Servant."

A colaborer or fellow servant is one not employed to do any of the duties of the master. In reference to section masters and positions of similar character, a better opinion on the subject is that "a servant having exclusive control over other servants, under a common master, including the power to hire and discharge, is, in the exercise of those powers, the representative of the master, and not a mere fellow servant." *Couch v. Charlotte, C. & A. R. Co.*, 22 S. C. 557, 564.

**COLD-BLOODED MURDER.**

The term "cold-blooded murder" is used in the common parlance to designate a will-

ful, deliberate, and premeditated homicide. *State v. Wieners*, 66 Mo. 13, 25.

## COLD CALCULATION.

In estimating the amount of damages in an action for personal injuries, the value of the life must be, in reasonable aspects, estimated, and in that connection there are some practical rules to be applied, which are sometimes called "cold calculations," because they require a dispassionate estimate of the real conditions and expectations of life at the time of the injury. By whatever term, however, they may be designated, they are just, and, so far as it is practicable to do so in so delicate and difficult a question, are intended to arrive at justice. *Davidson Benedict Co. v. Severson*, 72 S. W. 967, 973, 100 Tenn. 572 (citing *Louisville & N. R. Co. v. Stacker*, 86 Tenn. [2 Pickle] 343, 6 S. W. 737, 6 Am. St. Rep. 840).

## COLD STORAGE.

The term "cold storage," as used in the trade, means a warehouse or storeroom ordinarily used for the preservation of butter and eggs, where the temperature is kept at a low degree, but above freezing point. *Allen v. Somers*, 47 Atl. 653, 654, 73 Conn. 355, 52 L. R. A. 106, 84 Am. St. Rep. 158.

## COLD-STORAGE BUSINESS.

"Doing a cold-storage business" means carrying on the business of storing commodities in a cool place for hire or reward, and a packing house which used cold storage for preserving its own commodities alone, but did not receive and store for the public or any part thereof, is not "doing a cold-storage business" within Gen. Tax Act Dec. 26, 1890, § 22, imposing a tax "on all packing houses doing a cold-storage business." *Stewart v. Atlanta Beef Co.*, 18 S. E. 981, 985, 93 Ga. 12, 44 Am. St. Rep. 119.

## COLLAPSE.

A marine insurance policy insured against any loss occasioned by fire, except when caused by explosion of boiler, and except as limited by warranties therein contained, such as bursting of boilers, "collapsing" of flues, or the consequences of any character resulting from either of such exceptions; and the court, in construing the policy, said that the "bursting" of a boiler and the "explosion" of a boiler was one and the same thing, but the "collapsing" of a flue was not the explosion or the bursting of a boiler; that the flue was inside of and formed a part of the boiler, if a flue boiler, but that it was not the boiler proper, and might collapse and the boiler proper remain intact, and that the "collapsing" of a flue was

not the "explosion" of a flue. Webster defines "collapse" thus: "To fall together suddenly, as the two sides of a hollow vessel; to close by falling or shrinking together; to shrink up, as a tube in a steam boiler collapses." He defines "explosion" as follows: "The act of exploding; bursting with a loud noise or detonating sound; a sudden inflaming with force and a loud report, as the explosion of gunpowder;" the shattering of a boiler by a sudden and immense pressure, in distinction from "rupture." The *Century Dictionary* defines "collapse" thus: "To fall together, or into an irregular mass or flattened form, through the loss of firm connection or rigidity and support of the parts or loss of the contents, as a building through the falling in of its sides, or an inflated bladder from escape of the air contained in it." It defines "explosion" as follows: "A sudden bursting or breaking up or in pieces from an internal or other force; a blowing up or tearing apart, as by explosion of a steam boiler." From these definitions it will be seen that the words "explosion" and "collapse" have almost an opposite meaning. *Louisville Underwriters v. Durland*, 24 N. E. 221, 223, 123 Ind. 544, 7 L. R. A. 399.

## COLLATERAL.

See "As Collateral."

The use of the words "as collateral" on the stockbooks of a company, in registering the stock as belonging to a certain person as "collateral," implies that such person does not hold the stock as a shareholder. *Beal v. Essex Sav. Bank (U. S.)* 67 Fed. 816, 817, 15 C. C. A. 128.

"Collateral" is a separate obligation attached to any other contract to guaranty its performance. *Thomson-Houston Electric Co. v. Capital Electric Co. (U. S.)* 56 Fed. 849, 854 (citing *Bouvier*).

There is no technical legal definition of the word "collateral" distinct from its common signification. It is an additional security for the performance of the principal obligation, and on the discharge of the latter it is to be surrendered. *Seanor v. McLaughlin*, 80 Atl. 717, 718, 165 Pa. 150, 82 L. R. A. 467.

## COLLATERAL AGREEMENT.

Whether an engagement is a "collateral agreement" or an original undertaking is sometimes a question of difficulty. But when the promise is to do a particular thing which another person is bound to do, in the event he does not do it, the obligation is regarded as an original undertaking, and not a strict or collateral guaranty. The position of a guarantor, however, even in an original undertaking, to do something that another is un-

der obligation to do, is in the nature of a surety as between himself and the principal debtor, and must be dealt with as such. *Frank v. Williams*, 18 South. 351, 353, 36 Fla. 136.

### COLLATERAL ANCESTORS.

The term "collateral ancestors" is sometimes used to designate uncles and aunts and other collateral antecessors of the person spoken of, who are not in fact his ancestors, but the word "ancestors," in its ordinary meaning, only includes those from whom the person spoken of is lineally descended, either on the father's or mother's side. And whenever this word is intended to be used in the sense which is different from its ordinary import of lineal ascendants, or any such an enlarged sense of antecessors so as to embrace all the blood relatives of the person referred to who have preceded him, it is qualified or enlarged by some other term to show that it is not used in its natural sense merely. Thus in the act of October, 1553, which restored to blood the son of Henry Courtney, the attainted Marquis of Exeter, he was restored in blood as well as son and heir to his father's (the marquis') as to all and every other collateral and lineal ancestor. *Banks v. Walker* (N. Y.) 3 Barb. Ch. 438, 446.

### COLLATERAL ATTACK.

By a "collateral attack" is meant every proceeding in which the integrity of the judgment is challenged, except those made in the action wherein the judgment is rendered, or by appeals, and except suits brought to obtain decrees declaring judgment to be void ab initio. *Burke v. Interstate Savings & Loan Ass'n*, 64 Pac. 879, 881, 25 Mont. 315, 87 Am. St. Rep. 416.

"A collateral attack on a judgment is an attempt to avoid its binding force in a proceeding not instituted for one of the purposes aforesaid, as where, in an action of debt on a judgment, defendant attempts to deny the fact of indebtedness, or where, in a suit to try the title to property, a judgment is offered as a link in the chain of title, and the adverse party attempts to avoid its effect." An attack in trespass to try title by devisees against a purchaser at an executor's sale on the judgment of a probate court, having jurisdiction over plaintiff, which confirmed the sale, is a collateral attack. *Crawford v. McDonald*, 33 S. W. 325, 327, 88 Tex. 626.

If an action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack upon the judgment is collateral. *Peyton v. Peyton*, 68 Pac. 757, 764, 28 Wash. 278.

A "collateral attack" on a judicial proceeding is an attempt to avoid, defeat, or

evade it, or to deny its force and effect in some manner not provided by law. When a judicial order, judgment, or proceeding is offered in evidence in another proceeding, an objection thereto on account of judicial error is a collateral attack. *Van Fleet, Coll. Attack*, § 3. Thus where a person sued for an interest in real property, and the answer set up a judgment in the former action in which it was decreed that plaintiff had no interest in the property, and plaintiff repeated that the judgment was void because no jurisdiction had been obtained of him in the former action, the attack on the judgment was collateral. *Kalb v. German Savings & Loan Soc.*, 65 Pac. 559, 560, 25 Wash. 349, 87 Am. St. Rep. 757.

A collateral attack on a judgment is any proceeding to impeach a judgment which is not instituted for the express purpose of annulling, correcting, or modifying such judgment or enjoining its execution. *Morrill v. Morrill*, 25 Pac. 362, 364, 20 Or. 98, 11 L. R. A. 155, 23 Am. St. Rep. 95; *Melnert v. Harter*, 65 Pac. 1056, 1058, 39 Or. 609; *Smith v. Morrill*, 55 Pac. 824, 826, 12 Colo. App. 233; *Cochrane v. Parker*, 54 Pac. 1027, 1029, 12 Colo. App. 169; *Harter v. Shull* (Colo.) 67 Pac. 911, 912. Hence a proceeding to enjoin the enforcement of a judgment because of its invalidity or want of service of summons is not a collateral attack. *Smith v. Morrill*, 55 Pac. 824, 826, 12 Colo. App. 233.

A collateral attack is one, generally speaking, in which the invalidity of the judgment is predicated upon matters dehors the record. *City of Greensburg v. Zoller*, 60 N. E. 1007, 1008, 28 Ind. App. 126.

Where an attempt is made to avoid or correct a judgment in some manner not provided by law, the attack thereon is collateral. *Spencer v. Spencer*, 67 N. E. 1018, 1020, 31 Ind. App. 321 (citing *Harman v. Moore*, 112 Ind. 221, 13 N. E. 718).

The fact that the parties are the same, and that the defendants seek to attack the decree by allegations in their answer, cannot change the rule and make the attack any less a collateral one. *Cochrane v. Parker*, 54 Pac. 1027, 1029, 12 Colo. App. 169; *Harter v. Shull* (Colo.) 67 Pac. 911, 912. Thus, in an action to recover money paid under protest for taxes, it cannot be shown that the tax which was ordered to be levied for a certain purpose was in fact levied with intent to divert its general county purposes, thereby escaping the limitation of the general taxing power, as this would be a collateral attack on the record of the commissioners' court. *Cresswell Ranch & Cattle Co. v. Roberts County* (Tex.) 27 S. W. 737, 739.

When a complaint admits that a summons was served upon a party who seeks to set aside a judgment rendered in pursuance of the proof of a valid service thereof by

showing dehors the record that the notice so given was insufficient, the attack upon the judgment is collateral. *Meinert v. Harder*, 65 Pac. 1056, 1058, 39 Or. 609.

A collateral attack is, generally speaking, one in which the invalidity of a judgment is predicated upon matters dehors the record. When the elements of fraud and mistake are involved, the attack is direct. *Earle v. Earle*, 91 Ind. 27; *Thompson v. McCorkle*, 136 Ind. 484, 34 N. E. 813, 36 N. E. 211, 43 Am. St. Rep. 334. Where no fraud was alleged, the collection of assessments on abutting property to defray local improvements will not be enjoined, unless the proceedings are void, as such would be a collateral attack. *City of Greensburg v. Zoller*, 90 N. E. 1007, 1008, 28 Ind. App. 126.

#### **Direct attack distinguished.**

When the validity of a record attacked is directly put in issue by the pleadings of the party attacking it by proper averment, the attack is direct, and not collateral; but when there are no proper averments attacking the record, although its validity is drawn in the issue of the case, the attack is collateral. *Walker v. Goldsmith*, 12 Pac. 537, 553, 14 Or. 125.

A direct attack upon a judgment is an attempt to amend, correct, reform, vacate, or enjoin the execution of the same, in a proceeding instituted for that purpose, such as a motion for a rehearing, an appeal, some form of writ of error, a bill of review, an injunction to restrain its execution, etc.; while a collateral attack is an attempt to avoid its binding force in a proceeding not instituted for one of the purposes aforesaid, as where, in an action of debt on a judgment, defendant attempts to deny the fact of indebtedness, or where in a suit to try title to property, but a judgment is offered as a link in the chain of title, and the adverse party attempts to avoid its effects, etc. Thus, where a plaintiff in an action to recover land sought to set aside, on the ground of fraud, judgments in partition affecting their title, all parties to the judgments were made parties to the action, and the tribunal in which the pending action was brought had rendered the judgments and had jurisdiction to set them aside, the attack on the judgments was not collateral, but direct, though third parties, defendants to the action claiming under the judgments, had become possessed of the land. *Schneider v. Sellers*, 61 S. W. 541, 543, 25 Tex. Civ. App. 226.

The prayer of a complaint asked that a guardian's release of certain mortgages on property belonging to a ward should be set aside and the mortgage foreclosed, and for general relief. The allegations of the complaint attacked the probate proceedings and acts of the guardian and a sale of the property made by him as fraudulent, which was

denied by defendant. The defendant contended that, as the suit was for the foreclosure of the mortgage, the validity of the probate proceedings and the acts of the guardian could not be questioned, as it would be a collateral attack thereon; but it was held that as the complaint attacked directly the probate proceedings and the guardian's deeds thereunder, and prayed for general release in addition to the foreclosure of the mortgage, such attack was not a collateral attack. *Dormitzer v. German Savings & Loan Soc.*, 62 Pac. 862, 881, 23 Wash. 132.

#### **Res judicata distinguished.**

The doctrine of collateral attack denies any validity whatever to the former adjudication, while that of *res judicata* admits its entire validity, and simply denies the scope claimed for it. There is little similarity between the two doctrines. Collateral attack involves the jurisdiction of the court, and denies its power to act at all, while *res judicata* merely involves the question concerning what was actually contested and decided in the trial. The doctrine of collateral attack has nothing to do with the issues or the matters contested on the trial. A judgment on default, without any issue joined or contest made, is just as invulnerable against a collateral attack as one rendered on an issue joined after a contest. *Van Fleet on Collateral Attack*, § 17 (cited with approval in *Bitzer v. Mercke*, 63 S. W. 771, 772, 111 Ky. 299).

#### **COLLATERAL CONSANGUINITY.**

Collateral consanguinity is the relation which subsists between persons who lineally descend from the same ancestor, who is the "stirps," or root, but who do not descend the one from the other. *McDowell v. Addams*, 45 Pa. (9 Wright) 430, 432.

The series of degrees between persons who do not descend from one another, but spring from a common ancestor, is called the "collateral line," or "collateral consanguinity." Civ. Code Cal. 1903, § 1890; Civ. Code Mont. 1895, § 1856; Rev. Codes N. D. 1899, § 3747.

#### **COLLATERAL CONSIDERATION.**

A collateral consideration may consist of anything which would be a burden or inconvenience to one party or a possible benefit to the other. *Chicora Fertilizer Co. v. Dunan*, 46 Atl. 347, 350, 91 Md. 144, 50 L. R. A. 401.

#### **COLLATERAL DESCENT.**

The term "collateral descents" is used to designate descents from brother to brother, cousin to cousin, and the like, in contradistinction from "lineal descents," as from

father or grandfather to son or grandson. *Levy v. McCartee*, 31 U. S. (6 Pet.) 101, 112, 8 L. Ed. 334.

### COLLATERAL FACTS.

Collateral facts are those which are not directly involved or connected with the principal issue or matter in dispute, so that Civ. Code, § 5066, providing that if a paper is only incidentally or collaterally material to the case the subscribing witness need not be produced, means where such facts, which yet have a sufficient bearing on the case to be admitted under the rules of evidence, are offered, or are in writing, then because they are collateral and incidental, and because they are not directly involved, the writing may go in without proof of execution by the subscribing witness. *Summerour v. Felker*, 29 S. E. 448, 450, 102 Ga. 254.

The test of whether a fact inquired of in cross-examination is collateral is this: Would the cross-examining party be entitled to prove it as a part of his case, tending to establish his plea? *Garner v. State*, 25 South. 363, 364, 76 Miss. 515.

### COLLATERAL GUARANTY.

In a strict "collateral guaranty" a guarantor undertakes, in the event the principal fails to do what he has promised, to pay damages for such failure. A guarantor undertakes to pay such damages as a result of the principal's default. A surety undertakes to do the particular thing if the principal fails. *Nading v. McGregor*, 121 Ind. 465, 470, 23 N. E. 283, 6 L. R. A. 686; *Newcomb Bros. Wall-Paper Co. v. Emerson*, 17 Ind. App. 482, 46 N. E. 1018; *Conduitt v. Ryan*, 3 Ind. App. 1, 29 N. E. 160; *Lane v. Mayer*, 15 Ind. App. 382, 44 N. E. 73; *Bryant v. Stout*, 16 Ind. App. 380, 44 N. E. 68, 45 N. E. 343; *Brandt, Sur.* (2d Ed.) § 1. A salesman executed a bond to his employer with sureties, conditioned that whereas the salesman might receive or control moneys, securities, or personal property belonging to his employer, therefore, if he should account for and pay without loss or delay all such moneys, securities, or other personal property so coming into his possession or under his control, and not divert or detain any portion thereof on any pretext whatever, then the obligation to be void, and otherwise to remain in full force. Held, in accordance with the foregoing definition, that the bond was a contract of suretyship, and not of guaranty. *Durand & Kasper Co. v. Rockwell*, 54 N. E. 771, 772, 23 Ind. App. 11.

The terms "strict guaranty" and "collateral guaranty" do not include a promise of the guarantor to do what another is bound to do, if he shall not do it himself, but such an obligation is distinguished as an "original undertaking" in the nature of a suretyship.

*Woody v. Haworth*, 57 N. E. 272, 273, 24 Ind. App. 634

### COLLATERAL IMPEACHMENT.

A collateral impeachment of a judgment or decree is an attempt made to destroy or evade its effect as an estoppel by reopening the merits of the case, or by showing reasons why the judgment should not be rendered or have a conclusive effect in a collateral proceeding; that is, in any action other than that in which the judgment was rendered, for, if this be done upon appeal, error, or certiorari, the impeachment is direct. *Racey v. Racey*, 73 Pac. 305, 306, 12 Okl. 650.

### COLLATERAL INHERITANCE TAX.

What is called a "collateral inheritance tax" is a bonus exacted from the collateral kindred and others as a condition on which they may be admitted to take the estate left by a deceased relative or testator. The estate does not belong to them except as the right to it is conferred by the state. Independently of government, no such right exists. The right of the owner to transfer it to another after death, or of the kindred to succeed, is the result of municipal regulation, and must consequently be enjoyed subject to such conditions as the state sees fit to impose. *Dixon v. Ricketts*, 72 Pac. 947, 948, 26 Utah, 215 (citing *Strode v. Commonwealth*, 52 Pa. 181, 182).

A collateral inheritance tax is a tax on the property passing from the decedent, and not a mere succession duty imposed on the recipient (*In re Bittinger's Estate*, 129 Pa. 338, 18 Atl. 132), and hence is within the defect of power to impose it on land outside of the state. *In re Handley's Estate*, 37 Atl. 587, 181 Pa. 339.

### COLLATERAL ISSUE.

Rule 26 of court, providing that no appeal will be allowed on collateral issues, referred to such an issue as is presented by the following example: A fund is in the hands of the court for distribution among conflicting judgment liens. Upon the consideration of that matter a controversy springs up as to whether one of the judgments, constituting a claim upon the fund, has been extinguished. If this issue is submitted, it is a collateral issue. It is collateral to the matter pending, and must be determined before that matter can be adjusted. But where a debtor or a defendant in execution is called upon, by a summons in garnishment, to say on oath whether he owes anything to such debtor, and he answers negatively, and his answer is traversed, the issue thus presented is original and independent, and not collateral to any supposed issue raised by the summons alone, and consequently a judgment upon it may be appealed from by el-

ther party as a matter of right. *Strickland v. Maddox*, 4 Ga. 393, 394.

### COLLATERAL LIMITATION.

If a conveyance gives an interest for a prescribed period, but makes the right to possess or enjoy the thing conveyed to depend upon some collateral event, then the limitation is said to be collateral. *Templeman v. Gibbs*, 24 S. W. 792, 793, 86 Tex. 358.

### COLLATERAL LINE.

See "Collateral Consanguinity."

### COLLATERAL MOTION.

A motion to docket a cross-complaint as a separate suit is a "collateral motion," requiring a bill of exceptions to bring it into the record. *Thiebaud v. Tait* (Ind.) 31 N. E. 1052, 1053.

### COLLATERAL NEGLIGENCE.

A failure to safeguard an excavation or opening in a public highway or bridge by those who have assumed that duty from the state makes the party liable to an action. But where a company has assumed the obligation, there is nothing to prevent it from employing a contractor to do the work for him. But by employing a contractor it cannot get rid of its own duty to other people, whatever that duty may be. If the contractor performs the company's duty for it, it is performed by the company through him, and it is not responsible for anything more. It is not responsible for his negligence in other respects, as it would be if he were the company's servant. Such negligence is sometimes called casual or "collateral" negligence. *Weber v. Buffalo Ry. Co.*, 47 N. Y. Supp. 7, 11, 20 App. Div. 292.

### COLLATERAL PROCEEDING.

A "collateral proceeding" is defined as being any proceeding which is not instituted for the express purpose of annulling, correcting, or modifying the judgment or enjoining its execution. *Peyton v. Peyton*, 68 Pac. 757, 764, 28 Wash. 278.

A proceeding for the condemnation of the right of way for a railroad is a collateral proceeding, so far as concerns the question of the corporate existence of the company seeking the condemnation. *Peoria & P. Union R. Co. v. Peoria & F. R. Co.*, 105 Ill. 110, 116.

### COLLATERAL PROMISE.

A collateral promise is one whose primary object is to make the promisor the surety or grantor of another's debt. Such a promise is within the statute of frauds, requiring a promise to answer for the debt,

default, or miscarriage of another to be in writing. *Clay v. Walton*, 9 Cal. 328, 334.

A collateral promise is a promise to answer for the pre-existing debt or liability of a third person, which is founded upon such original liability, without any new consideration. Such promise is required by the statute of frauds to be in writing. *Elder v. Warfield* (Md.) 7 Har. & J. 391, 395.

"In *Nelson v. Boynton*, 44 Mass. (3 Metc.) 396, 37 Am. Dec. 148, Shaw, C. J., says the terms 'original' and 'collateral' promise are convenient enough to distinguish between the cases where the direct and leading object of the promise is to become the surety or guarantor of another's debt, and those where, although the effect of the promise is to pay the debt of another, yet the leading object of the undertaker is to subserve or promote some interest or purpose of his own. The former, though made before or after or at the same time with the promise, is not valid unless manifested by evidence in writing. The latter, if made on good consideration, is unaffected by the statute, because, although the effect of it is to release or suspend the debt of another, yet that is not the leading object on the part of the promisor." *Patton v. Mills*, 21 Kan. 163, 169; *Almond v. Hart*, 61 N. Y. Supp. 849, 852, 46 App. Div. 431.

"Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may have the effect of extinguishing that liability." An oral promise by the owner of a building, in the process of construction, to pay laboring men, for the purpose of procuring the early completion of the building, is not a collateral promise to answer for the debt of a contractor within the statute of fraud, but is an original undertaking which may be enforced against the owner. *Almond v. Hart*, 61 N. Y. Supp. 849, 852, 46 App. Div. 431.

### COLLATERAL PROOF.

"Collateral proof" of a deed is such an account as may reasonably be subjected under all the circumstances of the case, and as will afford a presumption that the deed is genuine. *Havens v. Seashore Land Co.*, 20 Atl. 497, 501, 47 N. J. Eq. (2 Dick.) 365.

### COLLATERAL SECURITY.

Collateral security "is a separate obligation attached to any contract to guaranty its performance" (*Bouvier*); "is security for the performance of covenants, or the pay-

ment of money, besides principal security" (Webster); "is security for the fulfillment of a contract or pecuniary obligation, in addition to the principal security" (Worcester). "There are three kinds of security. The first is simple lien; the second, a mortgage passing a property out and out; the third, the security intermediate between a lien and a mortgage, namely, a pledge where, by contract, a deposit of goods is made a security for a debt, and the right to the property vests in the pledgee so far as is necessary to secure the debt. In all cases of a pledge as collateral security, the general property remains in the debtor. The creditor has only a special property, a lien, a right to retain his security until payment of the debt. When the debt is paid, the security reverts. If default is made, the assignee can proceed to dispose of the security and discharge his debt, and the balance, if any, goes to the assignor or debtor. *Butler v. Rockwell*, 23 Pac. 462, 466, 14 Colo. 125.

"Collateral security," in the phraseology of banks, means some security additional to the personal obligation of the borrower. *Schoemaker v. National Mechanics' Bank* (U. S.) 21 Fed. Cas. 1331, 1334; *D. M. Osborne & Co. v. Stringham*, 57 N. W. 776, 778, 4 S. D. 593; *Edward P. Allis Co. v. Madison Electric Light, Heat & Power Co.*, 70 N. W. 650, 652, 9 S. D. 459.

"Collateral security" means either a separate obligation attached to a contract to guaranty its performance, or it may mean a transfer of property or other contracts to insure the performance of the principal agreement. *Hale v. Burlington, C. R. & N. R. Co.* (U. S.) 13 Fed. 203, 205; *Gilcrest v. Gottschalk*, 39 Iowa, 311, 313; *Lochrane v. Solomon*, 38 Ga. 286, 292.

Collateral, "in its common use, means additional, subsidiary security given to secure the principal obligation. It is a separate obligation. Such 'collateral security' stands by the side of the principal promise as an additional or cumulative means for securing the payment of the debt. The etymology of 'collateral' security indicates that it is something running along with, and, as it were, parallel to, something else of a similar character. It is collateral to the original indebtedness." *Moffatt v. Corning*, 24 Pac. 7, 13, 14 Colo. 104.

Collateral security "is an article of value or evidence of debt delivered by a debtor to a creditor, not in payment of the debt, but as a concurrent security for another debt, whether antecedent or newly created, and is designed to increase the facilities of the creditor to procure the principal debt which it is given to secure." *McCormick v. Falls City Bank* (U. S.) 57 Fed. 107, 110.

The term "collateral," applied to the security of a third person, does not ex vi ter-

mini confer a right in equity to substitution. *Crump v. McMurtry*, 8 Mo. 408, 414.

The use of the term "collateral security," when a debtor transfers to his creditor an article of value or the evidence of a debt, is intended to express that it is not received in payment of the principal debt, and that it is not an additional right to which the creditor is absolutely entitled. It is merely a concurrent security for another debt, subsidiary to the principal debt, and, if the principal debt be paid off, the debtor is entitled to a restoration of the collateral security. *Munn v. McDonald* (Pa.) 10 Watts, 270, 273.

"Collateral security" necessarily implies the transfer to the creditor of an interest in some property, or lien on property, or obligation, which furnishes a security in addition to the responsibility of the debtor. The law regulating this subject rests on the assumption of such transfer to the creditor of property in some form, on which property he relies for security, and which he is entitled to apply, instead of resorting to the debtor's own property, towards the satisfaction of his debt, by virtue of a contract, implied or express, as the case may be, but collateral to the contract of indebtedness. A debtor's additional promises to pay cannot, from the very nature of the case, be treated as collateral security for his debt, unless such additional promises are themselves secured by a lien on property, or by the obligations of third persons. In re *Wadell-Entz Co.*, 35 Atl. 257, 258, 67 Conn. 324.

Notes of third persons are "collateral security," within Comp. Laws S. D. § 5468, providing that no person is entitled to a mechanic's lien who takes a collateral security in the same contract. *Edward P. Allis Co. v. Madison Electric Light, Heat & Power Co.*, 70 N. W. 650, 652, 9 S. D. 459.

No person will be regarded as holding stock as a trustee or by way of "collateral security," within the meaning of section 9, *Wagner's St. p. 301*, and therefore exempt from liability as a stockholder, unless it has come into his possession by original subscription as trustee for some person other than the corporation, or by derivative title as trustee, or by way of collateral security after it has already been issued by the corporation in the ordinary course of business. *Fisher v. Seligman*, 75 Mo. 13, 24.

## COLLATERAL UNDERTAKING.

Where there is a pre-existing debt or other liability, a promise by a third person having immediate respect to and founded on the original liability, without any new consideration moving to him to pay or answer for such debt or liability, is a collateral undertaking within the statute of frauds, as in the case of *Fish v. Hutchinson*, 2 Wils. 94, which was an action founded upon a



promise by the defendant to pay a debt due from a third person to the plaintiff in consideration that the latter would stay his action against such third person. But where, distinct from the original liability, there is a new and superadded consideration for the promise, moving between the party promising and him to whom the promise is made,—in such case it is an original undertaking, as in *Williams v. Leper*, 3 Burr. 1886, where the defendant, having got possession of goods which were subject to distress for rent in arrear, promised the landlord (the plaintiff) to pay him the rent if he would desist from distraining. *Elder v. Warfield* (Md.) 7 Har. & J. 391-396.

### COLLATERAL WARRANTY.

"A warranty is collateral where he on whom the warranty descends does not claim the land as heir of him by whom the warranty was made." *Micheau v. Crawford*, 8 N. J. Law (3 Halst.) 90, 106 (quoting Co. Lit. 375b, 376a, and notes 320, 328; 2 Bl. Comm. 302).

### COLLATERALS.

Rev. Civ. Code, art. 917, permitting natural "collaterals" to inherit, refers to the legal or lawful collaterals. *Montegut v. Bacas*, 7 South. 449, 450, 42 La. Ann. 158.

### COLLATION.

The "collation" of goods is the supposed or real return to the mass of the succession which an heir makes of property which he receives, in advance of his share or otherwise, in order that such property may be divided together with the other effects of the succession. Civ. Code La. 1900, art. 1227.

"Collation" is the bringing the mass of property of an estate together, and so dividing it that each may have, considering what he has already received, his proper share. *Moore v. Freeman*, 35 N. E. 502, 50 Ohio St. 592.

The word "collation," in strictness, is applied only to donations inter vivos, and the obligation of collation is founded on equality, which should be natural between children and other lawful descendants. And as applied to the legitim, the word "impute" should be used rather than "collate." *Miller v. Miller*, 29 South. 802, 805, 105 La. 257.

### COLLECT—COLLECTION.

See "Actually Collected"; "For Collection"; "For Collection and Credit"; "Guaranty of Collection."  
All sums collected, see "All."

Wag. St. p. 1259, § 79, providing that the county clerk should "collect" or cause to

be collected fines, penalties, and all other moneys for school purposes, means that the county clerk is charged with the duty of seeing that the collections mentioned are enforced, but does not authorize the clerk to receive the money. *State v. Moeller*, 48 Mo. 331, 334.

In Rev. St. c. 208, §§ 15, 16, relating to trustee process, and providing that the trustee shall "collect" and apply the proceeds of certain varieties of property to the payment of the debt and costs, the word "collect" means "to do whatever is necessary to be done to convert the notes, bonds, and other property referred to in the section into money, so that he may apply the same to the payment of the claim." *Fling v. Goodall*, 40 N. H. 208, 219.

### Means of collection included.

"Authority to collect" implies and includes authority to use the means ordinarily employed for the purpose of accomplishing a collection, and among these are the retaining of counsel and the institution of suit. Indeed, that is generally the only way in which collection can be compelled, and an agent whose duty it is to collect has certainly the implied power to resort to the ordinary and generally the only means of compelling collection. 'Authority to collect' is broader and more comprehensive than 'authority to receive payment.' *Ryan v. Tudor*, 2 Pac. 797, 798, 31 Kan. 368.

To "collect" is to gather; to assemble. "When used with reference to the collection of money, it often implies much more than the mere act of receiving the money. An attorney brings suit to enforce the payment of a demand, and the amount recovered is made by the sale of defendant's property on judicial process. The term as applied to such a proceeding would describe not only the act of receiving the money, but all the means by which the payment was enforced." *Purdy v. City of Independence*, 39 N. W. 641, 643, 75 Iowa, 356.

A city charter which confers on the city the power to levy and "collect" a certain tax is construed so that the city should have power to use all the usual and ordinary means necessary for the collection of the tax. *McInerny v. Reed*, 23 Iowa, 410, 414.

Code Iowa, § 3370, provides that fines and forfeitures not otherwise disposed of shall go into the treasury of the county where the same are collected for the benefit of the school fund. Held, that the word "collected," as there used, meant more than simply the receiving of the money, but included all the acts by which the penalty is imposed and enforced, including the judgment of the court, which is the means by which the penalty is imposed, together with whatever, either by way of imposing or enforcing the penalty, may be or is done in the course of

collecting the fine. *Pottawattamie County v. Carroll County*, 25 N. W. 703, 67 Iowa, 456.

The words "collect taxes," in a statute making it the duty of the county treasurer to collect taxes, means to obtain payment of the same from taxpayers. In most cases such payments will be made voluntarily, but the power to collect carries with it the authority to use force in the manner pointed out by law to obtain payment. *Taylor v. Kearney County*, 53 N. W. 211, 213, 35 Neb. 381.

As used in a notice by a surety on a note after it became due, directing that the payee should at once proceed and collect the note, etc., the term "collect" implies the adoption of the commonly known and most effective means of enforcing collection, if necessary, namely, the commencement of suit. *Iliff v. Weymouth*, 40 Ohio St. 101, 103.

"Collect," as used in Pol. Code Cal., relating to fines, forfeitures, and penalties, is used in its ordinary sense, and when so used, and no other meaning is manifested, the word "collect," and its cognates or derivatives, signify the obtaining of money without suit. *People v. Reis*, 18 Pac. 309, 313, 76 Cal. 269.

"Collection," as used in a note which provides that 10 per cent. attorney's fees shall be paid if the note is placed in the hands of an attorney for collection, means that which may lawfully be done by the holder of the obligation to secure its payment or liquidation after its maturity. *Shenandoah Nat. Bank v. Marsh*, 56 N. W. 458, 459, 89 Iowa, 273, 48 Am. St. Rep. 381.

Where the caption of an act was "to provide for the collection of the special taxes imposed by law on dealers in spirituous or malt liquors and intoxicating liquors, and for other purposes," and in the body of the act it was provided that upon failure to pay such tax the dealer might be indicted and punished for a misdemeanor, the provision for an indictment and punishment was not objectionable as an insertion of matter different from the title. Code, § 809 (g, h); *Brown v. State*, 73 Ga. 38, 39.

The term "collection," as applied to the guaranty of a note, may undoubtedly imply a legal proceeding against the maker. If it is impracticable to use the ordinary means of coercing payment in consequence of the maker having gone to parts unknown or beyond the reach of legal proceedings, a reasonable construction of the word would control the implied obligation, which on the face of the guaranty was prima facie impossible. The term "collection" alone is equivocal. A reasonable construction would seem to be a warranty that the note could be collected by suit, and an implication not only of ability on the part of the maker to pay, but that he would be in a situation to be sued within the

state in which the contract was made. *White v. Case* (N. Y.) 13 Wend. 543, 544.

#### Note or mortgage.

"Collection," as used in a stipulation in a note providing for the payment of attorney's fees in case the note should be collected by an attorney, refers only to the money payment, and, where the note when sued upon was paid by giving a new note, such satisfaction was not a collection. *Davis v. Cochran*, 24 South. 168, 169, 76 Miss. 439.

*Gantt's Dig.* § 2103, providing that no appeal shall be taken from a justice's judgment after it has been "paid or collected," does not include giving a mortgage for a fine adjudged to the state. *Floyd v. State*, 32 Ark. 200, 202.

#### As equivalent to recovery.

"Collection," as used in a petition for the foreclosure of a mortgage, alleging that no proceeding had been had for the collection of the debt secured, is equivalent to recovery, and hence the petition complies with Code Civ. Proc. § 850, requiring complainant to state whether any proceedings have been had at law for the recovery of the debt secured. *Durland v. Durland*, 87 N. W. 1043, 1049, 62 Neb. 813.

#### Not applicable to realty.

In a will where a testator directed his executor to "collect all the above last-named specified property" collect can only apply to personalty, or can only apply to the proceeds of the sale of realty, and not the realty itself. *Going v. Emery*, 33 Mass. (16 Pick.) 107, 112, 28 Am. Dec. 645.

#### COLLECT ON DELIVERY.

See "C. O. D."

#### COLLECTED BY HIM.

The phrase "moneys collected by him," in a will appointing three executors, and directing that one of them should receive as compensation 6 per cent. upon all moneys collected by him, does not include the entire proceeds of the estate, or upon all sums received by the executor, but only on "collections," giving the word its ordinary meaning. *Ireland v. Corse*, 67 N. Y. 343, 345.

#### COLLECTIBLE.

See "Good and Collectible Note."

An agreement by an outgoing partner, on dissolution, to pay the continuing partner half of the outstanding accounts which are not "collected or collectible," does not require a suit to establish the collectibility of a claim uncollected after a reasonable length of time. *Fellerman v. Goldberg*, 58 N. Y. Supp. 1113, 1114, 28 Misc. Rep. 235.

To warrant that a debt is "collectible" is to warrant that it is legally demandable, and that the debtor is of competent ability to answer it, not that he will pay it when demanded by execution. *McDoal v. Yeomans* (Pa.) 8 Watts, 361, 362.

A guaranty of a note which is to be void "if said note is collectible" will be construed to require the exercise of diligence by the holder of the note to collect the same by action commenced within a reasonable time after its maturity, and the mere fact that the maker is insolvent is not sufficient to authorize a recovery on the guaranty. *French v. Marsh*, 29 Wis. 649, 652.

### COLLECTION OF ANTIQUITIES.

The mere purchase of articles of antiquity singly, at separate times, is insufficient to constitute them a "collection," if they have not been brought together anywhere, within the meaning of Tariff Act 1890, par. 524, relating to the duty on collections of antiquities. *Davis v. United States* (U. S.) 77 Fed. 172, 173, 23 C. C. A. 113.

"Collections of antiquities," which are made free of duty by Act Oct. 1, 1890, par. 524, include only collections of such antique articles as are commonly recognized to be suitable for cabinet collections, according to the taste and usage of collectors of antiquarian and artistic curiosities; that is, suitable to be assembled together in boxes, drawers, or like receptacles, or in any small apartment where articles of vertu, coins, and other bric-a-brac are usually deposited for exhibition, study, the gratification of personal taste, or other like purposes. *In re Glaenzer* (U. S.) 67 Fed. 532, 533.

#### Single articles.

"Collection of antiquities," within the tariff act, embraces a collection of articles where both the antiquity of the individual articles and the circumstance that they are assembled together into a collection unite to make them attractive or useful or valuable, or otherwise desirable. The phrase does not correctly describe two rugs, or cover one-half dozen of bedspreads and two lace curtains. *Baumgarten v. Magone* (U. S.) 41 Fed. 770, 771.

"Collection of antiquities," as used in Tariff Act Oct. 1, 1890, par. 524, does not include a single antique opal. There must be a collection of which the importation is a part, in order to come within such provision. *Tiffany v. United States* (U. S.) 66 Fed. 729, 730.

Tariff Act 1890, providing that collections of antiquities should be admitted free of duty, "was apparently intended to refer to an importation of a collection or group, and not to the importation of a single article."

*In re Glaenzer* (U. S.) 55 Fed. 642, 645, 5 C. C. A. 225.

### COLLECTION DISTRICTS.

In the case of *Cross v. Harrison*, 57 U. S. (16 How.) 164, 14 L. Ed. 889, it was said "that collection districts and ports of entry are no more than designated localities, within and at which Congress had extended the liberty of commerce in the United States, and that so much of its territory as is not within a collection district must be considered as having been withheld from that liberty. It is very well understood to be a part of the laws of nations that each nation may designate upon its own terms the ports and places within its territory for foreign commerce, and that any attempt to introduce foreign goods elsewhere within its jurisdiction is a violation of its sovereignty." *De Lima v. Bidwell*, 21 Sup. Ct. 743, 749, 182 U. S. 1, 45 L. Ed. 1041.

### COLLECTION OFFICER.

"Collection officer," as used in Act Cong. May 31, 1870, 16 Stat. 145, making it criminal for any collection officer to fraudulently make any false certificate of the result of any congressional election, includes local judges and clerks of election at which a representative in Congress is voted for, but does not embrace the Governor of the state. *United States v. Clayton* (U. S.) 25 Fed. Cas. 458, 459.

### COLLECTIVE NATURALIZATION.

"'Collective naturalization' is where the government, by treaty or session, acquires the whole or a part of the territory of another nation, and takes to itself the inhabitants thereof." *State v. Boyd*, 48 N. W. 739, 748, 31 Neb. 682; *People v. Board of Inspectors*, 67 N. Y. Supp. 236, 239, 32 Misc. Rep. 584.

The inhabitants of Porto Rico did not become citizens of the United States by collective naturalization resulting from the treaty by which the United States acquired the island, as the whole subject of collective naturalization was by the express terms of the treaty relegated to the Congress of the United States. *People v. Board of Inspectors*, 67 N. Y. Supp. 236, 239, 32 Misc. Rep. 584.

### COLLECTOR.

As employé, see "Employé."

Rev. St. Ind. 1881, § 1945, defining embezzlement by attorneys at law and collectors, means collectors who, as a profession, for fee or percentage, collect generally for the public. *State v. Sarila*, 34 N. E. 1129, 1130, 135 Ind. 195.

The term "bookkeeper and collector," in the bond of a person employed as "bookkeeper and collector," conditioned for the faithful performance of his duties and to pay over all moneys received in that capacity, did not of themselves indicate an employment which would give control of the entire cash in a job-printing business, the volume of which amounted to from eighty to one hundred thousand dollars a year, so as to make the sureties liable for moneys lost by reason of their principal acting as cashier of the business. *Kellogg v. Scott*, 44 Atl. 190, 192, 58 N. J. Eq. 344.

#### Of taxes.

See "Tax Collector."

#### Of town.

"Collector," as used in St. p. 391, providing that whenever a writ of execution shall issue against the inhabitants of any township or borough of this state, and there shall be no property belonging to said township or borough sufficient to satisfy the sum whereon to levy, then the officer authorized to execute said process shall serve a copy of the same on the collector of said township or borough, etc., means "the officer in either of the municipalities named having the legal custody of, and power to dispose of, funds of such corporation." *Gabler v. Treasurer of City of Elizabeth*, 42 N. J. Law (13 Vroom) 79, 80.

## COLLEGE.

See "Medical College."

Building exclusively used as a college, see "Exclusively Used."

The word "college" is applied to institutions which are confined to some special grades of instruction. This word "college" has become a common dictionary word, which may be appropriated by any person. *Commonwealth v. Banks*, 48 Atl. 277, 278, 198 Pa. 397.

"College," as used in 1 Rev. St. 388, § 4, exempting from taxation every building erected for the use of a college or incorporated academy, means a corporation organized for the purpose of disseminating learning. *Chegaray v. City of New York*, 13 N. Y. (3 Kern.) 220, 229.

The word "college" is employed in this country to indicate an institution of learning having corporate powers and possessing the right to confer degrees. Looked at with reference to its educational work, a "college" consists of the trustees, teachers, and scholars, they making up the membership of the college and representing its active work. *Northampton County v. Lafayette College*, 18 Atl. 516, 128 Pa. 132.

A college is a school of a higher grade than a high school, in which instruction in the high school branches is carried beyond the scope of the high school, and other advanced studies are pursued, or a school in which special, technical, or professional studies are pursued, and which may, when legally organized, have the right to confer degrees in agreement with the terms of the law regulating its practices, or its charter, or, in the want of legislative direction, in agreement with the practices of the better institutions of learning of their respective kinds in the United States. *Bates' Ann. St. Ohio* 1904, § 4007-3.

#### As buildings and grounds.

"College" means a place where a collection of students is contemplated, and not the hall or other buildings intended for their accommodation. *Stanwood v. Peirce*, 7 Mass. 458, 460.

"College," as used in Gen. St. Conn. § 3820, providing that the buildings or portions of buildings exclusively occupied as colleges shall be exempt from taxation, should be construed to include a building or group of buildings in which scholars are housed, fed, instructed, and governed under college discipline, while qualifying for their university degree, whether the university included a number of colleges or a single college. The word "college," as used to denote a constituent of or the equivalent of "university," has a clear and definite meaning. As first used, "college" indicated a place of residence for students, and occasionally a "universitas," or "studium generale." Newman says "the university, to enforce discipline, developed itself into colleges, and so the term 'college' was taken to mean a place of residence for the university student, who would there find himself under the guidance and instructions of superiors and tutors, bound to attend to his personal interest, moral and intellectual." A college is none the less a college because its beneficiaries share the cost of maintenance, and it is immaterial whether such contribution is lumped in one sum, or apportioned to sources of expenses, as tuition, room rent, lecture fee, dining hall, etc. *Yale University v. Town of New Haven*, 42 Atl. 87, 88, 71 Conn. 316, 43 L. R. A. 490.

Viewed with reference to its taxability, the college edifice, with the dormitories and other buildings in the same general inclosure used for the purposes of the school, constitute the "college." *Northampton County v. Lafayette College*, 18 Atl. 516, 128 Pa. 132.

"College," as used in Act 1851, exempting all "colleges," academies, or seminaries of learning from taxation, "is not to be taken in its general sense as signifying an assemblage of persons for any political or ecclesiastical purpose, but in its more usual acceptance, a 'college' of learning, nor in that

sense does it mean an assemblage of professors and students, nor yet the trustees in their corporate capacity, but certain property belonging to them, edifices and lands whereon the same are erected." *State v. Ross*, 24 N. J. Law (4 Zab.) 497, 498.

#### High school.

"College," as used in Act 1891, § 8, providing that no person shall be eligible to the office of county commissioner of schools who shall not be a graduate in the literary department of some recordable college, university, or state normal school, etc., does not include a high school. *People v. Howlett*, 53 N. W. 1100, 1101, 94 Mich. 165.

#### Medical college.

"College," as used in a Statute (1 Rev. St. [Edmund's Ed.] p. 406; 2 Rev. St. [6th Ed.] p. 12) providing that the trustees of every college to which a charter should be granted by the state shall be a corporation, is not confined to literary colleges, but applies as well to a medical college. *People v. Albany Medical College* (N. Y.) 62 How. Prac. 220, 222.

#### As public charity.

See "Public Charity."

#### As school.

See "Public School"; "School."

Common school distinguished, see "Common School."

### COLLEGE ESTATE.

"College estate," within the meaning of the charter of a university, which, after empowering the corporation to take and hold property both personal and real by way of endowment, further provides that, in order that the college may be amply endowed, the college estate shall be freed and exempted from all taxes, includes not only the grounds and buildings of the university, but also all property held by it by way of endowment. It was argued that the meaning of the phrase differed widely from the meaning of "the estate of the college." Perhaps there might be some force in this argument if this phrase stood alone, but taken, as it must be, in connection with the entire exemption clause in question, there can be no doubt whatever that it was intended to include property held by the plaintiff by way of endowment, as well as the college estate proper; and to place any different construction thereon would be to do violence to the manifest intention of the Legislature. *Brown University v. Granger*, 36 Atl. 720, 721, 19 R. L. 704, 36 L. R. A. 847.

### COLLEGE SQUARE.

The designation "college square," in a plat of land in a town, was evidently in-

tended to mean that it was set apart for a use or purpose not private in its character, and in which the public would have an interest; that its use would make the adjacent property more valuable; and that the square was a donation or dedication. *Village of Weeping Water v. Reed*, 31 N. W. 797, 801, 21 Neb. 261.

### COLLEGIATE EDUCATION.

"Collegiate and theological education," in a will by which testatrix provided for the payment of the expenses of a collegiate and theological education for certain of her relatives in case they chose to take advantage of such provisions, means "such an academic and theological training as is practicable and suitable to prepare a person to be a minister of the Gospel; and it would be improper to construe the phrase disjunctively, so as to permit a collegiate education not followed by a theological course." *Shepherd v. Shepherd*, 17 Atl. 173, 174, 57 Conn. 24.

### COLLIER—COLLIERY.

The term "collier" is defined to be "digging of coal; one who works in a coal mine; a coal merchant or dealer in coal." *Commonwealth v. Brookwood Coal Co.*, 25 Pa. Co. Ct. R. 55, 56.

A colliery is a place where coals are dug. *Carey v. Bright*, 58 Pa. (8 P. F. Smith) 70, 85; *Commonwealth v. Brookwood Coal Co.*, 25 Pa. Co. Ct. R. 55, 56.

A "colliery" is defined by lexicographers to be a mine, pit, or place where coals are dug, together with machinery used in discharging and raising of coal. *Springside Coal Min. Co. v. Grogan*, 58 Ill. App. 60, 65.

### COLLISION.

There are four possibilities under which a collision may occur: (1) It may happen without blame being imputable to either party, as where the loss is occasioned by a storm, or any other act of God. In that case the misfortune must be borne by the party on whom it happens to light, the other not being responsible to him in any degree. (2) When there has been a want of due diligence or lack of skill on both sides, in such case the rule of law is that the loss must be borne between them, as having been occasioned by the fault of both. (3) It may happen by the misconduct of the suffering party only, and then the rule is that the sufferer must bear his own burden. Lastly, it may be the fault of the ship which ran the other down, and in this case the injured party would be entitled to entire compensation from the other. *Strout v. Foster*, 42 U. S. (1 How.) 89, 92, 11 L. Ed. 58.

A "collision" between vessels, as between a steamboat and a flatboat, means the running upon the flatboat by the steamboat, or the forcing of some object upon or against it to produce injury; and hence, where a steamboat was running with great velocity, and out of the ordinary channel for boats, and produced waves which destroyed a flatboat moored along the shore of the river, there was a "collision." *Wright v. Brown*, 4 Ind. 95, 97, 58 Am. Dec. 622.

#### Collision while stationary.

It is impossible to give a certain and definite meaning to the word "collision," or to so limit its meaning as to plainly describe in advance that which shall and that which shall not amount to a collision within the meaning of a policy of marine insurance. The ordinary meaning of the word "collision," when applied to a vessel, does not require that the result of the impact shall be so far-reaching as to affect her seaworthiness. Very serious results in the matter of expense of repairing, at least, might follow from the impact, wherein the seaworthiness of the vessel would not be at all impaired, and yet no one would doubt that within the ordinary meaning of the words such a ship had been "in collision." It is not necessary that the vessel should be itself in motion at the time of the collision. If, while anchored in the harbor, the vessel is run into by another vessel, it would certainly be said that the two vessels had been in collision, although one was at anchor and the other was in motion. *The London Assurance v. Companhia De Moagens Do Barreiro*, 17 Sup. Ct. 785, 787, 167 U. S. 149, 42 L. Ed. 118.

Where a policy contained the words "free of particular average unless the vessel be sunk, burned, stranded, or in collision," it was held that there was a collision, within the meaning thereof, where the vessel was completely loaded, and, after casting off her moorings, was made fast again to the wharf because of a difficulty with her engines, and was there run into by a scow in tow of a tugboat, which made a substantial break in her bulwarks. *The London Assurance v. Companhia De Moagens Do Barreiro* (U. S.) 68 Fed. 247, 258, 15 C. C. A. 379.

#### Collision with stationary object.

Collision imports the act of colliding, a striking together, violent contact; but, as used in the admiralty, includes vessels coming in collision with any moving or stationary object, as piles, drawbridge, etc., as well as another vessel. *Newtown Creek Towing Co. v. Aetna Ins. Co.*, 48 N. Y. Supp. 927, 930, 23 App. Div. 152.

"Collision" is nautically defined to be the impinging of vessels together while in the act of being navigated. Common usage, however, applies the term equally to cases where a vessel has run afoul of another when

entirely stationary, or is brought in contact with another by swinging at her anchor; but that term as used in marine law cannot be construed to include an injury received by a vessel from being violently rubbed by another, or pressed by her with force against a pier or wharf. *The Moxey* (U. S.) 17 Fed. Cas. 940, 941.

#### As peril of the sea.

See "Perils of the Sea."

#### COLLISION WITH FOREIGN POWERS.

Where a policy of marine insurance warranted the property to be free from all claims through loss or damage arising from or growing out of a "collision with foreign powers or of our government with others," a burning of the vessel to prevent its falling into the hands of the enemy was the result of a collision with a foreign power. *Marcy v. Merchants' Mut. Ins. Co.*, 19 La. Ann. 388, 392.

#### COLLODION.

"Collodion" is the name given to a substance obtained by dissolving gun cotton in alcohol or ether. It is used as a vehicle for medicines, and as a substitute for sticking plaster. *Celluloid Mfg. Co. v. American Zylonite Co.* (U. S.) 26 Fed. 692.

#### COLLOQUIUM.

The colloquium "is an allegation used in pleading in libel or slander cases to show that the words were spoken in reference to the matter of the averment." *Van Vechten v. Hopkins*, 5 Johns. 211, 220, 4 Am. Dec. 339; *Cooper v. Greeley*, 1 Denio, 347, 359; *Bradley v. Cramer*, 18 N. W. 268, 270, 59 Wis. 309, 48 Am. Rep. 511; *State v. Grinstead*, 61 Pac. 976, 979, 10 Kan. App. 78 (citing *Carter v. Andrews*, 33 Mass. [16 Pick.] 1, 6; *State v. Elliott*, 61 Pac. 981, 10 Kan. App. 69); *Barnes v. State*, 41 Atl. 781, 782, 88 Md. 347. For example, where the alleged libelous article consists in defendant's saying "B. burned my barn," it not being a felony to burn a barn unless it contained corn, and that was the averment that the defendant had a barn full of corn, the allegation that the words were uttered in a conversation in reference to that barn is a colloquium. *Barnes v. State*, 41 Atl. 781, 782, 88 Md. 347 (citing *In re Barham's Case*, 4 Coke, 20; *Rex v. Horne*, 2 Cowp. 672, 684); *Sturtevant v. Root*, 27 N. H. 69, 73.

The office of the colloquium in a complaint for slander is to allege that the words were spoken with reference to extrinsic facts because of which the words are actionable. *Andrews v. Woodmansee* (N. Y.) 15 Wend. 232, 235, 236. The "colloquium" is the name to designate the portion of the plaintiff's pleading, in an action for libel, which is used

for the purpose of coupling the words published, which in themselves do not constitute a libel, with facts which show a libelous meaning. *Lukehart v. Byerly*, 53 Pa. (3 P. F. Smith) 418, 421. As the term is used in reference to the pleadings in libel and slander cases, it is defined as "an averment that the words in question are spoken of and concerning such usage or report or fact, whatever it is, which gives to the words, otherwise indifferent, the particular defamatory meaning imputed to them." *Carter v. Andrews*, 33 Mass. (16 Pick.) 1, 3, 6.

A colloquium, in a complaint for libel, is the statement of extraneous facts and circumstances necessary to fairly understand the defendant's words. *Buckstaff v. Viall*, 54 N. W. 111, 113, 84 Wis. 129.

The colloquium, in the law of pleading in libel and slander cases, applies to that portion of a complaint which is a direct allegation "that the language published was concerning the plaintiff or concerning the plaintiff and his affairs, or concerning the plaintiff and facts alleged as inducement." *Squires v. State*, 45 S. W. 147, 149, 39 Tex. Cr. R. 96, 73 Am. St. Rep. 904.

The colloquium is that part of a declaration in slander or libel which inserts other facts to give color to the words alleged, when the words do not of themselves involve the charge or express the meaning in the innuendo. *Vanderlip v. Roe*, 23 Pa. (11 Har.) 82, 84.

A colloquium, in libel, is the introductory averment as to what the word spoken referred to, the meaning of which may be explained but not added to by the innuendo. *Cheetham v. Tillotson* (N. Y.) 5 Johns. 430, 439.

An innuendo can only explain, but not enlarge, the meaning of the words, without the aid of a colloquium. Therefore the want of a colloquium is not cured by an innuendo. So, where a charge was that plaintiff "swore false before Squire Andrews," and there was no colloquium stated to show that it referred to the trial or other legal occasion, the charge was insufficient, though there was an innuendo for that purpose. *McClaghry v. Wetmore* (N. Y.) 6 Johns. 81, 83, 5 Am. Dec. 194.

## COLLUSION.

Collusion or otherwise, see "Otherwise."

Collusion is defined by Webster, first, in law, as a "deceitful agreement or compact between two or more persons for the one party to bring an action against the other for some evil purpose, so as to defraud a third person of his right; it is a secret understanding between two parties who plead or proceed fraudulently against each other to

the prejudice of a third person; and in general may be defined as a secret agreement and co-operation for a fraudulent purpose." *Bouvier* in his *Law Dictionary* defines "collusion" as an agreement between two or more persons to defraud a person of his rights by the forms of law, or to obtain an object forbidden by law. It is nearly allied to "covein." *Baldwin v. City of New York* (N. Y.) 45 Barb. 359, 369.

Collusion is where two persons, apparently in a hostile position or having conflicting interests, by arrangement do some act in order to injure a third person or deceive a court. *Carey v. Houston & T. C. R. R. Co.*, (U. S.) 52 Fed. 671, 675 (quoting *Rap. & L. Law Dict.*).

"Collusion," as used in a phrase "collusion with administrator," implies, *ex vi termini*, the presence of some one with whom the administrator could collude. Collusion is a secret concert of action between two or more for the promotion of some fraudulent purpose. *Belt v. Blackburn*, 28 Md. 227, 235.

A suit is said to be "collusive" when brought by seemingly adverse parties under secret agreement and co-operation, with a view to have some legal question decided which is not involved in a real controversy between them; or, when so brought with intent to defraud other persons, there must be no real controversy between the parties on purpose to secure some relief, which, as between themselves, would not be conceded with their suit. *Texas & P. R. Co. v. Gay*, 26 S. W. 599, 612, 86 Tex. 571, 25 L. R. A. 52.

Collusion, to constitute relivable fraud in an action to enjoin the collection of a judgment on the ground that it was recovered against a city by the collusion of its officers, does not require necessarily any express agreement between the officers and the claimant to aid the latter to obtain his judgment, or any specific intent to injure. Utter failure of duty on the part of such officers to defend against a known void claim, or one which they have good reason to believe is void, from a desire to co-operate with the plaintiff to enable him to obtain an advantage over the municipality, constitutes guilty collusion, within the meaning of the rule rendering a judgment open to attack in equity by the person whose interests would otherwise be sacrificed. *Balch v. Beach* (Wis.) 95 N. W. 132, 137.

"Collusion," as used in *Prov. St. 1742-43, c. 27, § 4*, declaring that if any person who shall lose money by playing at cards should not, without "covein or collusion," sue and with effect prosecute for the thing lost, it should be lawful for any person to sue and recover treble the value thereof, means covein or collusion between the person who lost and the person who won. *Cole v. Applebury*, 136 Mass. 525, 529.

**Consent judgment.**

Collusion cannot be predicated upon the fact that a debtor consented to a judgment for a debt which he honestly owed. *Rice v. Adler-Goldman Commission Co.* (U. S.) 71 Fed. 151, 152, 18 C. C. A. 15.

**As a conspiracy.**

While not, strictly speaking, a conspiracy, because "to conspire" may mean more than merely to collude, yet a collusion is included in, and often is termed synonymous with, "conspiracy." If the defendants collude for the purpose of cheating and defrauding the plaintiff, no right of action accrues to the plaintiffs unless by reason of such collusion they are cheated or defrauded. *Anderson v. Oscamp* (Ind.) 35 N. E. 707, 709.

"Collusion" is synonymous with "conspiracy." It is an agreement for a wrongful purpose. It is a secret agreement by two or more persons to obtain an unlawful object. Hence an allegation in a complaint which charges that defendants entered into collusion with defendant K. to cause a criminal operation to be performed upon the body of the plaintiff, and to have said K. perform an abortion upon her body, clearly charges the defendants with entering into an unlawful combination to injure plaintiff by performing the abortion. *Miller v. Bayer*, 68 N. W. 869, 870, 94 Wis. 123.

**In divorce proceedings.**

Collusion is an agreement between husband and wife that one of them shall commit, or appear to have committed, or to be represented in court as having committed, acts constituting a cause of divorce, for the purpose of enabling the other to obtain a divorce. Civ. Code Cal. 1903, § 114; Civ. Code Idaho 1901, § 2030; Civ. Code Mont. 1895, § 162; Rev. Codes N. D. 1899, § 2746; Civ. Code S. D. 1903, § 76; *Burgess v. Burgess* (S. D.) 95 N. W. 279, 280; *Clopton v. Clopton*, 91 N. W. 46, 49, 11 N. D. 212.

"Collusion," as the term is used with reference to divorce proceedings, means a secret agreement between husband and wife, and co-operation between them, for the fraudulent purpose of obtaining the divorce illegally. *Beard v. Beard*, 4 Pac. 229, 65 Cal. 354.

Collusion is a corrupt combining of married parties to procure a sentence or judicial order by some false practice, as for one of them to appear to or in fact do what would otherwise be ground for divorce, or in any way to deceive the court in a cause, thus seeking its interposition as for a real injury. *Pohlman v. Pohlman* (N. J.) 46 Atl. 658, 659, 60 N. J. Eq. 28.

Within the provisions of the Code providing that a divorce must be denied on the ground of desertion when there is an unrea-

sonable lapse of time such as establishes a presumption of connivance or collusion or condonation of the offense, "collusion" implies consent to the act complained of, and does not exist where the plaintiff alleged that defendant deserted him and still continues such desertion, without cause and against his will, and without his consent, and such facts have been proven. *Thomson v. Thomson*, 53 Pac. 403, 121 Cal. 11.

Collusion does not exist without an agreement or understanding between the parties to the suit. Where a wife sued for divorce on the ground of desertion, without demanding the custody of her children, she expecting that her husband would charge her with adultery, as he had previously filed a petition for divorce on that ground, but his answer merely denied the desertion, and she testifying that there was no agreement between her and her husband respecting any of the proceedings connected with the suit, and that in the surrogate's court she expected to be appointed guardian of her two younger children, and that on advice of counsel she decided not to have the custody of the children determined until after the divorce case was decided, and that she had not agreed with the husband to have custody of any of the children, it will not be understood that the suit was collusive. *Drayton v. Drayton*, 38 Atl. 25, 28, 54 N. J. Eq. 298.

**COLOGNE.**

Cologne is not an intoxicating liquor, though containing sufficient alcohol to produce intoxication. *Intoxicating Liquor Cases*, 25 Kan. 751, 766, 37 Am. Rep. 284.

**COLONEL MAZUMA.**

In a newspaper article in reference to a criminal prosecution with headline stating, "A Hung Jury. Colonel Mazuma's Presence," etc., the term "Colonel Mazuma" does not indicate a gentleman with a military title at all, and does not even refer to a person. It is a modern provincialism, probably emanating from the daily press, and used when referring to the corrupt application of money in the accomplishment of certain ends; and hence, where jurors read such article before rendition of the verdict, the verdict will be set aside. *People v. Stokes*, 37 Pac. 207, 210, 103 Cal. 193, 42 Am. St. Rep. 102.

**COLONY.**

Rev. St. § 5283, forbidding the fitting out and arming of a vessel with intent that she shall be employed in the service of any foreign state, or of "any colony, district or people," refers to a body politic which has been recognized, by our government at least, as a belligerent; and the section does not ap-



ply to the case of a vessel fitted out and armed to be employed in the service of insurgents, or persons never recognized as a political body. *The Three Friends* (U. S.) 78 Fed. 175, 176.

## COLOR.

See "Artist's Colors."

The term "color," in a federal statute establishing color as a standard to determine the duty upon sugar, "is the hue or degree of lightness which the sugar has attained in the ordinary course of its manufacture, and which indicates the degree of perfection to which process of clarification has been carried. Undoubtedly while the sugar, or the cane juice rather, remains in the manufacturer's hands, he may omit to take out the impurities, or may put in impurities if he so desires, for as yet it has not become sugar. The hue of the sugar—that is, the result of his operations—will be determined by the degree to which he has abstracted the impurities or foreign substances from it, or the amount of such foreign substances as he may have introduced into it. But when it has passed out of his hands and gone into the hands of the importer, or the proposed importer, or the merchant, then the hue it has acquired is the color that Congress had reference to when it established color as the standard of classification. If, then, by the mixture of some foreign or totally different substances, such as caramel, or, as in this case, charcoal, this color be changed, the color so acquired cannot be considered the color to which Congress referred as a standard for assessing duties." *United States v. Cargo of Sugar* (U. S.) 25 Fed. Cas. 288, 291.

The "impression, device, color, or thing," within the meaning of Pol. Code, §§ 1206, 1207, providing that when any ballot bears upon it any impression, device, color, or thing designed to distinguish such ballot from other ballots it shall be rejected, when construed with the phrase "designed to distinguish such ballots," is to be taken to mean an impression, device, color, or thing expressly designed as a means of designating the ballot, and does not include a mere discoloration appearing on ballots which are not designed, but resulting from the use of ink by the elector in scratching his ballot. *Wyman v. Lemon*, 51 Cal. 273, 274.

### As apparent or prima facie right.

Within the rule that every pleading by way of confession and avoidance must give color, it is said that "color" is a term of the English rhetoricians, and was adopted at an early period into the language of pleading. As a term of pleading it signifies an apparent or prima facie right. And the meaning of the rule that every pleading in confession and avoidance must give color is that it must

admit of an apparent right from the opposite party, and rely therefor on some new matter by which to defeat the apparent right. *Merten v. San Angelo National Bank*, 49 Pac. 913, 914, 5 Okl. 585; *Mauldin v. Ball*, 1 Pac. 409, 411, 5 Mont. 96.

The term "color" means semblance, show, pretense, appearance, and implies, in the language of the law, that the thing to which it is applied has not the real character imputed to it. *Chicago, R. I. & P. Ry. Co. v. Allfree*, 20 N. W. 779, 780, 64 Iowa, 500.

### As authority.

"Under color of," as used in Act Pa. 1839, § 20, declaring that street railway companies incorporated under certain acts, and any such company existing "under color of" any charter or letters patent, upon accepting the provisions of this act should become a body corporate thereunder, should be read as equivalent to the words "under authority of." The words often mean that the authority under color of which a thing is done is assumed or defective. But their meaning, like that of all words not purely technical, must depend on the connection in which they stand, and the fixed character of the things to which they relate. *Berks County v. Reading City Pass. Ry. Co.*, 81 Atl. 474, 475, 167 Pa. 102.

### By virtue of, distinguished.

"Color," in law, means not the thing itself, but only an appearance thereof. "as color of title" means only the appearance of title. The expressions "by virtue of" and "under color of" mean very different things; for instance, the proper fees are received by "virtue of the office," extortion is under "color of the office." Any rightful act in office is by "virtue of the office"; a wrongful act in office may be under "color of the office." *Broughton v. Haywood*, 61 N. C. 380, 383.

## COLOR BLINDNESS.

Color-blindness, by which is meant either an imperfect perception of colors or an inability to recognize them at all, or to distinguish between colors or between some of them, is a defect much more common than is generally supposed. Medical treatises of recognized merit on the subject represent, as the result of extended examinations, that a fraction over 4 per cent. of males are color-blind. With some the defect is congenital, with others brought on by occupations in which they have been engaged, or by vicious habits in the use of liquors or food in which they have indulged. It presents itself in a great variety of forms, from imperfect perception of colors to absolute inability to recognize them at all. Such being the proportion of males thus affected, it is a matter of the greatest importance to safe railroad transportation that strict examination be made as

to the existence of this defect in persons seeking employment on railroads in the capacity of engineers and other railroad employes, and therefore Act Ala. June 1, 1887, requiring engineers and other railroad employes to be examined by a medical board to determine whether or not they are color-blind, imposing the expense thereof on the company employing them, and making their employment penal unless they have certificates of fitness, is not repugnant to the power vested in Congress to regulate commerce, as applied to a railway company having its lines, over which the engineer runs, in different states. *Nashville, C. & St. L. R. Co. v. Alabama*, 9 Sup. Ct. 28, 29, 128 U. S. 96, 32 L. Ed. 352.

### COLOR OF AUTHORITY.

Within the rule that a *de facto* officer is one who is in possession of an office and discharging its duties under color of authority, by "color of authority" is meant authority derived from an election or appointment, however irregular or informal, so that the incumbent be not a mere volunteer. *State v. Oates*, 57 N. W. 296, 297, 86 Wis. 634.

Where a party has been placed in possession of premises by the sheriff of the county by virtue of a writ of possession issued in his favor from the district court, such entry is under color of lawful authority, and an action of forcible entry and detainer will not lie therefor. *Wyatt v. Monroe*, 27 Tex. 268, 269. But in connection with this case see *Laird v. Winters*, 27 Tex. 440, 86 Am. Dec. 620, in which it is held that a claimant of land who has been turned out of possession by a writ issued by virtue of a decree, to which he was in no sense a party, can recover his possession by an action of forcible entry and detainer. *Wyatt v. Monroe*, 27 Tex. 268, 269.

### COLOR OF LAW.

"Color of law" does not mean actual law. "Color," as a modifier in legal parlance, means appearance, as distinguished from reality. "Color of law" means mere semblance of legal right. *McCain v. City of Des Moines*, 19 Sup. Ct. 644, 646, 174 U. S. 168, 43 L. Ed. 936 (citing *State v. City of Des Moines*, 96 Iowa, 521, 65 N. W. 818, 823, 31 L. R. A. 186, 59 Am. St. Rep. 381).

### COLOR OF OFFICE.

Color of office is the right, authority, or commission by which a public officer exercises the duties of his office, which was invalid for some reason, and validates all acts of such officer while his right to the office has not been judicially determined adversely to him. *Mace v. Gaddis*, 18 Pac. 545, 546, 3 Wash. T. 125.

An officer's acts done "*colore officii*" are where they are of such a nature that his of-

fice gives him no authority to do them (*Feller v. Gates*, 67 Pac. 416, 417, 40 Or. 543, 56 L. R. A. 630, 91 Am. St. Rep. 492; *State v. Fowler*, 42 Atl. 201, 204, 88 Md. 601, 42 L. R. A. 849, 71 Am. St. Rep. 452; *Gerber v. Ackley*, 37 Wis. 43, 44, 19 Am. Rep. 751; *Bishop v. McGillis*, 50 N. W. 779, 80 Wis. 575, 27 Am. St. Rep. 63), though they are done in a manner that purports they are done by virtue of the office (*State v. Fowler*, 42 Atl. 201, 204, 88 Md. 601, 42 L. R. A. 849, 71 Am. St. Rep. 452).

"Color of office" refers to an act wrongfully done by an officer under the pretended authority of his office, and grounded on corruption, to which the office is a mere shadow of color. *Decker v. Judson*, 16 N. Y. 439, 442; *Kelly v. McCormick*, 28 N. Y. 318, 321. "Color of office," says Tomlin, "is where an act is evilly done by the countenance of an office, and is always taken in the worst sense, being grounded upon corruption, to which the office is as a mere shadow or color." *Kelly v. McCormick* (N. Y.) 2 E. D. Smith, 503, 511; *Winter v. Kinney*, 1 N. Y. (1 Comst.) 365, 368; *Burrall v. Acker* (N. Y.) 23 Wend. 606, 35 Am. Dec. 582. "It is a technical expression. It implies bad faith, corruption, breach of duty." *Chamberlain v. Beller*, 18 N. Y. 115, 117; *Mason v. Crabtree*, 71 Ala. 479, 481; *Richardson v. Crandall*, 48 N. Y. 348, 361.

The phrase "color of his office," as used in 2 Rev. St. p. 286, § 66, providing that no sheriff or other officer shall take any bond, obligation, or other security by color of his office in any other case or manner than is provided by law, is always taken in the worst sense, and signifies an act evilly done by the countenance of an office. *Morton v. Campbell* (N. Y.) 14 Abb. Prac. 410, 413; *Id.*, 37 Barb. 179, 181. It "necessarily imports an illegal claim of right or authority to take the security or to do the act in question by virtue of his office, which claim is a mere claim of pretense on the part of the officer." Any instrument or agreement contemplating an act contrary to the duty of an officer, tending either to official corruption or to the injury of a party interested in the process, is void. *Morton v. Campbell* (N. Y.) 37 Barb. 179, 181.

"Colorable" is defined as having the appearance, especially the false appearance, of right; and a person acting as a possessor, under appointment by a deputy United States marshal, is acting under a "color of office." *Virginia v. De Hart* (U. S.) 119 Fed. 626, 628.

Under Code, § 273, declaring official bonds obligatory on the principal and sureties "for the use of every person who is injured as well by any wrongful act committed under color of his office as by his failure to perform, or the improper or neglectful performance of those duties imposed by law," "under color of his office" means an abuse of the authority of an office, a pretended, not a

real, exercise of the incumbent's jurisdiction, as where, under color of his office, he arrests and imprisons a party. *Coleman v. Roberts*, 21 South. 449, 451, 113 Ala. 323, 330, 36 L. R. A. 84, 59 Am. St. Rep. 111 (citing *Kelly v. Moore*, 51 Ala. 364).

**Acts of particular officers.**

To constitute "color of office" such as will render an officer's sureties liable for his wrongful acts, something else must be shown besides the fact that in doing the act complained of the officer claimed to be acting in an official capacity. If he is armed with no writ, or if the writ under which he acts is utterly void, and if there is at the time no statute which authorizes the act to be done without process, then there is no such color of office as will enable him to impose a liability on the sureties in his official bond. *State v. Dierker*, 74 S. W. 153, 156, 101 Mo. App. 636 (citing *Hawkins v. Thomas*, 3 Ind. App. 399, 29 N. E. 157). See, also, *Chandler v. Rutherford* (U. S.) 101 Fed. 774, 777, 43 C. C. A. 218.

Where a notary pretended he had rendered a judgment, thereby pretending he had authority to receive the money thereon, he committed a wrongful act under "color of office." *Mason v. Crabtree*, 71 Ala. 479, 481.

Where a bond given by an administrator under the provisions of the statute requires him to make a distribution of any moneys, effects, rents, etc., coming into his hands by color of his office, the phrase "color of his office" cannot operate to make the sureties on his bond liable for rents collected by him for lands belonging to his intestate leased by him as administrator, which land descended to the heirs of his intestate at his death. *Wilson v. Unsell's Adm'r*, 75 Ky. (12 Bush) 215, 222.

Code, § 72, provides that the bond of a clerk of a superior court shall be liable for all moneys which may come into his hands by "color of his office." It was held that where the commissioners in partition paid the proceeds to the clerk, who receipted it as clerk, the bond was liable. *Smith v. Patton*, 42 S. E. 849, 131 N. C. 396, 92 Am. St. Rep. 783.

"Color of office" is defined as a pretense of official right to do an act made by one who has no such right. Thus, the act of a clerk of court whose duties are to record mortgages, releases, etc., in recording a forged release of a mortgage given to him by the mortgagor, is not an act done under color of office. *Luther v. Banks*, 36 S. E. 826, 827, 111 Ga. 374.

**As affected by consent.**

By the term "colore officii" must be understood some illegal exertion of authority whereby an obligation is extorted which the statute does not require to be given. If all

parties voluntarily consent to enter into the bond, and the departure from the precise requisition of the statute is made by mistake or accident, and without any design to compel the obligees to enter into an undertaking not required by law, the bond is not invalid simply because it contains something which the statute does not authorize. *United States v. Humason* (U. S.) 26 Fed. Cas. 428, 429.

Bonds made in substantial compliance with the statute, and voluntarily executed by the parties, and not executed by the sheriff, will not be declared void as taken "colore officii." *Kelly v. McCormick*, 28 N. Y. 318, 321; *Griffiths v. Hardenbergh*, 41 N. Y. 464, 469.

**Virtute officii distinguished.**

Acts done "virtute officii," within the meaning of the principle that the sureties of an officer can be held liable for such acts, are where they are within the authority of the officer, but in doing it he exercises that authority improperly; whilst acts done "colore officii," for which his sureties cannot be held liable, are where they are of such a nature that his office gives him no authority to do them. Hence, where a sheriff, acting under an attachment against the property of a debtor, seized the goods of another person, and detained the same on being indemnified, such acts were done "virtute officii," and the sheriff's sureties were liable for his trespass. *People v. Schuyler*, 4 N. Y. (4 Comst.) 173, 187; *Gerber v. Ackley*, 37 Wis. 43, 44, 19 Am. Rep. 751.

Taking a security by a public officer "virtute officii" implies that the act is lawful either by the common law or by the authority of some statute. To take it by "color of office" necessarily implies that the act is unlawful and unauthorized, and that the legal right to take it is as a mere color or pretense. *Burrall v. Acker* (N. Y.) 23 Wend. 606, 608, 35 Am. Dec. 582.

**COLOR OF RIGHT.**

It may be said that "color of right" which constitutes one an officer de facto may consist in an election or appointment, or in holding over after the expiration of one's term, or acquiescence by the public in the acts of such officer for such a length of time as to raise the presumption of colorable right by election or appointment. *Hamlin v. Kas-safer*, 15 Pac. 778, 780, 15 Or. 456, 3 Am. St. Rep. 176.

**COLOR OF TITLE.**

"Color of title" is defined as "apparent right." *Newlin v. Rogers*, 51 Pac. 315, 316, 6 Kan. App. 910.

"Color of title" is defined to be that "which in appearance is title, but which in

reality is no title." *State v. Farrier*, 1 Atl. 751, 752, 47 N. J. Law (18 Vroom) 383; *Kenedy v. Jarvis* (Tex.) 1 S. W. 191, 193; *Miller v. Clark*, 23 N. W. 35, 37, 56 Mich. 337; *White v. Stokes*, 53 S. W. 1060, 1061, 67 Ark. 184; *Erdman v. Corse*, 40 Atl. 107, 108, 87 Md. 506; *Baker v. Swan's Lessee*, 32 Md. 355, 358; *Kopp v. Herrman*, 82 Md. 339, 33 Atl. 646, 647; *Cowley v. Monson* (U. S.) 5 Fed. 779, 782; *Latta v. Clifford* (U. S.) 47 Fed. 614; *Nashville, C. & St. L. Ry. Co. v. Mathis*, 19 South. 334, 385, 109 Ala. 377; *Black v. Tennessee, etc., Ry. Co.*, 9 South. 537, 538, 93 Ala. 109; *Sharp v. Shenandoah Furnace Co.*, 40 S. E. 103, 106, 100 Va. 27; *De Foresta v. Gast*, 38 Pac. 244, 245, 20 Colo. 307; *Lindt v. Uihlein*, 89 N. W. 214, 216, 116 Iowa, 48; *Bolden v. Sherman*, 110 Ill. 418, 425; *Dickens v. Barnes*, 79 N. C. 490, 491.

"The courts have concurred, it is believed without an exception, in defining 'color of title' to be that which in appearance is title, but which in reality is no title. They have equally concurred in attaching no exclusive or peculiar character or importance to the ground of the invalidity of an apparent or colorable title; the rule with them has been whether there was an apparent or colorable title under which an entry or claim has been made in good faith." *Wright v. Mattison*, 59 U. S. (18 How.) 50, 56, 15 L. Ed. 280; *Edgerton v. Bird*, 6 Wis. 527, 536, 70 Am. Dec. 473; *Swift v. Mulkey*, 21 Pac. 871, 873, 17 Or. 532; *Carter v. Woolfork*, 17 Atl. 1041, 71 Md. 283; *Bartlett v. Ambrose* (U. S.) 78 Fed. 839, 843, 24 C. C. A. 397; *Woodruff v. Wallace*, 41 Pac. 357, 363, 3 Okl. 355; *Lebanon Min. Co. v. Rogers*, 5 Pac. 661, 662, 8 Colo. 34.

"When we say a person 'has color of title,' whatever may be the meaning of the phrase, we express the idea at least that some act has been done or some event transpired by which some title, good or bad, to a parcel of land, has been conveyed to him." *City of St. Louis v. Gorman*, 29 Mo. 593, 602, 77 Am. Dec. 586.

Color of title exists wherever there is a reasonable doubt regarding the validity of an apparent title, whether the title arises from the circumstances under which the land is held, the identity of the land conveyed, or the construction of the instrument under which the party in possession claims title. *Cameron v. United States*, 13 Sup. Ct. 595, 598, 143 U. S. 301, 37 L. Ed. 459.

The term "color of title" designates a claim of title that will support a defense based on the statute of limitations, and implies that the title thus described is not valid, but is claimed to be by the party holding under it. In criminal law the term "color of title" implies "a wrong committed by an officer under the pretended authority of his office." To give "color of title" in pleading

is to allege a fictitious matter which gives the appearance of title, and is avoided by allegations setting up the real and valid title. *Chicago, R. I. & P. Ry. Co. v. Allfree*, 20 N. W. 779, 780, 64 Iowa, 500.

A "color of title" is that apparent right in the tenant which he has derived by his paper title which distinguishes him from the naked trespasser or intruder. He who holds under a paper title, therefore, which apparently gives him a right to the land which would lead an honest mind to the conclusion that the right to the land passed by the deed, and more especially when the delivery of the deed is accompanied by a livery of seisin or possession of the premises purporting to be conveyed, must be considered as holding under color of title. *Saltmarsh v. Crommelin*, 24 Ala. 347, 352.

By the term "color of title," as used in a provision requiring suits to recover real estate, as against a person in peaceable and adverse possession thereof under color of title, to be commenced within three years next after the cause of action shall have accrued, is meant a consecutive chain of such transfer down to such person in possession, without being regular, as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing, or such like defect as may not extend to or include the want of intrinsic fairness and honesty, or when the party in possession shall hold the same by a certificate of head-right, land warrant, or land scrip, with a chain of transfer down to him in possession. *Rev. St. Tex. 1895, art. 3341*. See, also, *Rice v. P. J. Willis & Bro.* (U. S.) 87 Fed. 626, 628, 31 C. C. A. 154.

A purchaser in good faith at any judicial or tax sale made by the proper person or officer has "color of title" within the meaning of the chapter relating to occupying claimants, whether such person or officer has sufficient authority to sell or not, unless such want of authority was known to such purchaser at the time of the sale, and his rights shall pass to his assignees or representatives. Any person has also color of title who has occupied a tract of real estate by himself, or by those under whom he claims, for the term of five years, or who has thus occupied it for less time if he, or those under whom he claims, have at any time during such occupancy, with the knowledge or consent, express or implied, of the real owner, made any valuable improvements thereon, or if he or those under whom he claims have at any time during such occupancy paid the ordinary county taxes thereon for any one year, and two years have elapsed without a repayment of the same by the owner thereof, and such occupancy is continued up to the time at which the action is brought by which the recovery of the real estate is obtained. *Rev. St. Utah 1898, § 2024*.

What constitutes "color" is a question of law for the court, while occupancy and acts of ownership are facts for the jury. A deed of conveyance to land, describing it as "all that part of the west half of the north-west quarter of section 19, township 17, range 3 west, that lies south of Black creek," is sufficient to put any one on inquiry who has a claim to a tract with a corresponding description, and an adverse possession thereunder is under color of title. *Black v. Tennessee Coal, Iron & R. Co.*, 9 South. 537, 538, 93 Ala. 109.

#### **Administrator's or guardian's deed.**

An administrator's deed for land sold under an order of a competent court for the payment of debts of the intestate is good color of title under the seven-year limitation law. *Conner v. Goodman*, 104 Ill. 365, 368.

A guardian's deed is inoperative unless the sale and conveyance has been reported to and approved by the circuit court. Such a deed does not constitute such a claim and color of title made in good faith as is required by the limitation act of 1839. *Rawlings v. Bailey*, 15 Ill. (5 Peck) 178.

#### **Bona fides.**

A deed relied upon to give color of title must have been obtained bona fide. If procured by fraud, or if the grantee who relies upon it to sustain his adverse possession is aware that his grantor had no title to convey, the deed is not available as color of title. *Saxton v. Hunt*, 20 N. J. Law (Spencer) 487.

An instrument possessing such characteristics as bring it within the definition of "color of title" as fixed by law is color of title without regard to the good or bad faith of the holder, or without reference to whether he knew in fact of the defect; but, though a paper may constitute color of title, no prescription can be based thereon unless the claimant entered a claim thereunder honestly and in good faith. *Lee v. O'Quin*, 30 S. E. 356, 360, 103 Ga. 355.

A deed purporting to convey title is color of title, without regard to the good or bad faith of the holder. What is color of title is a question of law, while good faith is one of fact. *Hardin v. Gouveneaur*, 69 Ill. 140, 143.

Claim or color of title may be shown by any paper purporting to convey the land or the right to its possession into the party asserting adverse possession, however and for whatever reason such paper might be lacking in the essentials of a muniment of title, provided the party claims under it in good faith. *Goodson v. Brothers*, 20 South. 443, 445, 111 Ala. 589.

"Possession under color of title" means possession under a bona fide claim of title.

*Whitney v. Backus*, 149 Pa. 29, 33, 24 Atl. 51.

An entry on real estate is by "color of title" when it is made under a bona fide and not pretended claim of another. *McCall v. Neely* (Pa.) 3 Watts, 69, 72.

#### **Bond or contract for title.**

"Color of title" may be made through conveyance or bonds or contracts, or bare possession under parol agreements, nor is it at all important whether the title be weak or strong. *Wright v. Mattison*, 59 U. S. (18 How.) 50, 56, 15 L. Ed. 280.

"Color of title" is that which in appearance is title, but which in reality is not title. Thus, where defendants do not set up or claim under any other title than that of a contract for a deed, they do not claim under color of title, as such contract does not pretend to transfer title. *Seymour v. Cleveland*, 68 N. W. 171, 173, 9 S. D. 94.

An executory contract to convey land, the consideration of which has been paid, and which a court would therefore specifically enforce against the vendor, is sufficient color of title to make a possession adverse. *La Frombois v. Jackson* (N. Y.) 8 Cow. 589, 18 Am. Dec. 463.

One who holds possession of land under a contract of purchase made with the agent of the owners of the land, which contract was ratified by the execution of a deed by such owners, such possession having continued for several years, during which she has paid the taxes, is clearly in possession under claim and color of title. *Darst v. Marshall*, 20 Ill. (10 Peck) 227, 234.

"Color of title" is a title which is prima facie good. A purchaser of land holding possession under a bond for title, and having paid the purchase money, has color of title such as will enable him to defend under the statute of limitations, at least from the time when, according to the stipulation of the bond, the title is to be made; but it is a doubtful question whether he has such color of title as will vitiate a conveyance by the owner pending such possession. *Farley v. Smith*, 39 Ala. 38.

The statute of limitations of Texas, § 15, provided that by the term "color of title" was meant a consecutive chain of transfer from the sovereign authority to the party in possession, which was not regular, but the defect in which did not extend to or include the want of intrinsic fairness or honesty. Held, that under this definition a mere declaration in writing by a vendor of land that the vendee had paid the money for it, and that the vendor intended to make the deed when prepared to do so, did not constitute "color of title." *Osterman v. Baldwin*, 73 U. S. (6 Wall.) 116, 123, 18 L. Ed. 730. But under such definition "color of title" was con-

strued to include a bond for title to land, though it does not recite a consideration, for, no matter how defective the title under which a party in possession claims, it is a possession under "color of title" within the statute. *Downs v. Porter*, 54 Tex. 59, 62.

#### **As chain of transfers.**

Section 15 of the statute of limitations of Texas, providing that every suit to be instituted to recover real estate, as against one in possession under color of title, shall be instituted within three years, etc., is not confined to cases in which the defendant was the first to enter under that title; but if he be in a regular chain of transfer from and under the sovereignty of the soil, or in a consecutive chain of such transfer, though not formal in its instruments, he is a defendant within the descriptive words of the statute, and it is wholly immaterial whether he was the first taker from the sovereign of the soil or not, and hence a possession under color of title may be in two or more holding any privity one under another, and need not necessarily be confined to the defendant who was first to enter under the title. *Christy v. Alford*, 58 U. S. (17 How.) 601, 602, 15 L. Ed. 256.

By "color of title" is meant a consecutive chain of transfer down to the person in possession without being regular, as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing. *Thompson v. Ferry* (Ariz.) 56 Pac. 741, 743; *Stanley v. Schwalby*, 18 Sup. Ct. 418, 420, 147 U. S. 508, 37 L. Ed. 259; *Buford v. Bostick*, 58 Tex. 63, 70; *Darnell v. State*, 63 S. W. 631, 632, 43 Tex. Cr. R. 86; *Black v. Garner* (Tex.) 63 S. W. 918, 921; *Horton v. Crawford*, 10 Tex. 382, 386.

#### **Claim of title distinguished.**

The term "color of title" is not synonymous with the term "claim of title." To constitute the former, there must be a paper title; but the latter may be constituted wholly by parol. *Hamilton v. Wright*, 30 Iowa, 480, 486.

Color of title and claim of title held synonymous. *United States v. Cameron* (Ariz.) 21 Pac. 177, 179.

#### **Decree of court.**

A decree in chancery declaring that certain described lands, the title to which is in the defendant in the case, shall be held by the defendant in trust for the sole use and benefit of the plaintiff, constitutes color of title. *Wardlaw v. McNeill*, 31 S. E. 785, 786, 106 Ga. 29.

Where there is an attempt, unconnected with fraud, to foreclose, and a decree is rendered, and sale had, although the decree may be erroneous, or even void, still it shows a change in the relations between the parties from mortgagor and mortgagee to that of

claiming separate and independent rights, and will constitute color of title in the purchaser. *Chickering v. Falles*, 28 Ill. (16 Peck) 507; *Hinkley v. Greene*, 52 Ill. 223; *McCagg v. Heacock*, 42 Ill. 153; *Huls v. Buntin*, 47 Ill. 396. Such color of title, obtained by foreclosure of a senior mortgage, is sufficient, with a possession of seven years to establish limitations, as against a junior mortgagee not made a party to the foreclosure proceedings. *Mason v. Ayers*, 73 Ill. 121, 124.

#### **Deed or devise from life tenant.**

A deed from a life tenant, purporting to convey an estate for the grantee's life, constitutes color of title, and, accompanied with sufficient adverse occupancy, will perfect such life estate. *Staton v. Mullis*, 92 N. C. 623, 627.

A devise in fee from a life tenant constitutes color of title, and seven years' possession under it bars the right of entry. *Evans v. Satterfield*, 5 N. C. 413, 414.

#### **Deed of release.**

A deed of release is claim and color of title, within the limitation law of 1839. *Holloway v. Clark*, 27 Ill. (17 Peck) 483, 486.

#### **As extending possession beyond actual possession.**

Color of title sufficient to extend actual possession of a portion of a tract of land to the whole tract, may be shown by the production of a plat made for or a deed made to the person so claiming the land, or one under whom he went into possession, covering the whole tract, and of the proper date for the purpose, or it may be shown by any other evidence tending to prove that during the requisite time the party in possession has claimed the whole tract. But where two plats covering a large territory were in the possession of one holding actual possession of a small tract included in one of the plats, the other plat, though it embraced territory adjacent to the first plat, would not be sufficient to extend the possession over the territory covered by it. *Stanley v. Shoolbred*, 25 S. C. 181, 190.

#### **Formal requisites and description.**

A color of title is anything in writing which serves to define the extent and character of the claim to the land with parties from whom it may come and to whom it may be made. *Burdell v. Blain*, 66 Ga. 169, 170; *Tumlin v. Perry*, 34 S. E. 171, 172, 108 Ga. 520; *Wardlaw v. McNeill*, 31 S. E. 785, 787, 106 Ga. 29.

"Color of title is anything in writing connected with the title which serves to define the extent of the claim. It is wholly immaterial how imperfect or defective the writing may be considered as a deed. If it is in writ-

ing and defines the extent of the claim, it is a sign, semblance, or claim of title." *Field v. Boynton*, 33 Ga. 239, 242; *Veal v. Robinson*, 70 Ga. 809, 816; *Street v. Collier*, 45 S. E. 294, 118 Ga. 470; *Heavner v. Morgan*, 23 S. E. 874, 878, 41 W. Va. 428; *Mullan's Adm'r v. Carper*, 16 S. E. 527, 532, 37 W. Va. 215; *Randolph v. Casey*, 27 S. E. 231, 233, 43 W. Va. 289.

Color of title involves the idea of some deed of conveyance or some paper or document upon which the holder may reasonably rely as vesting in him the real ownership of the property. *Lindt v. Uihlein*, 89 N. W. 214, 216, 116 Iowa, 48.

Any instrument having a grantor and grantee, and containing a description of lands intended to be conveyed and apt words for their conveyance, gives color of title to the lands described. Such an instrument purports to be a conveyance of the title, and by reason of the fact that it does not for some reason have that effect it operates only to pass color or semblance of title to the grantee, which will ripen into an absolute title by the completion of the time of adverse possession. *Brooks v. Bruyn*, 35 Ill. 392, 394; *Crispen v. Hannavan*, 50 Mo. 536, 546; *Woodruff v. Wallace*, 41 Pac. 357, 363, 3 Okl. 355.

Color of title is that which in appearance is title, but which in reality is no title. Whenever an instrument by apt words of transfer from grantor to grantee in form passes what purports to be the title, it gives color of title. *Teaver v. Akin*, 1 S. W. 772, 773, 47 Ark. 528; *Field v. Columbet* (U. S.) 9 Fed. Cas. 12; *Bartlett v. Ambrose* (U. S.) 78 Fed. 839, 843, 24 C. C. A. 397.

Color of title does not mean a good title, or even a defective conveyance from one having a good title, but means only the appearance of title; that is, a deed to the premises in form of law. In *re Ah Lee* (U. S.) 5 Fed. 899, 913.

A deed which on its face seems to convey title, but does not, is a good foundation for color of title. *Latta v. Clifford* (U. S.) 47 Fed. 614.

A deed, though fraudulent and void as to the creditor, is color of title in the grantee. *Harper v. Tapley*, 35 Miss. 506, 512.

"Color of title" is defined to be an apparent title founded on a written instrument, such as a deed, levy of execution, degree of care, or the like. To give color the conveyance must be good in form, contain a description of property professing to convey the title, and be duly executed. Containing these requirements, it will give color of title, though in fact invalid and insufficient to pass the title, or actually void or voidable. It will not do to say that the deed is for reasons not apparent on its face void, and therefore can-

not give color of title, for color of title is not, and does not profess to be, title at all. Color of title is that which is title in appearance, but not in reality. *Packard v. Moss*, 8 Pac. 818, 820, 68 Cal. 123 (citing 3 Wait, Act. & Def. 17).

"To give color of title it is not necessary that the claim should be under an instrument containing the statutory requisites to convey land. It is enough that the claim of title be under an instrument in writing and defining the extent of the claim." Thus, a deed describing the land claimed by the grantee is sufficient to give him color of title, though not executed as required by statute and not recorded. *Aldrich v. Griffith*, 29 Atl. 376, 378, 66 Vt. 390.

Color of title to land is that which is an apparent title, but in reality is not one. It may be by deed or some instrument of writing operating as an equitable transfer, or it may originate in a parol agreement in a case where actual, and not constructive, occupancy is claimed. When it originates by a deed or instrument purporting to be a deed, there has been a difference in opinion in regard to the requisites which a deed must need, which will be allowed to be color of title. Some authorities insist the deed must be at least clothed with the requisite formalities. All agree that it must designate clearly the land conveyed, and all agree that any defect in the title of the grantor will not affect its admissibility as a color of title. *Hamilton v. Boggess*, 63 Mo. 233, 244.

The paper title, to give color, must be so far prima facie good in appearance as to be consistent with the idea of good faith on the part of the party entering under it; the inquiry being whether there existed such apparent or colorable title under which claim in entry could have been made in good faith, the party believing his title to be good and his claim well founded. *Baker v. Swan's Lessee*, 32 Md. 355, 358.

A bond for a title, which defines the extent and character of the claim, the parties from whom it came, and the parties to whom it was made, but which does not sufficiently describe the lands, located definitely and exactly, is sufficient to constitute color of title. *Tumlin v. Perry*, 34 S. E. 171, 172, 108 Ga. 520.

Colorable title is that which "in appearance is title, but in fact is not." A deed which is invalid because the description of the property sought to be conveyed is indefinite is not sufficient to constitute color of title in one in adverse possession of real estate under such deed. *Dickens v. Barnes*, 79 N. C. 490, 491.

Color of title must apparently transfer title to the holder, must profess to convey a title, must be so far prima facie good in appearance as to be consistent with the idea

of good faith, and must purport to transfer, and apparently transfer, the title. A deed purporting to convey two lots of land in a subdivision by their numbers, where the plat and stakes show the precise location of the lots sold, was held color of title to the entire lots as shown by the plat and stakes, notwithstanding one of the lots, as shown by other testimony, extended six feet over and upon an adjoining tract, and the description in the deed showed distances to include the six feet on the adjoining lot. *Bolden v. Sherman*, 110 Ill. 418, 425.

A deed from S. to B., conveying six rights of land, containing 180 acres, and one from B. to J., purporting to convey one-half of said six rights of land, and one from J. to R. of a piece of land, giving the boundaries on the north, east, and south, and to extend west far enough for 90 acres, are sufficient to show color of title to the west line of the original 180 acres, and the extent of R.'s possession; R. claiming to hold to such west line and being in actual possession of a part of the land. *Beach v. Sutton*, 5 Vt. 209, 218.

#### **Homestead entry or filing.**

After citing *Brooks v. Bruyn*, 85 Ill. 392, and *Wright v. Matteson*, 59 U. S. (18 How.) 50, 58, 15 L. Ed. 280, the court held that a homestead filing does not give color of title. It is a certificate which upon its face does not purport to give title; is an instrument given to designate the person who has claimed, and who is granted, the right to the use and occupancy of a tract of public lands. The government merely parts with the possession of the land, and not the title. *Woodruff v. Wallace*, 41 Pac. 357, 363, 8 Okl. 355.

Color of title has generally been defined as that which in appearance is title, but which in reality is no title. *Wright v. Matteson*, 59 U. S. (18 How.) 50, 15 L. Ed. 280; *Edgerton v. Bird*, 6 Wis. 527, 70 Am. Dec. 473. So that a person holding under an invalid certificate of homestead entry does not hold under color of title; the homestead entry not conveying title. *Whitcomb v. Provost*, 78 N. W. 432, 433, 102 Wis. 278.

#### **Land certificate.**

Const. art. 14, § 2, provides that all land certificates shall be located only upon vacant and unappropriated domain, and not upon any land titled or equitably owned under color of title from the sovereignty of the state, etc. Held, that while a land certificate located prior to the adoption of the Constitution on land to which the title of others was not perfect, but which was covered by the phrase "land titled" in the Constitution, might constitute color of title, it would not so constitute color of title when made subsequent to the adoption of the Constitution. *Texas-Mexican Ry. Co. v. Locke*, 12 S. W. 80, 90, 74 Tex. 370.

A certificate of purchase of swamp lands constitutes color of title, under Code Civ. Proc. Cal. § 1925, declaring it evidence that the holder is the owner of the tract described therein. *Goodwin v. McCabe*, 17 Pac. 705, 706, 75 Cal. 584.

#### **Limited by boundaries and exceptions.**

Color of title cannot extend beyond the boundaries specified in the grant, so that, where land according to the United States survey was not embraced in a patent, the patent does not constitute color of title to such land. *Goltermann v. Schliermeyer*, 19 S. W. 484, 488, 111 Mo. 404.

A deed to A., describing the land as commencing at a certain point, thence running north a specified distance to the south boundary of the lands of B., thence along such south boundary of B.'s land, etc., does not include any part of the land lying north of the south boundary of B.'s land, although the distance specified for A.'s land to run north would carry it beyond such boundary, and such deed does not give color of title to any land lying north of such boundary line. *Smith v. Headrick*, 93 N. C. 210, 218.

Where certain lands had been sold out of a large tract, in a deed describing the boundaries of the large tract by courses and distances, and adding, "including all lands not heretofore sold," such words are descriptive only of all the lands included in the boundaries that were not included in the deeds and conveyances that were before made to other persons. The lands so previously conveyed were as much excluded from the operation of the deed as if they had not been embraced within the sweeping boundaries of that deed. Therefore such deed did not constitute color of title to any of the lands which had been conveyed to other persons. *King v. Wells*, 94 N. C. 344, 354.

The expressed description in a deed will not be extended beyond its terms because of the belief by the holder that it covered lands not embraced in that description, not because of any unexpressed intention in the mind of the grantor that it should cover such undescribed land. To constitute it color of title, it must actually cover the land claimed under it. *Williamson v. Tison*, 28 S. E. 766, 767, 99 Ga. 791.

One who enters into possession of land under a conveyance giving color of title is presumed to occupy according to the boundaries named in the conveyance. *Sumner v. Blakslee*, 59 N. H. 242, 247, 249, 47 Am. Rep. 196.

When one enters upon land under color of title by deed or other written document, he acquires actual possession to the extent of the boundary set forth in the writing, even though the title conveying to him



should be good for nothing. *Kopp v. Herrman*, 82 Md. 339, 33 Atl. 646, 647.

**Must be valid on its face.**

The words "claim or color of title" made in good faith must be understood as importing such a title as, tested by itself, would appear to be good—not a paramount title, capable of resisting all others, but such a one as would authorize the recovery of the amount when attacked, if no better title were shown; that is, *prima facie* title. *Rawlings v. Bailey*, 15 Ill. (5 Peck) 178, 180; *Irving v. Brownell*, 11 Ill. (1 Peck) 402, 413; *Converse v. Calumet River Co.*, 62 N. E. 887, 888, 195 Ill. 204.

"Color of title is that which in appearance is title, but which in reality is no title. It is that which is apparently good title, but which, by reason of some defect not appearing on its face, does not in fact amount to title. A person in possession under an instrument which upon its face does not appear to give him any right of title or possession cannot be said to be holding under color of title." *McLellan v. Omodt*, 33 N. W. 326, 37 Minn. 157.

Where a claim of title is founded upon a written instrument, which purports, however imperfectly, to grant the possession claimed, there is color of title sufficient to support the claim and possession thereunder. An instrument is sufficient to give color of title, however defective its execution or acknowledgment, and however insufficient upon its face to convey title, providing it purports to convey title and pretends conformity to the law. *City of La Crosse v. Cameron* (U. S.) 80 Fed. 264, 271, 25 C. C. A. 399.

To claim a writing as color of title which shows by its terms a title against plaintiff's right which, so far from passing title to one in possession, passes the title to one adverse to his possession, certainly would not aid a possession of seven years and establish a prescriptive right. *White v. Rowland*, 67 Ga. 546, 556, 44 Am. Rep. 731; *Williamson v. Tison*, 26 S. E. 766, 767, 99 Ga. 791.

To constitute color of title there must be some written document of title professing to pass the land which is not so obviously defective that it could not have misled a man of ordinary capacity. *Dobson v. Murphy*, 18 N. C. 586, 592.

**Must purport to convey title.**

Color of title may be defined to be a writing upon its face professing to pass title, but which does not do it, either from a want of title in the person making it, or from the defective conveyance that is used—a title that is imperfect, but not so obviously so that it would be apparent to one not skilled

in the law. *Beverly v. Burke*, 9 Ga. 440, 443, 54 Am. Dec. 351; *Williamson v. Tison*, 26 S. E. 766, 767, 99 Ga. 791; *Gitten's Lessee v. Lowry*, 15 Ga. 336, 338; *Wardlaw v. McNeill*, 31 S. E. 785, 786, 106 Ga. 29; *Tate's Heirs v. Southard*, 10 N. C. 119, 121, 14 Am. Dec. 578; *Bloom v. Strauss*, 69 S. W. 548, 550, 70 Ark. 483.

Color of title is a written instrument, however defective or imperfect, no matter from what cause invalid, which purports to pass or convey title, and which defines the extent of the claim under it. *Swann v. Thayer*, 14 S. E. 423, 424, 36 W. Va. 46.

Color of title to land is defined to be a writing which on its face professes to pass title to land. *Keener v. Goodson*, 89 N. C. 273, 277.

One is said to have color of title to land when he has an apparent, though not real, title to the same, founded on a deed which purports to convey the land to him. *Seigneuret v. Fahey*, 6 N. W. 403, 27 Minn. 60. Color of title signifies some written document which appears to be a title to land, but is not a good title. *Oliver v. Pulliam* (U. S.) 24 Fed. 127, 130.

As used in Act 1839, § 9, providing that one claiming land under color of title made in good faith and paying taxes for seven successive years, while the land was vacant and unoccupied, acquired a good title to the extent of his paper title, means a paper title, whether originating in a wrong or a right. It is such a title as, tested by itself, would appear to be good; that is, a *prima facie* title. An instrument or writing, to be effectual as color, must purport on its face to convey the title. It must apparently transfer the title to the holder; not that the title, when traced back to its source, should prove to be an apparently legal and valid title, but the instrument under which claimant holds and upon which he relies must itself profess to convey a title to the grantee. *Dickenson v. Breeden*, 30 Ill. 279, 325.

Color of title is required, first, to show the extent of the possession; second, the estate claimed by the person in possession; and, thirdly, to give notoriety to others of the claim. "Color of title is not a good one; otherwise, seven years' possession under it would not be required to make it good. Any deed which on its face purports to be a conveyance from one man to another is color of title." A. constituted B. his attorney to levy, recover, and receive all debts due to him, to take and use all due means for the recovering of the same. B. sold to C. a tract of land belonging to A., and conveyed the same as attorney for A. C. entered and had seven years' possession. Held, that the deed of B., though he had no authority to sell, was color of title. *Hill's Heirs v. Wilton's Heirs*, 6 N. C. 14, 18.

"One who holds land under a paper title which apparently gives him the right to the land, and which would lead an honest man to the conclusion that the right to the land passed by the deed \* \* \* must be considered as holding under color of title." *Gist v. Beaumont*, 16 South. 20, 21, 104 Ala. 847.

By the term "color of title" is meant that which appears to be title, but which in reality is no title. It involves, also, the idea of some deed of conveyance, or some paper or document, upon which the holder may reasonably rely as vesting in him the real ownership of the property. A deed given in payment for liquors intended to be sold in violation of law, and void under a statute providing that all conveyances made in whole or in part for or on account of the sale of intoxicating liquors sold in violation of the statute shall be void, is so far in violation of equity and good conscience as not to constitute color of title which will entitle the grantee, as against the grantor, to the value of improvements placed on the property while in possession under the deed. *Lindt v. Uihlein*, 89 N. W. 214, 215, 116 Iowa, 48.

#### **Must show title in grantor.**

A deed gives color of title, but is not even prima facie evidence of title against a stranger, without showing title in the grantor; and several successive transfers cannot alter the case, nor can lapse of time, until aided by the statute of limitations. *Wilson v. Spring*, 38 Ark. 181, 192.

#### **Paper title required.**

Color of title means any written evidence or document under which claim of title is made, and does not mean an instrument in fact effectual to pass title. *La Frombois v. Jackson* (N. Y.) 8 Cow. 589, 596, 18 Am. Dec. 463.

Color of title is not every pretense of claim of title asserted by a person holding realty, but consists in a writing or conveyance of some kind, on its face purporting to convey the land under which the claim of title is asserted. What constitutes color of title is a question of law, and not of fact. *Armijo v. Armijo*, 13 Pac. 92, 94, 4 N. M. (Johns.) 133. A person is properly said to have color of title to lands when he has an apparent, though not a real, title to the same, founded upon a paper writing which purports to convey them to him. What is color of title is purely a question of law, to be determined by the court from an inspection of the papers relied on as constituting color. *Lee v. O'Quin*, 30 S. E. 356, 360, 103 Ga. 355.

"Color of title," as used in *Hurd's Rev. St. 1899*, p. 1118, c. 83, § 6, providing that every person in actual possession of land under color of title shall be adjudged the legal owner to the extent of his paper title, means

an instrument purporting on its face to transfer title, and cannot be aided by parol evidence. *Converse v. Calumet River Co.*, 62 N. E. 887, 888, 195 Ill. 204.

The phrase "color of title," as used in Gen. St. § 2186, refers to a paper writing purporting to convey title, or to some writing whereby title is sought to be acquired. *Knight v. Lawrence*, 36 Pac. 242, 244, 19 Colo. 425.

As used in the limitation act of 1874, the phrase "color of title" means a paper title; but it does not mean a perfect paper title. *De Foresta v. Gast*, 38 Pac. 244, 245, 20 Colo. 307.

In many cases a writing is assumed or held to be necessary as a foundation for color of title. But it is now thought to be the better doctrine that both color and claim of title may exist without any instrument, provided that such claim or color be in good faith. Yet, if there be no writing purporting to convey, there must be some visible acts or signs or indications, which are apparent to all, showing the extent of the boundaries of the land claimed, to amount to color of title. One who has followed a vein which deflects from his own claim into the patented claim of another has not, as to the latter claim, color of title. *Lebanon Min. Co. v. Rogers*, 5 Pac. 661, 662, 8 Colo. 84.

Color of title is defined to be a writing upon its face professing to bear title, but which does not do it, either from a want of title in the person making it, or the defective mode of conveyance that is used. *Avent v. Arrington*, 105 N. C. 377, 10 S. E. 991. So that there is no such thing as color of title by descent. *Williams v. Scott*, 29 S. E. 877, 878, 122 N. C. 545.

The words "color of title" do not "necessarily import the accompaniment of the usual documentary evidence; for, though one entering by title dependent on a void deed would certainly be in by color of title, it would be strange if another, entering under an erroneous belief that he is the legitimate heir of the person last seised, should be deemed otherwise, and it would be stranger still if his allenee were deemed to have more color of title than he had himself. To give color of title, therefore, would seem not to require the aid of a written conveyance, or a recovery by process and judgment, for the law would require it to be the better title." *McCall v. Neely* (Pa.) 3 Watts, 69, 72.

"Color may be given for title without a deed or writing at all, and commence in trespass; and, when founded upon a writing, it is not essential that it should show upon its face a prima facie title, but it may be good as a foundation for color, however defective." *McClellan v. Kellogg*, 17 Ill. (7 Peck) 498, 501.

"Color of title," within a statute declaring that possession under color of title of a portion of a tract of land in the name of the whole tract, and the claim and exercise during the time of such possession of the usual acts of ownership, shall be deemed a possession of the whole tract, cannot be acquired by one going into possession of the land without color of title, and then executing a conveyance thereof to another, and afterwards taking a reconveyance of the property. Such conveyance does not constitute color of title. *Myiar v. Hughes*, 60 Mo. 105, 111.

Color of title, it has often been hold, need not be a technical deed of the land, and is important to give constructive possession of land only, as being definite, not subject to variation from time to time, and something, also, which it is presumed any adverse claimant to the land may ascertain upon inquiry, and which, therefore, he is presumed to know. But where the manner of occupying a portion of the land clearly indicates to every observer the extent of one's claim of possession, every occasional entry of such possessor will be construed an act of possession, and not a bare trespass, which it would be in one making no claim of title; and this is all that is meant by constructive possession. Judgment affirmed. *Buck v. Squiers*, 23 Vt. 498, 504.

#### Quitclaim deed.

A quitclaim deed, taken in good faith, is sufficient color upon which to base title by prescription, when accompanied by seven years' possession thereunder. *Johnson v. Girtman*, 42 S. E. 96, 115 Ga. 794 (citing *Castleberry v. Black*, 58 Ga. 886).

#### Recording required.

Though an unregistered deed does not constitute a perfect title, and cannot be read without proof of its execution, yet it is color of title, under which possession for seven years bars the entry of the owner. *Hunter v. Kelly*, 92 N. C. 285, 287. See, also, *Alldrich v. Griffith*, 29 Atl. 376, 378, 66 Vt. 390.

The term "color of title" means a deed or survey of land placed on the public records of land titles, whereby notice is given to the true owner and all the world that the occupant claims the title. It is on the same principle that it is held that occasional entries on land, cutting timber, etc., which ordinarily would be mere acts of trespass in a stranger, when done by one having color of title, are considered as acts of possession, because the true owner of the land has notice on the public records that a person committing such acts claims title to the land. *Hodges v. Eddy*, 38 Vt. 327, 344.

#### Sheriff's deed.

A sheriff's deed, which purported to pass an estate in fee simple in the land, though the interest of the judgment debtor did not

pass by virtue of it, is color of title sufficient to constitute a claim of adverse possession. *Falls of Neuse Mfg. Co. v. Brooks*, 11 S. E. 456, 460, 106 N. C. 107.

A person who holds a sheriff's deed to land in all respects in due form and regular upon its face, and by virtue of such a deed recovers in ejectment the land from one in possession, and is placed in possession by an order of court having jurisdiction of the persons and subject-matter, has color of title, and cannot be said to be a bare trespasser. *Bernheim v. Horton*, 15 South. 822, 823, 103 Ala. 380.

Where there was a purchase at sheriff's sale and the payment of the purchase money, evidenced by the memoranda and receipt of the purchase money by the sheriff who made the sale, there was a color of title sufficient to support limitations, if followed by seven years' possession. *Field v. Boynton*, 33 Ga. 239, 242.

A sheriff's deed gives color of title by relation from the sale. *Rogers v. Mabe*, 15 N. C. 180, 195.

#### Sheriff's return of sale.

A sheriff's return of a sale is not color of title, for that is not understood by any man of ordinary capacity as either passing or professing to pass a title. *Dobson v. Murphy*, 18 N. C. 586, 593.

#### Tax deed.

A tax deed, valid on its face, made by a public officer who had the right to sell the property for unpaid taxes, constitutes color of title. *Carter v. Woolfork*, 17 Atl. 1041, 71 Md. 283.

A tax deed, regularly executed, purporting to convey land to the grantee by virtue of the legal authority vested in the grantor, gives color of title, though in fact it may be fatally defective. *De Foresta v. Gast*, 38 Pac. 244, 245, 20 Colo. 307.

Void tax deeds are held to give color of title, so that a tax deed, though void, and based upon a void sale, if not showing invalidity upon its face, is a sufficient color of title to be a foundation for adverse possession. *Bartlett v. Ambrose* (U. S.) 78 Fed. 839, 843, 24 C. C. A. 397; *Mullan's Adm'r v. Carper*, 16 S. E. 527, 532, 37 W. Va. 215. By color of title is included a tax deed void upon its face; and a tax deed, the defect in which is anterior to the deed and not apparent on its face, constitutes color of title. *Zwietusch v. Watkins*, 21 N. W. 821, 823, 61 Wis. 615. Color of title may arise from a void deed, yet it will protect the party in possession under it from being treated as a mere trespasser. A sale for taxes confers color of title. *Watkins v. Winings*, 1 N. E. 638, 102 Ind. 330.

Although a tax deed under which the occupant claimed contained a recital showing

that an assessment under which the tax sale was made was invalid, it contained all the other requisites of a good deed, including a sufficient description of the land claimed under it, and hence is sufficient as color of title. *Wilson v. Atkinson*, 20 Pac. 66, 67, 77 Cal. 485, 11 Am. St. Rep. 299.

A tax deed, though it may not be sufficient to pass a good title, owing to irregularities appearing on its face, constitutes color of title sufficient to extend a continuous occupancy of the land to the extent of the boundaries contained therein. *Stovall v. Fowler*, 72 Ala. 77, 78.

To constitute color of title a deed must purport to convey title to the land of which it is claimed to be color of title; and, though it be conceded that a tax deed for the undivided half of a tract of land may be color of title as to one of the undivided halves, the party holding such color of title must show that the sale of the land was for the half interest against which it is sought to be used. *Perry v. Benton*, 111 Ill. 138, 141.

An auditor's deed to the purchaser at a tax sale is color of title in the purchaser in the true intent and meaning of the statute relating to limitations, without regard to its intrinsic worth as a title, and without regard to the constitutionality of the laws under which it was derived. *Woodward v. Blanchard*, 16 Ill. (6 Peck) 424, 430, 431.

A sheriff's tax deed, though not evidence of title until the foundation is laid by the production of a judgment and precept regular and sufficient on their face, is color of title sufficient to establish limitations, if followed by continuous possession. *Baily v. Doolittle*, 24 Ill. (14 Peck) 577-579.

#### **Void deeds.**

Color of title is that which in appearance is title, but which in reality is no title. It is that which the law will consider *prima facie* a good title, but which, by reason of some defect not appearing on its face, does not in fact amount to a title. An absolute nullity, as a void deed or judgment, will not constitute color of title. *Bernal v. Gleim*, 83 Cal. 668, 669.

Color of title is that which in appearance is a title, but which in reality is not one. Even a void and worthless deed is a color of title. *McIntyre v. Thompson* (U. S.) 10 Fed. 531, 536.

#### **Void will.**

"Color of title" is defined to be "a writing upon its face professing to pass title, but which does not do it, either from want of title in the person making it, or from the defective conveyance used." Where a will did not pass any interest in land under it, it cannot be held to be color of title, to aid the possession of a beneficiary and ripen it

into a prescription. *White v. Rowland*, 67 Ga. 546, 556, 44 Am. Rep. 731.

After quoting the definition of color of title in *Beverly v. Burke*, 9 Ga. 440, 54 Am. Dec. 351, it was held that, where a will was void because children were not mentioned, one who had made improvements under it will be held to have made improvements under color of title. *Bloom v. Strauss*, 69 S. W. 548, 550, 70 Ark. 483.

#### **COLORABLE DEVIATION.**

The term "colorable deviation," in a statement that a certain device, which was a plain equivalent, performing the same function in a combination as that covered by the patent, is a mere colorable deviation, is a smaller and more restricted term than "equivalent," as used in its technical patent law sense. *Tecktonius v. Scott*, 86 N. W. 672, 675, 110 Wis. 441.

#### **COLORATION.**

"Coloration," as used in Act Pa. May 5, 1889 (P. L. 241), making it unlawful to manufacture or sell oleomargarine which shall be an imitation of yellow butter, but providing that it shall not be considered to prohibit the manufacture or sale of an article free from coloration or ingredients that cause it to look like butter, means the act or practice of coloring, or the state of being colored. *McCann v. Commonwealth*, 48 Atl. 470, 471, 198 Pa. 509.

#### **COLORE OFFICII.**

See "Color of Office."

#### **COLORED CHILD.**

The term "colored child," in 13 Stat. 266, § 4, providing that every colored child heretofore born is declared to be the legitimate child of the mother, and also of his colored father, if he is acknowledged by such father, includes colored children born during slavery. *Davenport v. Caldwell*, 10 S. C. (10 Rich.) 317, 341.

The term "colored children," as used in the title relating to public education, include all persons of mixed blood descended from negro ancestry. Rev. St. Tex. 1895, art. 3908.

#### **COLORED MAN.**

An application for a new trial, stating as a ground that certain members of the jury were colored men, is not a sufficient allegation to show that such jurors were not qualified electors. "There are various shades of color among the human race in this country, and there is no legal technical signification to the phrase 'colored man,' which the courts are bound judicially to know. A man of

pure Caucasian blood, in the freaks of nature and the idiosyncrasies of families, is sometimes impressed with the dye much deeper than falls to the common lot of his race." *Pauska v. Daus*, 31 Tex. 67, 73.

### COLORED PERSON.

The term "colored person," as used in an act legitimating the marriage of colored persons, includes all colored persons, no matter how or when their freedom was acquired. *Francis v. Francis* (Va.) 31 Grat. 283, 286.

The question whether a person is a colored person, in cases involving the status of colored persons, partakes more of a political than of a legal character, and belongs almost entirely to the jury, and should be determined, not solely by the admixture of negro blood, but by reputation, by reception in society, and by the exercise of the privileges of a white man. *White v. Tax Collector of Kershaw Dist. (S. C.)* 3 Rich. Law, 136.

As the term "persons of color" has acquired quite as definite a meaning as "negro," "mulatto," etc., and is used in the statute prohibiting vessels sailing for the purpose of engaging in the slave trade, the use of the term in an indictment for the violation of the statute does not render the indictment invalid, as being too indefinite and unintelligible. *United States v. La Coste* (U. S.) 26 Fed. Cas. 826, 829.

The term "colored race," as used in the title relating to public education, includes all persons of mixed blood descended from negro ancestry. *Rev. St. Tex.* 1895, art. 3908.

### Negro synonymous.

"Color," as used in P. L. 1881, p. 186, providing that no child between the age of 5 and 18 years shall be excluded from any public school on account of his or her religion, nationality, or color, being applied to persons, means persons of the negro race. *Pierce v. Union Dist. School Trustees*, 46 N. J. Law (17 Vroom) 76, 78.

"Colored person," as used in Code, c. 103, § 2, providing that every person having one-fourth or more of negro blood shall be deemed a colored person, is synonymous with the word "negro," as used in Acts 1877-78, c. 7, § 8, providing that any white person who shall intermarry with a negro, or any negro who shall intermarry with a white person, shall be punished, etc. *Jones v. Commonwealth*, 80 Va. 538, 542.

The expression "person of color" means negro or mulatto. *United States v. La Coste* (U. S.) 26 Fed. Cas. 826, 831.

A "free woman of color" is to be understood to be one of African descent, and syn-

onymous with "free negro." *Heirn v. Briault*, 37 Miss. 209, 222.

### As persons of mixed blood.

"Colored persons," according to the usual signification of those words, means persons of mixed blood. *Hopkins v. Bowers*, 16 S. E. 1, 111 N. C. 175.

A colored person, or person of color, is a person having one-fourth or more of negro blood. Such a person, by Code 1860, c. 130, § 9, was declared to be a mulatto; but that section only applied to slaves, and not to free negroes. *Scott v. Raub*, 14 S. E. 178, 181, 88 Va. 721.

"Free person of color" does not mean only a free negro, but may mean persons colored by Indian blood or persons descended from negro ancestors beyond the fourth degree. *State v. Chavers*, 50 N. C. 11, 15.

The term "persons of color" was defined in 13 Stat. 245, to designate all free negroes, mulattoes, and mestizos, all freedmen and freedwomen, and all descendants through either sex of any of these persons. *Davenport v. Caldwell*, 10 S. C. (10 Rich.) 317, 333.

The expression "persons of color" includes all who are descended from negro ancestors of the fourth generation, inclusive, though one ancestor of each generation may have been a white person. *State v. Watters*, 25 N. C. 455, 457; *State v. Dempsey*, 31 N. C. 384, 388.

The term "person of color," as used in Acts 1838, c. 24, declaring void all marriages between white persons and free negroes and persons of color, includes only cases where such persons of color are within the third degree. *State v. Melton*, 44 N. C. 49, 50.

The term "person of color," as used in Rev. St. tit. 55, exempting from taxation the personal and real estate of "persons of color," includes a quadroon, or a person having one-fourth negro blood, and all other persons who have descended in part only from colored ancestors and have a distinct, visible admixture of African blood. *Johnson v. Town of Norwich*, 29 Conn. 407, 408.

The phrase "persons of color" means "Africans or their descendants, mixed or unmixed. A person who has any perceptible admixture of African blood is generally called a 'colored person.' In affixing the epithet 'colored,' we do not ordinarily stop to estimate the precise shade, whether light or dark, though, where precision is desired, they are sometimes called 'light-colored' or 'dark-colored.' There is no margin between white and colored, and all that are not white are colored." *Van Camp v. Board of Education of Village of Logan*, 9 Ohio St. 406, 411.

Every person having one-fourth or more of negro blood shall be deemed a colored person. *Code Va.* 1887, § 49.

In the construction of statutes, the term "colored person," or "person of color," or "colored," as applied to any person, has the same signification as is attached to "negro," which term includes every person having one-eighth or more of negro blood. Rev. St. Fla. 1892, §§ 1, 2611.

### COLORED RACE.

The term "colored race" is but another designation, and in this country but a synonym, for "African." Clark v. Directors of City of Muscatine, 24 Iowa, 266, 275.

### COLORING MATTER.

See "Artificial Coloring Matter."

### COLPORTEUR.

The word "colporteur," as used in a will giving a sum in trust to the deacons of a church to aid in the support of a Baptist colporteur and missionary in the state of Wisconsin, means, according to the lexicographers, "one who travels for the sale and distribution of religious tracts and books." Webster's Dict. "A hawker and peddler; especially, in modern usage, a peddler of religious books." Worcester Dict. In France, "a hawker of books and pamphlets; one who travels for vending small books." Imp. Dict. In England, "one who is engaged by a religious society or association to travel about and distribute or sell religious books or tracts of the society, in the latter case at reduced prices." Cyclop. Dict. "A person employed by a Bible or tract society, or the like, to distribute gratuitously or sell at low rates Bibles and various other religious publications." Cent. Dict. In re Fuller's Will, 44 N. W. 304, 305, 75 Wis. 431.

### COLT.

The term "colt," as distinguished from "horse," means a horse not old enough to work. Mallory v. Berry, 16 Kan. 293, 295.

An indictment alleging that the defendant branded a colt is sufficient, without a further allegation that the colt was of the horse species. "Horse" is the generic name of the equine species. To name one of the species is sufficient. Pullen v. State, 11 Tex. App. 89, 91.

### COM.

"Com." and "Co." are both well-understood abbreviations of the word "company," when used as a part of the name of a commercial firm; and where a complaint alleged that defendants made their note payable to "S. & Co.," and that "S. & Com." indorsed and delivered it to plaintiff, and the note,

when introduced in evidence, was indorsed "S. & Co.," there was no variance. Keith v. Sturges, 51 Ill. 142, 143.

### COMBAT.

See "Mutual Combat."

### COMBINATION—COMBINE.

An agreement between two or more persons forms a combination between them. In re Grice (U. S.) 79 Fed. 627, 642.

Worcester defines "combine" thus: "To join together, to coalesce, to unite, to be united, to be joined in friendship or in design. Roget, in his Thesaurus, classifies the word "combine" as synonymous with or belonging to the same class as "unite; incorporate; amalgamate; embody; absorb; re-embody; blend; merge; fuse; melt into one; consolidate; coalesce; centralize; impregnate; to put together; to lump together." Considering such definitions in view of the familiar rule of statutory construction that the words of a statute are to be taken in their ordinary and familiar signification and import, the word "combine," as used in Act April 15, 1854, providing that no company formed to navigate the lakes and rivers shall combine with any other company formed under the act for any purpose, is not to be construed as only prohibiting combinations to prevent what is contrary to public policy or injurious to the public, but includes combinations for any purpose whatsoever. Watson v. Harlem & N. Y. Nav. Co. (N. Y.) 52 How. Prac. 348, 353.

### COMBINATION IN RESTRAINT OF TRADE.

In order to constitute a trust, within the statute making contracts void where a combination of capital, skill, or acts is formed to create or carry out restrictions in trade or to prevent competition in the sale or purchase of commodities, there must be a combination of capital, skill, or acts by two or more. "Combination," as here used, means union or association. If there be no union or association by two or more of their capital, skill, or acts, there can be no combination; hence no trust. When we consider the purposes for which the combination must be formed, the essential meaning of the word "combination," and the fact that a punishment is prescribed for each day that the trust continues in existence, we are led to the conclusion that the union or association of capital, skill, or acts denounced is where the parties in the particular case designed the united co-operation of such agencies, which might have been otherwise independent and competing, for the accomplishment of one or more of such purposes. State ex inf. Crow v. Continental Tobacco Co., 75 S. W. 737, 747, 177 Mo. 1

(citing *Gates v. Hooper*, 39 S. W. 1079, 90 Tex. 563).

As used in Rev. St. 1895, art. 5313, making contracts void where a combination of capital, skill, or acts is formed to create or carry out restrictions in trade, means union or association. If there be no union or association by two or more of their capital or acts, there can be no combination, and hence no trust. *Gates v. Hooper*, 39 S. W. 1079, 1080, 90 Tex. 563; *Texas & P. Coal Co. v. Lawson*, 34 S. W. 919, 920, 89 Tex. 394. So that a lease by a coal company of its saloon, in which the lessor covenants not to permit the sale of liquor by any one else on its lands, is void. *Texas & P. Coal Co. v. Lawson*, 34 S. W. 919, 920, 89 Tex. 394.

The term "combination in restraint of commerce among the states," within the meaning of Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], prohibiting combinations in restraint of commerce among the states, does not include a combination for the purchase of the stock of sugar refineries for the purpose of acquiring control over the business of refining sugar for sale in the United States. *United States v. E. C. Knight Co.*, 15 Sup. Ct. 249, 252, 156 U. S. 1, 39 L. Ed. 325.

"Combination in restraint of trade," as prohibited by Act March 30, 1889, includes a contract of sale between a brewing company and a dealer, whereby the company grants exclusive territory to the dealer for the sale of its products, and the dealer agrees not to sell the product of any other company. *Texas Brewing Co. v. Templeman*, 38 S. W. 27, 28, 90 Tex. 277.

A combination or contract in restraint of trade may be not only not illegal, but praiseworthy, as where parties attempt to engross the market by furnishing the best goods, or the cheapest; so that ordinarily a case cannot be made under the statute, unless the means are shown to be illegal, and therefore it is ordinarily necessary to declare the means by which it is intended to engross or monopolize the market. *United States v. Patterson* (U. S.) 55 Fed. 605, 607, 638.

#### As applicable to laborers.

Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], providing that every contract or combination, in the form of trust or otherwise, "in restraint of trade or commerce," is illegal, applies to combinations of laborers, as well as of capitalists. *United States v. Workmen's Amalgamated Council of New Orleans* (U. S.) 54 Fed. 994, 996, 26 L. R. A. 158.

A combination setting out to secure and compel the employment of none but union men in a given business, and as a means of effecting this compulsion to finally enforce the discontinuance of labor in all kinds of

business, including the business of transportation of goods and merchandise which were in transit from state to state and to and from foreign countries, was a combination in restraint of trade. *United States v. Workmen's Amalgamated Council* (U. S.) 54 Fed. 994, 999, 26 L. R. A. 158.

#### COMBINATION PATENT.

##### See "Patentable Combination."

A "combination" is an entirety. If one of its elements is omitted, the entire claim disappears. Every part of a combination claimed is conclusively presumed to be material to the combination, and no evidence to the contrary is admissible in any case of alleged infringement. The patentee makes all parts of the combination material when he claims them in combination, and not separately. A claim for a combination covers the exact combination claimed, and nothing more. It does not protect the elements of the combination, nor their mode of union, nor their co-operative law, separately considered. *Engle Sanitary & Cremation Co. v. City of Elwood* (U. S.) 73 Fed. 484, 485 (citing *Walk. Pat. § 349*; *Rob. Pat. § 527*; *Richards v. Chase Elevator Co.*, 159 U. S. 477, 16 Sup. Ct. 53, 40 L. Ed. 225).

"Combination," as used with respect to patents, means a co-operative union of elementary parts, effecting one practical result. *Thomas Roberts Stevenson Co. v. McFassell* (U. S.) 90 Fed. 707, 708, 33 C. C. A. 249.

A claim for a patent cannot be treated as a combination claim, in the absence of the word "combination" and of a statement of a specific element of which it is composed. "Claims for devices cannot be changed to claims for combination by construction." *Brown Mfg. Co. v. David Bradley Mfg. Co.* (U. S.) 51 Fed. 226, 227.

A patent, made up of a combination of separate elements, all of which are old and well known, is a "combination patent," and is a patentable invention, providing a new and useful result is obtained. *P. H. Murphy Mfg. Co. v. Excelsior Car Roof Co.* (U. S.) 70 Fed. 491, 495.

A combination claim is one which takes various mechanical elements and joins them together in such a way as to make an operative mechanism, the action of which is produced by the joint action of all the mechanical elements in the combination. *Moore v. Schaw* (U. S.) 118 Fed. 602, 603.

#### COMBINATION POOLS.

The term "combination pools" is used to designate a method of gambling on horse races, which is somewhat similar to mutual pools, and is conducted in the following manner: "In the combination pools there must

be three contests or races. The person speculating in combination pools must select his choice in the race, the same as done in the mutual; but, in order to win, he must have selected the winner in each of the three races. If any one of the horses chosen by him fails, he wins nothing. Any number of persons may select the same combination, and, if any particular combination wins, the persons having selected that combination are entitled to the whole amount, less the commission of the persons conducting the pool, to be equally divided, upon producing their cards or tickets. The sum deposited on each selection of a combination is uniform. Persons purchasing these combination tickets may decline to name any combination and purchase the field, and, should all the combinations fail, the pool, less the commission aforesaid, is divided among those holding tickets on the field." *James v. State*, 63 Md. 242, 250.

### COMBINED OFFENSE.

Code, § 4300, providing that, in cases of combined offenses, both offenses may be charged in one indictment, means only cases where the same act constitutes in itself more crimes than one, and does not include cases in which two or more crimes are committed in succession. *State v. Ridley*, 48 Iowa, 370.

### COMBUSTION CHAMBER.

In the description of a claim for a patent, the term "combustion chamber" necessarily implies an inclosed space in which the acts of combustion may be confined. It is a well-understood term in the vocabulary of industrial arts. *Bryce Bros. Co. v. National Glass Co.* (U. S.) 116 Fed. 183, 190, 53 C. C. A. 611.

### COME.

Act April 19, 1794, § 7, provided that, if any person die seized or possessed of property, leaving neither widow, lawful issue, nor father, the whole of the real estate shall be enjoyed by the intestate's mother, unless the real and personal estate of either of them has come to the intestate from the part of his father, in which case so much as shall have so come shall descend as if such intestate had survived his mother. Held, that "come" does not mean come by descent only, but is also applicable to a devise. *Shippen v. Izard* (Pa.) 1 Serg. & R. 222, 224.

Rev. St. art. 4535, requiring a railway company doing business in the state to receive all freight and passengers "coming to it" on a connecting line, designates freight which has reached that line in the course of transportation, to be forwarded over the road of the receiving company. *Gulf & I. Ry.*

*Co. v. Texas & N. O. Ry. Co.*, 56 S. W. 323, 329, 93 Tex. 482.

The expression, as used in the act relating to descents and distributions, "where the estate shall have come to the intestate on the part of the father," or "mother," as the case may be, shall be construed to include every case where the inheritance shall have come to the estate by gift, devise, or descent from the parent referred to, or from any relative of the blood of such parent. *Ann. St. Ind. T.* 1899, § 1841.

### To market.

The words "coming to market," in the by-law of October 6, 1802, which makes it unlawful for any person to buy up any provision or article of food coming to market, means on his way to the market place with intent to buy goods there offered for sale in market hours, and does not require that there shall be a market actually holding at the time of the purchase in order to constitute the offense. *Boteler v. Washington* (U. S.) 3 Fed. Cas. 962.

### To reside.

"Come to reside," as used in Code 1797, relating to the residence of a pauper who shall come to reside within the state, extends to a person residing within the state at the time of the passage of the act, but not having settlements therein, and is not limited to persons coming into the state literally, after the act took effect. *Town of Starksborough v. Town of Hinesburgh*, 13 Vt. 215, 222; *Town of Burlington v. Town of Calais*, 1 Vt. 385, 394.

In the several provincial statutes of 1692, 1701, and 1767, in reference to settlements for the purpose of the poor laws, the terms "coming to sojourn or dwell," "being an inhabitant," "residing and continuing one's residence," and "coming to reside and dwell," are frequently and variously used, and we think they are used indiscriminately to mean the same thing, namely, to designate the place of a person's domicile. This is defined in Const. c. 1, § 1, for another purpose, to be "the place where one dwelleth or hath his home." *Inhabitants of Abington v. Inhabitants of North Bridgewater*, 40 Mass. (23 Pick.) 170, 176.

### Within or into the state.

Limitation statutes, declaring that, where the statute has been suspended during the debtor's absence from the state, the statute shall begin to run again on the debtor's coming into the state, mean a coming into the state which is so notorious that persons with whom the debtor associated knew of the same, or that the creditor might by the use of ordinary diligence have learned of the debtor's whereabouts. If the debtor came into the state secretly, his act in so doing would not be a "coming into the state" with-



In the statute. *Frey v. Aultman, Miller & Co.*, 2 Pac. 168, 169, 30 Kan. 181.

If a debtor remove or return into the state publicly and with a view to dwell and permanently reside within its jurisdiction, although in an extreme part from the place of his former residence or that of the creditor, it is a "coming or returning within the state," within the meaning of the statute of limitations. *Mazon v. Foot* (Vt.) 1 Aikens, 282, 285, 15 Am. Dec. 679.

#### COME AT ONCE.

A telegram announcing the sickness of the wife of the sender, with the expression "Come at once," is sufficient to require of a telegraph company active diligence in an effort to promptly deliver the message. The expression is sufficient to justify or require an inference that the message was of importance. *Western Union Tel. Co. v. Lavender* (Tex.) 40 S. W. 1035, 1036.

#### COME BY THE FATHER.

The phrase "come by the father," relative to the descent of an estate, as used in a statute, embraces not only the father, but all of the ancestors of the father, both paternal and maternal. *Kelly's Heirs v. McGuire*, 15 Ark. 555, 586.

#### COME BY THE MOTHER.

The phrase "come by the mother," in a statute relative to descent of property, has a technical meaning, and embraces not only the mother, but all the ancestors of the mother. *Kelly's Heirs v. McGuire*, 15 Ark. 555, 586.

#### COME TO TIME.

A statement by one of the two signers of a promissory note, who claimed to be a surety to the holder of such note, that "you must make D. come to time this fall. You know it is the best time for making money with the farmers,"—cannot be construed as a direction to the holder to take legal proceedings against D., the other signer of the note. *Lawson v. Buckley*, 2 N. Y. Supp. 178, 179, 49 Hun, 329.

#### COME UP TO.

Pol. Code, § 1571, providing that the state chemist shall analyze the samples of fertilizers sent to him, and, if such analysis shows that the "fertilizer does not come up to the guaranteed analysis," then the sale made by such sample shall be null and void, does not necessarily require that the two analyses should agree exactly in all particulars; but, if they show results substantially the same, the reason and spirit of the law is complied with, and a sale will not be void. *Spinks v.*

*Rome Guano Co.*, 33 S. E. 906, 907, 108 Ga. 614.

#### COMES NOT.

The term, in the entry of a judgment by default, that "defendant comes not," merely imports a failure of the defendant to come and answer the declaration, and not that he has never appeared to the suit. *Horner v. O'Laughlin*, 29 Md. 465, 472.

#### COMEDY.

A comedy is a dramatic representation of the lighter faults, passions, actions, and follies of mankind. *Commonwealth v. Fox*, 10 Phila. 204.

#### COMFITS.

Leghorn citron, in the sense that sugar is used to preserve it, may be said to fall within the classification of "comfits, sweetmeats, or fruits preserved in sugar," in *Tariff Act 1883*, par. 302; but such citron is not dutiable under such paragraph, but is entitled to free entry as a dried fruit. *Nordlinger v. United States* (U. S.) 69 Fed. 92.

"Comfits," as used in the customs duty act, includes candied citron. A comfit, according to the dictionary, is a dried sweetmeat, any kind of fruit or root preserved with sugar and dried. A sweetmeat is a fruit preserved with sugar, but not necessarily dried. What would be a sweetmeat becomes a comfit, if it is not only preserved with sugar, but also dried. *Levy v. Robertson* (U. S.) 38 Fed. 714, 715.

#### COMFORT.

See "Aid and Comfort"; "Good and Comfortable Support and Maintenance"; "Necessary Comforts."

The words "support and comfort," as used in a will giving all the testator's estate, both personal and real, to his wife for life, for her "support and comfort," merely express the purpose and motive of the gift, and do not make the gift conditional. They have little, if any, more significance than the words "to be for her benefit and enjoyment," and are not sufficient to cut down the clearly expressed absolute gift to a qualified or conditional one." *Maynard v. Cleaves*, 21 N. E. 376, 149 Mass. 307.

Priv. Acts 1835, c. 85, § 8, incorporating the town of Raleigh, and providing that such corporation shall have power and authority to pass such ordinances as should be necessary to preserve the health and comfort of the town, is not susceptible of a construction sufficiently broad to authorize an ordinance punishing criminal offenses, on the theory

that a breach of the peace disturbs the comfort of the citizens; "but this would be a strained construction of the charter, and, if regarded as correct, would include the whole catalogue of criminal offenses, and authorize the corporation to inflict penalties for the commission of them." *Corporation of Raleigh v. Dougherty*, 22 Tenn. (3 Humph.) 11, 12, 39 Am. Dec. 149.

#### As maintenance or support.

In a statute exempting property from sale for the satisfaction of any and all debts, other than debts "for articles of comfort and support of the household," the words "comfort" and "support" have the same meaning, and are synonymous with "maintenance," and when the household are supplied with food, raiment, habitation, medical assistance, and medicines, the boundary prescribed by the statute is reached. *Eskridge v. Ditmars*, 51 Ala. 245, 255.

"The word embraces whatever is requisite to give security from want and furnish reasonable physical, mental, and spiritual enjoyment. 'It implies,' says Webster, 'some degree of positive animation of spirits, or some pleasurable sensations derived from happy and agreeable prospects.'" As used in a will requiring testator's executors to set aside so much of the income of testator's estate as is necessary for the comfort of testator's wife, it is not satisfied by setting aside a sufficient sum to provide her with sufficient food and wearing apparel. *Forman v. Whitney*, 41 N. Y. (2 Keyes) 165, 168.

"Comfort," as used in a will devising testator's property to certain persons for life, and providing that, should it be necessary for their personal comfort to use any portion of said property, they might sell it, means "support." *Peckham v. Lego*, 19 Atl. 392, 393, 57 Conn. 553, 7 L. R. A. 419, 14 Am. St. Rep. 130.

#### As physical comfort.

"Comfort," as used in a will devising property to testatrix's husband for life, with power to dispose and sell the same whenever in his judgment he might deem it conducive to his comfort, means the physical comfort to be derived from the actual or potential application of the proceeds of such a disposition to the present or prospective physical comfort or support of the husband. There may be also, to a limited extent, a mental element in the comfort, consisting of that peace of mind which comes from a knowledge or belief that, by reason of a change in the property resulting from a disposition by sale, it will be rendered more easily available for the physical comfort or support of the husband, and not to that peace of mind which arises from a knowledge that the property has been so disposed of as to contribute to the enjoyment and support of others. The comfort experienced by the phi-

lanthropist in giving away his property, whether to relatives, friends, or strangers, is not the kind of comfort which testatrix had in mind when she was engaged in making the will. *Stocker v. Foster*, 60 N. E. 407, 408, 178 Mass. 591.

#### COMFORTABLE HOME.

A provision in a will, bequeathing a homestead farm subject to the obligation to furnish a "comfortable home" for testator's sister, means something more than a shifting abode, with strange faces and strange surroundings, and requires a home for such sister on the ancestral estate amidst the scenes of her childhood. *Emery v. Swasey*, 53 Atl. 992, 994, 97 Me. 136.

#### COMITY.

Comity means general reciprocity. In *re McCoskey*, 1 N. Y. Supp. 782, 783, 6 Dem. Sur. 438.

The term "comity" is defined as "courtesy: a disposition to accommodate." Courts of justice in one state will, out of comity, enforce the law of another state, when by such enforcement they will not violate their own laws or inflict an injury on some one of their own citizens. This rule contributes largely to produce kindly intercourse between the states and individuals, permits them to sue in each other's courts, and to travel and transact all kinds of business in each other's territory, when they are not prevented by some positive law of the state. *Franzen v. Zimmer*, 35 N. Y. Supp. 612, 614, 90 Hun. 108.

Comity concedes and allows, but does not withhold or prohibit. It yields as a favor what cannot be claimed as a right. When it is the basis of judicial determination, the court extending the comity out of favor and good will extends to foreign laws an effect they would not otherwise have. It is not an exercise of comity to administer the local law, though it agrees with the foreign law. *Stowe v. Belfast Sav. Bank* (U. S.) 92 Fed. 90, 96.

Comity is not a rule of law, but one of practice, convenience, and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uniformity of decision and discouraging repeated litigation of the same question. But its obligation is not imperative. If it were, the indiscreet action of one court might become a precedent, increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle. Comity persuades, but it does not command. It declares, not how a case shall be decided, but how it may with propriety be decided. It recognizes the fact that the primary duty of every court is to dispose of

cases according to the law and the facts; in a word, to decide them right. In doing so the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where in his own mind there may be a doubt as to the soundness of his views that comity comes in play and suggests a uniformity of ruling to avoid confusion until a higher court has settled the law. It demands of no one that he shall abdicate his individual judgment, but only that deference shall be paid to the judgments of other co-ordinate tribunals. Clearly it applies only to questions which have been actually decided and which arose under the same facts. *Mast, Foos & Co. v. Stover Mfg. Co.*, 20 Sup. Ct. 708, 710, 177 U. S. 485, 44 L. Ed. 856; *Welsbach Light Co. v. Cosmopolitan Incandescent Light Co.* (U. S.) 104 Fed. 83, 85, 43 C. C. A. 418. Thus the owner of a patent is not in any case entitled to a preliminary injunction against infringement as a matter of strict right, but the application therefor is addressed to the sound discretion of the court, which cannot be constrained by any rule of comity to follow the decisions of another jurisdiction against its own independent judgment. Hence it is not a ground for the reversal of an order refusing such an injunction that it is contrary to the decisions of the courts of another circuit. *Welsbach Light Co. v. Cosmopolitan Incandescent Light Co.* (U. S.) 104 Fed. 83, 85, 43 C. C. A. 418.

The term "comity" is open to the charge of implying that the judge, when he applies foreign law to a particular case, does so as a matter of caprice or favor. It is rather a scapegoat, an opportunity of escape for the court. *Conklin v. United States Shipbuilding Co.* (U. S.) 123 Fed. 913, 916.

### COMITY OF NATIONS.

What is termed "comity of nations" is the formal expression and ultimate result of that mutual respect accorded throughout the civilized world by the representatives of each sovereign power to those of every other in considering the effect of their official acts. Its source is a sentiment of reciprocal regard, founded on identity of position and similarity of institutions. The effect to be given to a foreign judgment in personam for a money demand must be determined either by the comity of nations, the rule of absolute reciprocity, or the personal obligation resting upon the defendant. *Fisher v. Fielding*, 34 Atl. 714, 716, 67 Conn. 91, 32 L. R. A. 236, 52 Am. St. Rep. 270.

Comity, in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will on the other, but it is the recognition which one nation allows within its territory to the legis-

lative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens, who are under the protection of its laws. *Hilton v. Guyot*, 16 Sup. Ct. 139, 143, 159 U. S. 113, 40 L. Ed. 95.

In *Bank of Augusta v. Earle*, 38 U. S. (13 Pet.) 519, 10 L. Ed. 274, it was said by Chief Justice Tenney: "Comity extended to other nations is no impeachment of sovereignty. It is a voluntary act of a nation by which it is offered, and it is inadmissible when contrary to its policy or prejudicial to its interests." *Chicago, B. & Q. R. Co. v. Gardiner*, 70 N. W. 508, 510, 51 Neb. 70.

The comity extended to other nations is no impeachment of sovereignty. It is the voluntary act of the nation by which it is offered, and is inadmissible when contrary to its policy or prejudicial to its interests. But it contributes so largely to promote justice between individuals and to produce a friendly intercourse between the sovereignties to which they belong that courts of justice have continually acted upon it as part of the voluntary law of nations. *People v. Martin*, 67 N. E. 589, 591, 175 N. Y. 315, 96 Am. St. Rep. 628 (citing *Bank of Augusta v. Earle*, 38 U. S. [13 Pet.] 519, 10 L. Ed. 274).

### COMMA.

The comma and semicolon are both used for the same purpose in punctuation, namely, to divide sentences and parts of sentences; the only difference being that the semicolon makes the division a little more prolonged than the comma. *Holmes v. Phenix Ins. Co.* (U. S.) 98 Fed. 240, 242, 39 C. C. A. 45, 47 L. R. A. 308.

### COMMAND.

See "At Command."

"The word 'command,' as applied to the case of principal and accessory, is where the person having control over another, as a master over his servant, orders a thing to be done." *State v. Mann*, 2 N. C. 4.

Either of the words "wish," "desire," "command," or "direct" are apt words to be used in a will to show testator's intent to make a will. *Barney v. Hayes*, 29 Pac. 282, 284, 11 Mont. 571, 28 Am. St. Rep. 495.

### COMMANDING ON BOARD.

"In the merchant service, the master when present, and after him the mates pursuant to their grades, are the officers commanding on board, according to the order and discipline of the service." *The Union* (U. S.) 24 Fed. Cas. 537, 543.

**COMMENCE.**

See "Duly Commenced"; "To Be Commenced."

"Commence" is defined in the Century Dictionary as "to cause to begin to be, perform the first act of, enter upon, begin"; as defined by Webster, "to begin, to originate, to do the first act in anything, to take the first step." Thus a statute fixing a fee to be paid to the state by insurance companies before commencing business in the state does not apply to companies already doing business in the state. *State v. Hartford Fire Ins. Co.*, 13 South. 362, 364, 99 Ala. 221.

"Commenced," as used in Railroad Law (Revision, p. 934) § 34, requiring a railroad company to "commence" construction within six months from the date of its organization, means the actual commencement of the work of constructing the road. *Point Breeze Ferry & Improvement Co. v. Bergen Neck Ry. Co.*, 20 Atl. 762, 53 N. J. Law (24 Vroom) 108.

**COMMENCED.**

In Act Cong. Aug. 13, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], giving district courts jurisdiction of all suits of common law brought by the United States, and declaring that for jurisdictional purposes national banks shall be deemed citizens of the state in which they are located, but providing that this shall not be held to affect the jurisdiction of the courts of the United States in cases "commenced" by the United States or by direction of any officer thereof, or cases for winding up the affairs of any such bank, the word "commenced" is to be given a prospective, as well as a present, operation, and the proviso is to be interpreted as if it read, "now pending or hereafter brought." *Stephens v. Bernays* (U. S.) 44 Fed. 642, 643.

Where, in one section of an act, it is provided that in suits commenced the plaintiff will not be allowed more costs than damages if he recover less than \$6, and in another section the provisions were made applicable only to suits to be commenced, the ambiguity of the phraseology was such as to forbid a construction rendering the act applicable to actions commenced prior to its passage. *White v. Hunt*, 6 N. J. Law (1 Halst.) 415, 418.

Const. art. 6, § 5, declaring that all actions for the recovery of the possession of, quieting the title to, or the enforcement of liens upon, real estate shall be commenced in the county in which the land is situated, meant actions commenced subsequent to the Constitution. *Gurnee v. Superior Court of City and County of San Francisco*, 58 Cal. 88, 99.

**Incompleteness implied.**

Code N. C. § 895, providing that the county shall not be liable for costs in actions commenced in justices' courts, construed to only apply to cases where the justice acts as committing magistrate, and not the cases over which he has final jurisdiction. *Merriman v. Henderson County Com'rs*, 11 S. E. 267, 268, 106 N. O. 369.

Code, § 121, providing that no action or proceeding commenced before the adoption of the Code shall be affected thereby, does not include a judgment. "The use of the word 'commenced' shows very clearly that the section referred to was never intended to embrace a judgment, which is an entire act." *Daily v. Burke*, 28 Ala. 328, 331.

The word "commenced," in Code, § 895, providing that in no action or proceedings commenced or decided in justice court shall a county be liable to pay any costs, applies to cases of which the justice has final jurisdiction, but which are carried by appeal to the superior court; but when the defendant is bound over to court by the justice, the case becomes a proceeding of the superior court, and costs, including costs in the justice court for investigation, are governed by Code, § 743 et seq., relative to costs in the superior court. *Merriman v. Henderson County Com'rs*, 11 S. E. 267, 268, 106 N. O. 369.

**COMMENCEMENT OF ACTION.**

To "commence a suit" is to demand something by the institution of process in a court of justice. *Cohens v. Virginia*, 19 U. S. (6 Wheat.) 264, 408, 5 L. Ed. 257.

In the case of *Goldenberg v. Murphy*, 108 U. S. 162, 2 Sup. Ct. 388, 27 L. Ed. 686, it was held that there is no real difference in meaning between the words "commenced" and "brought." Chief Justice Waite said: "A suit is brought when in law it is 'commenced,' and we see no significance in the fact that, in the legislation of Congress on the subject of limitations, the word 'commenced' is sometimes used, and at other times the word 'brought.' In this connection the two words evidently mean the same thing, and are used interchangeably." *United States v. American Lumber Co.* (U. S.) 80 Fed. 309, 315. So, also, *Rawle v. Phelps* (U. S.) 20 Fed. Cas. 320, 321; *Kaelser v. Illinois Cent. R. Co.* (U. S.) 6 Fed. 1, 4.

**Day of tests of writ.**

The words "commencement of a writ," for the purpose of computing time under the act of limitation, is to the day indorsed on a writ. *Reed v. Brewer*, 7 Tenn. (Peck) 275, 276.

The date of the writ is prima facie evidence that it was issued on that day. *Chapman v. Goodrich*, 55 Vt. 354, 355.

A suit in chancery commences from the date of the subpoena which is issued out and returned or placed in the hands of the officer. *Pindell v. Maydwell*, 46 Ky. (7 B. Mon.) 314.

In general the day of the teste of the writ is to be considered as the time of the commencement of the action, and, when the day of the teste of a writ is the day it was made out, neither party can be permitted to show under any circumstances that the suit was commenced on another day; but where a writ is made out before the cause of action arises, and bears teste the day when so made, the writ must be copied so as to bear teste on the day when the cause of action arose, or on a day subsequent thereto, or the suit will fail. Thus, where defendant lived a long distance from the plaintiff, and plaintiff brought an action of trover for a horse, and had a writ made out, and took it and an officer with him, and, on the defendant's refusal to deliver the horse, directed the officer to serve the writ, the time of the service of the writ, and not the making of it, must be considered as the actual commencement of the action. *Robinson v. Burleigh*, 5 N. H. 225, 227.

#### Delivery of process to officer.

"The time of the commencement of a suit or action is the time of the delivery of the writ to the proper officer, or leaving it at his house for the purpose of its being executed." *Bronson v. Earl* (N. Y.) 17 Johns. 63, 65. A suit or action is formally commenced when the original writ is actually delivered to the proper officer for service. *Ross v. Luther* (N. Y.) 4 Cow. 158, 15 Am. Dec. 341.

"The suing out of a writ has been held in civil cases by this court to be 'commencement of suit,' and, although there may be some uncertainty or ambiguity in the term 'suing out a writ,' yet there can be no doubt that the delivery of the writ to the proper officer, or leaving it at his house for the purpose of being executed, is to be deemed an actual commencement of the suit." *Bronson v. Earl* (N. Y.) 17 Johns. 63, 65.

Shannon's Code, §§ 4445, 4446, relating to limitations, and providing that the suing out of the summons is the "commencement of an action," whether it be executed or not, if the action is duly prosecuted, is not satisfied where the summons is issued to plaintiff's counsel, and not given to an officer for service, and the suit is dismissed for want of service. *East Tennessee Coal Co. v. Daniel*, 42 S. W. 1062, 1065, 100 Tenn. 65.

For the purpose of commencing an action by a process of foreign attachment, the affidavit was filed and writ issued, but it does not appear that the writ was ever served or returned by the sheriff, nor that it was ever placed in his hands, or in any manner deliv-

ered to him. No property was attached or person summoned as garnishee, nor do any steps appear to have been taken to bring the defendants into court, by notice or otherwise. The record states that the writ issued, and it is copied into the record, but such statement does not imply that it was placed in the hands of the sheriff for service, and without a delivery of the writ to the sheriff for service, or something equivalent to such delivery, the action would not be commenced. *Hancock v. Ritchie*, 11 Ind. 48, 51.

The delivery of the original notice in a personal action to the sheriff of the proper county, with the intent that it be served immediately, or by the actual service of that notice by another person, is the commencement of the action. This rule applies to all actions in personam. *Elliott v. Stevens*, 10 Iowa, 418; *Hagan v. Burch*, 8 Iowa (8 Clarke) 309, 311. Hence, that being done, the addition of the new cause of action to the first petition by amendment, the facts stated arising out of the same transaction, cannot be the commencement of a new action. *Mather v. Butler County*, 16 Iowa, 59, 61.

A suit is deemed for some purposes to have been commenced by filing the petition in the district court, but, strictly speaking, it is commenced by delivering the original notice to the sheriff, or by actual service thereof by another. *Reed v. Chubb*, 9 Iowa, 178.

Where a writ had been sued out and placed in the hands of an officer before limitations took effect against the action, the action was "commenced and sued," within the meaning of such phrase in the statute of limitations. *Johnson v. Farwell*, 7 Me. (7 Greenl.) 370, 375, 22 Am. Dec. 203.

The issuing of the writ is the commencement of the suit in a case where time is material so as to save the statute of limitations. Nor is it necessary to prove an actual delivery of the writ to the sheriff, providing it be shown that it was actually made out and sent to the sheriff, with a bona fide and absolute intention of having it served. But such intention must be positive and unequivocal. Hence where, a day or so before the expiration of the time in which an action could be brought, an attorney made out the writ and entered it in his register, either then or afterwards, as of the last day on which action could be brought, and gave it to the plaintiff with instructions not to deliver it to the sheriff before such last day, and it appeared that there was no intention to bring the action until an assignment of a certain note had been secured, and this assignment was not in fact secured until the last day, and did not reach the plaintiff until afterwards, the intention with which the writ was delivered by the attorney to the plaintiff was not shown to have been such a bona fide and absolute intention of having it served as was

necessary in order to effect a commencement of the suit. *Burdick v. Green* (N. Y.) 18 Johns. 14, 17, 18, 20.

"Commenced and sued," as used in an act of limitation providing that actions shall be commenced and sued within a certain limited time, is equivalent to a declaration that the party shall do everything that the statute requires to have a writ issued. "Simply leaving a petition with a person who may be a clerk, with direction to use it, not as a clerk of the court, but as an individual, cannot be considered as filing the same with the clerk officially. When a writ is made provisionally, and delivered to an officer with instructions that it is not to be used until after a certain time or the happening of a certain event, the action cannot be considered as commenced until the arrival of the time or the happening of the event. A writ is not considered as legally sued out until it is delivered to the sheriff with authority to him to serve it on the defendant." The suit is not instituted till after the petition is filed with the clerk, and he is expressly or impliedly ordered to issue the writ. *Maddox v. Humphries*, 30 Tex. 494, 496.

**Exhibition of claim to trustees.**

The exhibition of a claim to the trustees appointed under an act for giving relief against absent and absconding debtors may be considered as equivalent to the commencement of a suit, so as to bar the running of the statute of limitations, and ought to be so considered, since an action at law will not lie against such trustees. *Peck v. Trustees of Randall* (N. Y.) 1 Johns. 165, 172, 178.

**Filing complaint or petition.**

"In England it is settled that the filing of a bill or declaration is to be regarded, for every essential purpose, as commencement of the suit." *Lowry v. Lawrence* (N. Y.) 1 Caines, 69, 72 (quoting *Cowp.* 454).

Code, § 523, providing that no proceeding for reversing, affecting, or modifying judgments or final orders shall be "commenced" within three years after the rendition of a judgment or making the final order complained of, does not mean the filing of a petition, but includes both the filing of a petition and causing a summons to issue, which is the method provided by the Code (section 55) for the commencement of an action. *Robinson v. Orr*, 16 Ohio St. 284, 286.

"In common parlance, an action will be deemed 'commenced' when the first step is taken in court, which under our law is the filing of the petition." *Burton v. Buckeye Ins. Co.*, 26 Ohio St. 487, 489.

Where a petition in mechanic's lien suit is filed within 90 days after the filing of the lien, the action is commenced within the meaning of the statute, though the writ is is-

sued subsequent to that period. *Gosline v. Thompson*, 61 Mo. 471.

The expression "preceding the commencement of this action," as used in a complaint stating that no action has accrued to the plaintiff by reason of the matter as therein set forth at any time within two years preceding the commencement of this action, is equivalent to the words "preceding the filing of the complaint." *Adams v. Patterson*, 35 Cal. 122, 126. See, also, *Pimental v. City of San Francisco*, 21 Cal. 351, 367.

A suit is deemed to be commenced, for some purposes, such as suing out of an attachment, by the filing of the petition in the district court. *Reed v. Chubb*, 9 Iowa, 178, 180.

"Commencement of proceedings," as used in the bankruptcy act, with reference to time, shall mean the date when the petition was filed. U. S. Comp. St. 1901, p. 3419.

"Commencement of proceedings in bankruptcy" is the filing of a petition for adjudication of bankruptcy by or against a debtor, upon which such debtor shall be adjudicated a bankrupt. Section 38, Bankr. Law 1867; *United States v. Pusey* (U. S.) 27 Fed. Cas. 631, 633 (citing *In re Patterson* [U. S.] 18 Fed. Cas. 1315).

**Filing indictment or information.**

The "commencement of a prosecution" which will toll the statute of limitations is the presentation or filing of an indictment or information. Mere filing of a complaint before a magistrate charging the commission of a felony cannot be regarded as the commencement of the prosecution, since neither the preliminary examination nor the prosecution is founded on the complaint. *In re Griffith*, 11 Pac. 174, 175, 35 Kan. 377.

The filing of an information, the arrest of the accused, and his recognizance to appear and answer in the district court, if done within a year after the offense is alleged to have been committed, are the "commencement of a prosecution" within the meaning of the statute of limitation. *State v. Groome*, 10 Iowa, 308, 309.

**Filing oath or affidavit in criminal cases.**

The usual commencement of a criminal procedure, according to Wharton, is a preliminary oath before a magistrate, on which a warrant is issued for arrest. *Hartnett v. State*, 42 Ohio St. 568, 576.

A criminal prosecution is commenced on the filing of an affidavit and issuing a warrant by a committing magistrate, within the meaning of Rev. St. § 643, providing that, when any criminal prosecution is commenced in any court of the state, it may under certain circumstances be removed into the United

States court. *Georgia v. Bolton* (U. S.) 11 Fed. 217, 218.

**Filing præcipe.**

A suit is commenced when a plaintiff, by filing with the clerk a præcipe for the process he desires, submits himself and the subject-matter to the court's controversy. The jurisdiction which the court thus obtains is the power to hear and determine the cause. "It is coram iudice whenever a case is presented which brings this power into action." *Bush v. Hanson*, 70 Ill. 480; *United States v. Arredondo*, 31 U. S. (6 Pet.) 691, 709, 8 L. Ed. 547. When the court thus has jurisdiction of the plaintiff and of the subject-matter, the action is commenced, though there be no jurisdiction as yet of the defendant. Therefore, where a præcipe was filed, and summons was issued to a fire insurance company within a year after a loss, but the summons was not served, and another process was issued on the return day of the first process, the suit was commenced within a year, though the second process did not issue until after the expiration of the year. *Schroeler v. Merchants' & Mechanics' Ins. Co.*, 104 Ill. 71, 78.

**Foreclosure notice.**

A fire policy provided that if the property should be sold, transferred, or become incumbered by mortgage or trust deed, or by judgment tax or mechanic's lien, or upon the "commencement" of proceedings for its foreclosure or sale, or levy thereon, the policy should become void. Held, that an advertisement for a mortgage sale was a "commencement" of foreclosure within the meaning of the word in the policy. *Springfield Steam Laundry Co. v. Traders' Ins. Co. of Chicago*, 66 Mo. App. 199, 203.

"Commencement of an action or suit," in a statute providing in effect that limitations will be sustained on all debts, grounded upon any contract in writing, by the commencement of an action or suit within four years next after the same could have been instituted, does not include the mere fact of posting notices of a trust sale by a trustee before the debt secured by the trust deed is barred, but not in time to make the sale before the bar of limitations would be complete. *Blackwell v. Barnett*, 52 Tex. 323, 335.

**Issuance of summons.**

The commencement of an action, prosecution, or suit is the issuance of the summons, and not the filing of the petition. *Butts v. Turner*, 68 Ky. (5 Bush) 435, 436.

"Proceedings in error are not commenced when personal service can be obtained, until a summons is issued, which shall be duly served." *Bemis v. Rogers*, 8 Neb. 149, 150.

The commencement of a suit in justice court happens on the issuing of the summons. *Boyce v. Morgan* (N. Y.) 3 Caines, 133.

**Issuance of warrant in criminal case.**

A criminal prosecution is deemed "commenced" by the issuing of a warrant within the Indiana statute requiring that prosecutions for certain offenses shall be commenced within two years after the examination thereof. *Flick v. State*, 51 N. E. 951, 952, 22 Ind. App. 550.

The commencement of prosecution is the issuance of a warrant in good faith, and its delivery to the officer to execute, and, where the defendant was afterwards arrested on such warrant and bound over for trial, such issuance constituted a sufficient commencement of a prosecution to satisfy the statute of limitations. *People v. Clark*, 33 Mich. 112, 120.

Rev. St. § 643 [U. S. Comp. St. 1901, p. 521], declares that, whenever any civil suit or criminal prosecution is commenced in a state court for any act done by an officer under the revenue laws of the United States, the same may be removed to the United States Circuit Court. Held, that the "commencement of an action" within such statute was the issuance of a warrant and the arrest made by a state officer, and that it was no objection to the removal that no indictment had been found against the federal officer in the state court. *North Carolina v. Kirkpatrick* (U. S.) 42 Fed. 689.

A warrant of arrest issued and returned by a proper officer is the commencement of a criminal prosecution. *Ross v. State*, 55 Ala. 177.

**Issuance of writ.**

The commencement of a suit in this country is usually the time of the issuance of the writ, and differs from the English rule, which fixes the filing of the bill or declaration as the time of the commencement of the suit. *Lowry v. Lawrence* (N. Y.) 1 Caines, 69, 72; *Cheetham v. Lewis* (N. Y.) 3 Johns. 42; *Burdick v. Green* (N. Y.) 18 Johns. 14, 17.

The time of the "commencement of a suit or action," in order to stop the running of the statutes of limitation, is the day when the writ is issued, provided the writ must be served and returned. *Day v. Lamb*, 7 Vt. 426, 429; *Chapman v. Goodrich*, 55 Vt. 354, 355.

The expression "commencement of the action," as used in a plea in an action of assumpsit alleging that the cause of action did not accrue to plaintiff at any time within six years before the commencement of the action, means the time when the writ issued. The receipt of the writ by the sheriff, or its service on the defendant, is not required in

order to constitute the commencement of an action. In contemplation of law the writ is issued, on the application of the creditor, by the sovereign power of the state, through the instrumentality of its officers. It is the state's precept or command, and is issued, and the action commenced, whenever it is in the hands of the plaintiff or his attorney, ready to fulfill its purposes. The commencement of the action depends wholly on the will or the diligence of the plaintiff. *Hall v. Spencer*, 1 R. I. 17, 19.

As used in the statute of limitations (Rev. St. c. 81, § 82), the "commencement" of an action is the time of actually making a writ with the intention of service. *Dodge v. Hunter*, 26 Atl. 1055, 1056, 85 Me. 121, 124.

The issuing of the *capias ad respondendum* is the commencement of a suit. *Hogan v. Cuyler* (N. Y.) 8 Cow. 203, 205.

The issuance of a *capias ad respondendum* to stay the statute of limitations is a mere matter of form, and the fact that the writ was delivered to the sheriff with instructions to return it non est, without any intention of its being served on the defendant, did not prevent it from constituting a good commencement of the suit for the purpose of defeating the operation of the statute of limitations, since the defendant is not thereby deprived of any defense. *Beekman v. Satterlee* (N. Y.) 5 Cow. 519, 528.

#### Issuance of writ of replevin.

The issuance of a replevin writ to a sheriff constitutes the commencement of a replevin suit. *Underwood v. Tatham*, 1 Ind. (1 Cart.) 276.

#### Motion to revive judgment.

"A motion to revive the lien of a judgment under the provisions of Code, § 323, is not the commencement of an action within the meaning of section 27, prescribing that an action on a judgment must be commenced within six years after its rendition, it being only a mode by which to secure the fruits of an action already had and determined between the parties." *Burns v. Conner*, 23 Pac. 836, 837, 1 Wash. St. 6.

#### Service of notice in ejectment.

The date of the issue of process is the commencement of an action. The service of notice in ejectment is the commencement of that action, although the suit is not pending until the return of the notice and filing of the declaration and notice in court. *Pindell v. Maydwell*, 46 Ky. (7 B. Mon.) 314.

#### Service of summons or writ.

An action is not commenced until service is made on the defendants, and, where one of the defendants dies before service is made

on either, the action does not survive. *Clark v. Helms* (Conn.) 1 Root, 486, 487.

The commencement of a suit or action is the service of the writ, and not the signing or issuance of the writ. *Jencks v. Phelps*, 4 Conn. 149, 152; *Spalding v. Butts*, 6 Conn. 28, 30; *Reliance Trust Co. v. Atherton* (Neb.) 93 N. W. 150.

Within Kan. Rev. St. 1868, pp. 624, 634, § 20, declaring that if any action be commenced within due time and a judgment thereon for plaintiff be reversed, or if plaintiff fail in such action otherwise than on the merits, and the time and limit for the same shall have expired, the plaintiff may commence a new action within a year after the reversal or failure, held, that the service of a summons and the return thereof constituted the commencement of an action contemplated by such section. *Isaacs v. Price* (U. S.) 13 Fed. Cas. 154, 156.

Where an attorney sues out a summons and shows it to a defendant, requesting him to sign his appearance thereto, and defendant promised so to do, if he cannot arrange with plaintiff, and afterwards appears by himself or attorney, the commencement of the suit was at the time when summons was first shown to the defendant. *Whitaker v. Turnbull*, 18 N. J. Law (3 Har.) 172, 174.

A suit is to be construed as commenced or brought when the writ is sued out and completed in order to have it served on the defendant, and hence, although the writ be completed and put into the hands of an officer, yet if he be directed not to serve it until after the happening of some contingency, the suit is not commenced until after such happening. *Mason v. Cheney*, 47 N. H. 24, 25.

The actual service of the original notice in a personal action by a person other than the sheriff is the commencement of the action. *Elliott v. Stevens*, 10 Iowa, 418, 422; *Mather v. Butler County*, 16 Iowa, 59, 61; *Hagan v. Burch*, 8 Iowa (8 Clarke) 309, 311.

*Paschal's Dig.* art. 4604, providing that limitations will be suspended on all debts grounded upon contract in writing by the commencement of an "action or suit" within four years next after the same could have been instituted, is not met by the posting of notices of a trust sale by a trustee before the debt secured by the trust is barred, but not in time to make the sale before the bar of limitation would be complete. *Blackwell v. Barnett*, 52 Tex. 326-335.

An action to redeem property sold for taxes is not commenced within Code 1873, § 3157, until notice has been served on defendant as provided by section 2599, even for the purpose of avoiding the time limitation. *Hawley v. Griffin* (Iowa) 92 N. W. 113, 117.



**Same—Bona fide attempt to serve.**

The commencement of a suit in chancery is the filing of a bill with a bona fide effort to have process served thereon. *Greenwood v. Warren*, 23 South. 686, 687, 120 Ala. 71.

A suit in equity in a federal court is commenced by the suing out of process and a bona fide attempt to serve it. "Bona fide" in this sense requires an effort to proceed according to law, and to employ the means which the law prescribes. *United States v. American Lumber Co.* (U. S.) 85 Fed. 827, 830, 29 C. C. A. 431.

**Same—Filling up for service.**

The commencement of an action or the suing out of a writ is the time when the writ is in fact filled up for service. *Howard v. Hunt*, 17 N. H. 449.

**Service of writ of attachment.**

Where, in an action on a promissory note, the real estate of the defendant was attached before the note was signed, the attachment of the realty must be considered the commencement of the action. *Swift v. Crocker*, 38 Mass. (21 Pick.) 241, 243.

The commencement of an attachment is the service of the writ, and not the delivery of the writ to the officer for service. *Gates v. Bushnell*, 9 Conn. 530, 533.

**Suing out of process.**

The time of the commencement of suit, in determining whether it has been brought within period of limitations, "is the day when the writ was issued, if it was served and returned within the time therein limited. For other purposes, service of the writ is regarded as the commencement of the suit." *Kirby v. Jackson*, 42 Vt. 552, 554.

"The words 'commence a suit' have a definite legal signification, and mean the suing out of process, or originating proceedings, whereby an action in a court of law or equity is instituted to establish some right or redress some wrong." *Wilson v. Baptist Education Soc.* (N. Y.) 10 Barb. 308, 318.

Within the Judicial Code of March 31, 1875, providing that when any suit is "commenced" in any Circuit Court of the United States to enforce any legal or equitable lien on property situate within the district where the suit is brought, and one or more of the defendants shall not be an inhabitant or found within the district, it shall be lawful for the court to make an order directing such absent defendant to appear and plead on a day certain, the suit is "commenced" to an absent defendant whenever the complainant has in good faith obtained process, or, perhaps, whenever he has shown all that is necessary for him to do to obtain process, to bring a defendant before the court, and

it does not mean that the suit is commenced against such absent defendant on the filing of the bill. *Bisbee v. Evans* (U. S.) 17 Fed. 474, 476.

By the procurement of a blank form of process from the clerk or an attorney, suitably filled out and intended to be served, the writ or action may well be called "commenced" or "sued out." It is the intention and act combined which in fact constitute the institution of the suit. *Cross v. Barber*, 15 Atl. 69, 70, 16 R. I. 266.

An action is to be regarded as "commenced," so as to avoid the statute of limitations, when the writ is completed with the purpose of immediate service. If completed, except for the affixing of a revenue stamp, but the purpose is to serve it without, the suit will be regarded as commenced at the date of the writ, but if the writ was retained for several days for want of a stamp, and then it be affixed, and nothing more is shown, a suit must be regarded as commenced when the stamp was affixed. *Mason v. Cheney*, 47 N. H. 24, 25.

"Commencement of an action" means the time when there is a declaration and voluntary appearance of the defendant, or the declaration and issuing of a writ, and in the latter case the commencement of the action is the time when the writ is actually sued out. *State Bank v. Bates*, 10 Ark. (5 Eng.) 120, 122.

**As when writ returnable.**

Act Feb. 24, 1806, declared that no action should be removed from any of the courts of common pleas to the supreme or circuit courts, unless the same is removed on or before the first day of the next term that the action shall have been commenced. Held, that such clause should be interpreted as meaning the first day of the term to which the writ was returnable, inasmuch as the writ of removal is directed to the court in which the action is brought, which court can have no knowledge of the action until its session at the term succeeding its commencement, and hence removal must be had "on or before the first day of the term next after that to which the writ is returnable." *Lyle v. Baker* (Pa.) 4 Dall. 433, 434, 1 L. Ed. 897.

**COMMENCEMENT OF BUILDING.**

The "commencement" of a building, within the mechanic's lien law, is the doing of some act upon the ground on which the building is to be erected, and in pursuance of a design to erect, the result of which act would make known to a person viewing the premises, from observation alone, that the erection of a building on that land had been commenced. Work done in breaking the ground for a cellar is a commencement of a building, because it must have changed the

appearance of the ground so as to show the purpose of the work. *James v. Van Horn*, 39 N. J. Law (10 Vroom) 353, 363. A statute giving a mechanic's lien priority over a mortgage recorded after the "commencement of the building" means the first labor done on the ground which is made the foundation of the building, the effects of which are apparent, such as beginning to dig the foundation, or work of like description, which every one can readily recognize as the commencement of the building. *Mutual Ben. Life Ins. Co. v. Rowand*, 26 N. J. Eq. (11 C. E. Green) 389, 392. Code, art. 61, § 15, Mechanic's Lien Law, providing that a mechanic's lien shall have preference over a mortgage which was not recorded until after the "commencement of the building," means some work and labor on the ground, the effects of which are apparent and easily seen by everybody, such as beginning to dig the foundation, or work of like description, which every one can readily see and recognize as the commencement of the building. *Brooks v. Lester*, 86 Md. 65, 70; *Kelly v. Rosenstock*, 45 Md. 389, 392. "Commencement of the building," as used in the mechanic's lien law, means an excavation for a foundation which has progressed so far as to make it apparent on the ground that the building is to be erected. *Jacobus v. Mutual Ben. Life Ins. Co.*, 27 N. J. Eq. (12 C. E. Green) 604, 606; *Kansas Mortg. Co. v. Weyerhaeuser*, 29 Pac. 153, 156, 48 Kan. 335. Such work must be done with an intention and purpose then formed to continue such work to the completion of the building, and work done on the ground without any design or purpose to construct a building at that time, and which is intermitted, is not sufficient. *Kelly v. Rosenstock*, 45 Md. 389, 392.

The act of furnishing or placing on the ground some material that is afterward used in the construction of the building is not the "commencement" of the building. *Kansas Mortg. Co. v. Weyerhaeuser*, 29 Pac. 153, 156, 48 Kan. 335 (citing *Pennock v. Hoover*, 5 Rawle, 291).

Comp. St. Neb. c. 54, § 3, provides that, on filing the proper account for a mechanic's lien, the same shall operate as a lien for two years from the commencement of the labor or the furnishing of such materials. Held, that the word "commencement" qualified both "labor" and "material," and the materialman's lien dates from the time of the first delivery. *Courtney v. Insurance Co. of North America (U. S.)* 49 Fed. 309, 312, 1 C. C. A. 249.

"Commencement," as used in Pub. St. c. 177, § 1, amended Laws 1888, c. 696, giving a lien for labor and material furnished in the construction of a building, before any other lien which shall originate subsequent to the commencement of the building, relates to the construction of the building itself, and not of different jobs of work thereon,

where the work is performed dividedly, at different times, by different employes or contractors. *Bassett v. Swarts*, 21 Atl. 352, 17 R. I. 215.

## COMMENT.

A statute declaring that counsel for the state in a criminal prosecution shall not comment on the failure of the accused to testify does not mean that the counsel shall not criticize or condemn or anathematize the accused, but it forbids in unmistakable language any reference, friendly or unfriendly, to his failure to testify. It forbids any remark, of any character or in any words, on such failure, and requires that the attention of the jury shall not be called to the fact at all by counsel. *Yarbrough v. State*, 12 South. 551, 70 Miss. 593.

Laws, § 2055, declaring that the court shall not "comment" on the weight of evidence, means statements with reference to the sufficiency or value of the evidence of particular witnesses, or certain parts thereof, but does not include a case where the court instructed the jury that evidence relating to common notoriety referring to the defendant could be considered only on the question of probability that defendant had heard that he was charged with the crime. *Trujillo v. Territory*, 32 Pac. 154, 155, 156, 7 N. M. 43.

## COMMERCE.

See "Channel of Commerce"; "Domestic Commerce"; "Foreign Commerce"; "Internal Commerce"; "International Commerce"; "Intrastate Commerce"; "Purpose of Commerce"; "Restraint of Commerce."

See, also, "Commerce with Foreign Nations"; "Commerce with Indian Tribes"; "Interstate Commerce"; "Regulate Commerce."

Engage in commerce, see "Engage."

"Commerce" is defined in *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1, 6 L. Ed. 23, to mean, not only traffic, but also intercourse. When applied to states, it means commercial intercourse as between them. This definition has been approved in many cases. *Henderson v. Wickham*, 92 U. S. 259, 271, 23 L. Ed. 543; *Welton v. Missouri*, 91 U. S. 275, 280, 23 L. Ed. 347; *Hannibal & St. Joseph R. Co. v. Husen*, 95 U. S. 465, 468, 24 L. Ed. 527; *Brown v. Houston*, 5 Sup. Ct. 1091, 1093, 114 U. S. 622, 29 L. Ed. 257; *State of Minnesota v. Barber*, 10 Sup. Ct. 862, 866, 136 U. S. 313, 34 L. Ed. 455; *Brimmer v. Rebman*, 11 Sup. Ct. 213, 214, 138 U. S. 78, 35 L. Ed. 862; *Voight v. Wright*, 11 Sup. Ct. 855, 856, 141 U. S. 62, 35 L. Ed. 638; *State Freight Tax Case*, 82 U. S. (15 Wall. 232, 275, 21 L. Ed. 146; *Robbins v. Shelby County Taxing Dist.*, 7 Sup.

Ct. 592, 594, 120 U. S. 489, 30 L. Ed. 694; *Brown v. Maryland*, 25 U. S. (12 Wheat.) 419, 448, 6 L. Ed. 678; *The License Cases*, 46 U. S. (5 How.) 504, 599, 12 L. Ed. 256; *Mobile County v. Kimball*, 102 U. S. 691, 697, 26 L. Ed. 238; *Bowman v. Chicago & N. W. R. Co.*, 8 Sup. Ct. 689, 696, 125 U. S. 465, 31 L. Ed. 700; *Lelsy v. Hardin*, 10 Sup. Ct. 681, 685, 135 U. S. 100, 34 L. Ed. 128; *In re Rahrer*, 140 U. S. 545, 555, 11 Sup. Ct. 865, 35 L. Ed. 572; *United States v. E. C. Knight Co.*, 15 Sup. Ct. 249, 253, 156 U. S. 1, 3 L. Ed. 325; *Pensacola Tel. Co. v. Western Union Tel. Co.*, 96 U. S. 1, 9, 24 L. Ed. 708; *Wilkerson v. Rahrer*, 11 Sup. Ct. 865, 867, 140 U. S. 545, 35 L. Ed. 572; *United States v. Holliday*, 70 U. S. (3 Wall.) 407, 409, 417, 18 L. Ed. 182; *Dillon v. Erie R. Co.*, 43 N. Y. Supp. 320, 325, 19 Misc. Rep. 116; *Schmidt v. People*, 31 Pac. 498, 18 Colo. 78; *Farris v. Henderson*, 33 Pac. 380, 383, 1 Okl. 384; *State v. Duckworth*, 51 Pac. 456, 457, 5 Idaho, 642; *Commonwealth v. Gloucester Ferry Co.*, 98 Pa. 105, 120; *Campbell v. Chicago, M. & St. P. Ry. Co.*, 53 N. W. 351, 352, 86 Iowa, 587.

Commerce is traffic, but it is something more—it is intercourse. It comprehends intercourse for the purposes of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries, and between the citizens of different states. *McNaughton Co. v. McGirl*, 49 Pac. 651, 653, 20 Mont. 124, 38 L. R. A. 367, 63 Am. St. Rep. 610 (citing *Welton v. Missouri*, 91 U. S. 275, 23 L. Ed. 347; *Mobile County v. Kimball*, 102 U. S. 691, 26 L. Ed. 238).

"Commerce," as used in the United States Constitution, providing that Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes, includes commerce in all its ramifications, and every feature or form which it may assume; that is, with foreign countries and among the states, and, if the power to regulate it be exclusive, it is coextensive with the meaning of the word. *Ex parte Crandall*, 1 Nev. 294, 302.

It has been considered that the power given to Congress to regulate commerce is the power to prescribe the rule by which it shall be governed, and that "commerce," in the sense in which the word is used in the Constitution, is coextensive in its meaning with "intercourse." In so far as intercourse between two states consists in traffic, a rule prescribing the subjects of that traffic, or dictating the mode in which or the condition on which such traffic must be prosecuted, is a commercial regulation. *Carson River Lumbering Co. v. Patterson*, 33 Cal. 334, 339.

It is well said that domestic commerce and interstate commerce are different things. Still both are comprehended in the single word "commerce"; and a title with the reg-

ulation of commerce as its expressed subject would, beyond doubt, be broad enough to include provisions as to both domestic commerce and interstate commerce. *State v. Schiltz Brewing Co.*, 59 S. W. 1033, 1039, 104 Tenn. 715, 78 Am. St. Rep. 941.

"Commerce with foreign nations and among the several states" can mean nothing more than intercourse with those nations and among those states, for purposes of trade, be the object of the trade what it may; and this intercourse must include all the means by which it can be carried on, whether by the free navigation of the waters of the several states, or by a passage overland through the states, where such passage becomes necessary to the commercial intercourse between the states. It is this intercourse which Congress is invested with the power of regulating, and with which no state has a right to interfere. *Corfield v. Coryell* (U. S.) 6 Fed. Cas. 546, 550.

"Commerce," in its general sense, means an interchange or mutual change of goods, wares, productions, or property of any kind between nations or individuals, either by barter, or by purchase and sale; but adopting the definition given it in its connection as used in the Constitution of the United States, it also means intercourse and navigation. *Fuller v. Chicago & N. W. R. Co.*, 31 Iowa, 187, 207.

"Commerce" is defined as the interchange of goods, merchandise, or property of any kind; trade, traffic; used more especially of trade on a large scale carried on by transportation of merchandise between different countries, or between different parts of the same country, distinguished as "foreign commerce" and "internal commerce." *Master Granite & Blue Stone Cutters' Ass'n of Philadelphia*, 23 Pa. Co. Ct. R. 517, 520.

The word "commerce" is not defined in the Constitution. Undoubtedly, the carrying from one state to another by independent carriers of goods and commodities that are ordinary subjects of traffic, and which have in themselves a recognized value in money, constitutes interstate commerce. *Champion v. Ames*, 23 Sup. Ct. 321, 322, 188 U. S. 321, 47 L. Ed. 492.

"Commerce with foreign nations and among states," strictly considered, consists of intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. *Louisville & N. R. R. Co. v. Railroad Commission of Tennessee* (U. S.) 19 Fed. 679, 709 (citing *Mobile County v. Kimball*, 102 U. S. 691, 702, 26 L. Ed. 238); *Lindsay & Phelps Co. v. Mullen*, 20 Sup. Ct. 325, 333, 176 U. S. 126, 44 L. Ed. 400; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 571, 7 Sup. Ct. 4, 30 L. Ed. 244; *Gloucester Ferry Co. v.*

Pennsylvania, 5 Sup. Ct. 826, 828, 114 U. S. 196, 29 L. Ed. 158; *Ex parte Jervey* (U. S.) 66 Fed. 957, 959; *In re Green* (U. S.) 52 Fed. 104, 113; *Cooley v. Board of Wardens of Philadelphia*, 53 U. S. (12 How.) 299, 318, 13 L. Ed. 996; *Bowman v. Chicago & N. W. Ry. Co.*, 8 Sup. Ct. 689, 698, 699, 125 U. S. 465, 31 L. Ed. 700; *Kidd v. Pearson*, 9 Sup. Ct. 6, 10, 128 U. S. 1, 32 L. Ed. 346; *In re Grand Jury* (U. S.) 52 Fed. 840, 841; *Welton v. Missouri*, 91 U. S. 275, 279, 23 L. Ed. 347; *State v. Delaware, L. & W. R. Co.*, 30 N. J. Law (1 Vroom) 473, 487; *Williams v. Fears*, 35 S. E. 699, 701, 110 Ga. 584.

"Commerce" is defined to be an exchange of commodities, but this definition does not convey the full meaning of the term. It also includes navigation and intercourse, and the transportation of passengers is a part of commerce. *Passenger Cases*, 48 U. S. (7 How.) 283, 401, 12 L. Ed. 702. The term "commerce" includes the transportation of passengers. *Anderson v. Louisville & N. R. Co.* (U. S.) 62 Fed. 46, 49. As used in Const. U. S. art. 1, § 8, giving Congress power to regulate interstate commerce, etc., "commerce" is not to be construed as limited to an exchange of commodities only, but includes as well intercourse with foreign nations and between the several states, and includes the transportation of passengers. *People v. Raymond*, 34 Cal. 492, 497; *Fry v. The State*, 63 Ind. 552, 562, 30 Am. Rep. 238.

"Commerce," briefly stated, is the sale or exchange of commodities. But that which the law looks upon as the body of commerce is not restricted to specific acts of sale or exchange. It includes the intercourse—all the initiatory and intervening acts, instrumentalities, and dealings that directly bring about the sale or exchange. Though the sale or exchange is a commercial act, so also is the solicitation of a drummer whose occupation is to bring about the sale. *Brennan v. City of Titusville*, 153 U. S. 289, 14 Sup. Ct. 829, 38 L. Ed. 719. The whole transaction, from initiation to culmination, is commerce. *United States v. Swift & Co.* (U. S.) 122 Fed. 529, 531.

Commerce is traffic, but it is much more. It embraces also transportation by land and water, and all the means and appliances necessarily employed in carrying it on. *Chicago & N. W. R. Co. v. Fuller*, 84 U. S. (17 Wall.) 560, 568, 21 L. Ed. 710. The term "commerce," in its broadest acceptance, includes not merely traffic, but the means and vehicles by which it is prosecuted. *Winder v. Caldwell*, 55 U. S. (14 How.) 434, 444, 14 L. Ed. 487.

"Commerce," as used in Const. U. S. art. 1, § 8, cl. 3, declaring that Congress shall have "power to regulate commerce" with foreign nations and among the several states, embraces a vast field, containing not only many, but exceedingly various, subjects quite

unlike in their nature, some imperatively demanding a single uniform rule operating equally on the commerce of the United States in every particular, and some as imperatively demanding that diversity which alone can meet the local necessities of navigation. *Cooley v. Board of Wardens of Philadelphia*, 53 U. S. (12 How.) 299, 318, 13 L. Ed. 996.

"Commerce," as used in Const. art. 1, § 8, providing that Congress shall have power to regulate commerce, etc., embraces all instruments by which commerce may be conducted. *Trade-Mark Cases*, 100 U. S. 82, 96, 25 L. Ed. 550.

#### Commercial agencies.

"Commerce," as used in Const. U. S. art. 1, § 8, relating to the regulation of commerce by Congress, consists of intercourse and traffic, including in these terms navigation, the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. Information or intelligence is not an article of "commerce," in any proper meaning of that word. Neither are they subjects of trade and barter, offered in the market as something having an existence and value independent of the parties to them. Neither are they commodities, to be shipped or forwarded from one state to another, and there put up for sale. The information furnished by mercantile agencies to subscribers of their rating books is like other personal contracts between parties. It is individual in its character, and has no relation to the general public. The mercantile agency is not a common carrier. It is no intermediate instrument to disseminate its information, but it is a collector, storer, and holder of it, to be given directly to those who wish to purchase or pay for it. Mercantile commercial agencies, therefore, are not instruments of commerce, so as to be placed exclusively under the regulation of Congress and free from state control. *State v. Morgan*, 48 N. W. 314, 320, 2 S. D. 32.

#### Commercial travelers.

"Commerce," as used in the United States Constitution, reserving to Congress the right to regulate commerce with foreign nations and among the several states and with the Indian tribes, cannot be construed to apply to a law requiring a license for selling goods by sample in one state as the representative of a resident of another state, for it does not prescribe rules for the conduct of commercial transactions, nor contemplate any restriction on commerce, but simply imposes a tax on an occupation exercised by all persons within the limits of the state. *Territory v. Farnsworth*, 5 Pac. 869, 874, 5 Mont. 303.

Act Tex. May 4, 1882, imposing a license on drummers and others selling goods, by sample or otherwise, or soliciting trade, is a

regulation of commerce, and unconstitutional as applied to citizens of other states. *Asher v. Texas*, 9 Sup. Ct. 1, 2, 128 U. S. 129, 32 L. Ed. 368.

**Driving live stock on foot.**

Commerce is traffic, but it is much more. It embraces also transportation by land and water, and all the means and appliances necessarily employed in carrying it on. *Chicago & N. W. R. Co. v. Fuller*, 84 U. S. (17 Wall.) 565, 568, 21 L. Ed. 710. Act May 29, 1884, c. 60, § 1, 23 Stat. 31 [U. S. Comp. St. 1901, p. 299], making it a misdemeanor for one to drive live stock on foot from one state to another, knowing them to have a contagious disease, is within the power given to Congress to regulate interstate commerce. *United States v. Slater* (U. S.) 123 Fed. 115, 121.

**Emigrant agents.**

The business of procuring contracts for personal labor to be performed out of the state is not a commodity of commerce, and any transportation of persons that might result from such contract is so remote and incidental as not to be deemed within the protection or meaning of the law of interstate commerce. *State v. Napier*, 41 S. E. 13, 16, 63 S. C. 60 (citing *Williams v. Fears*, 179 U. S. 270, 21 Sup. Ct. 128, 45 L. Ed. 186, affirming the judgment of the Supreme Court of Georgia, 35 S. E. 699, 110 Ga. 584, 50 L. R. A. 685).

**Exchange or sale of commodities.**

Commerce is the exchange of commodities. *Commonwealth v. Housatonic R. Co.*, 9 N. E. 547, 551, 143 Mass. 264.

Commerce between nations and among states has several branches. It consists in selling the superfluity and in purchasing the articles of necessity, as well products as manufactures; in buying from one nation and selling to the other, and transporting the merchandise from the seller to the buyer to gain the freight. *Passenger Cases*, 48 U. S. (7 How.) 283, 416, 12 L. Ed. 702.

Commerce proceeds from trade, and is the exchange of one kind of property for another, whether it be by barter, or by purchase and sale. *In re Nickodemus* (U. S.) 18 Fed. Cas. 222, 224.

Commerce includes not only the transportation of person and property, and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities. *Commonwealth v. Hogan, Mc-Morrow & Tieke Co.* (Ky.) 74 S. W. 737, 738, 25 Ky. Law Rep. 41 (citing *Robbins v. Shelby County Taxing Dist.*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; *O'Neil v. Vermont*, 144 U. S. 223, 12 Sup. Ct. 693, 36 L. Ed. 450).

"Commerce," as used in the federal Constitution, is traffic; it is the act of buying

and selling, and not the result of the act, not the thing bought, or the thing that stands in place of the thing sold—the price; the sale. It is true the liberal rule of construction makes "commerce" mean intercourse, and mean navigation, but the word has no such meaning by dictionaries, by the common law, or by common usage; and if this rule permits you to step beyond the meaning of the word thus defined to intercourse and to navigation, it may perhaps allow you to step to sales; but sales, if commerce at all, are not commerce with foreign nations or among the states: If commerce at all, they must be held to be internal commerce, a commerce that takes place entirely within the state. *Padelford v. City of Savannah*, 14 Ga. 438, 514.

"Commerce," within the provisions of the federal Constitution giving Congress the power to regulate commerce, etc., consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities; and an act regulating sale of goods made by convicts in other states violates such provision. *Arnold v. Yanders*, 47 N. E. 50, 51, 56 Ohio St. 417, 60 Am. St. Rep. 753.

"Commerce is the interchange or mutual change of goods, productions, or property of any kind between nations or individuals." *City of Council Bluffs v. Kansas City, St. J. & C. B. R. Co.*, 45 Iowa, 838, 349, 24 Am. Rep. 773.

Commerce is intercourse. One of its most ordinary ingredients is traffic. Sale, being the object of importation, is an essential ingredient of that intercourse of which importation constitutes a part. *Brown v. Maryland*, 25 U. S. (12 Wheat.) 419, 446, 6 L. Ed. 678.

In the clause of the federal Constitution giving Congress power to regulate commerce, the word "commerce," whether with foreign nations, the several states, or with the Indian tribes, embraces all the transportation, purchase, sale, and exchange of all such commodities as are transported, bought, and sold by the usage of the commercial world. Gen. Laws Minn. 1889, c. 8, prohibiting the sale of meat unless inspected by state inspectors, is a regulation of commerce in violation of the commerce clause of the federal Constitution. *In re Christian* (Minn.) 39 Fed. 636, 637, note.

**Floating of logs.**

Neither a log nor any number of logs floating upon the surface of a stream, uncontrollable and uncontrollable, is navigation or commerce, and an act regulating the floating of logs upon a navigable stream is not a regulation of "commerce among the several states." *Harrigan v. Connecticut River Lumber Co.*, 129 Mass. 580, 585, 37 Am. Rep. 387.

**Freight and passenger traffic.**

In his work on the Constitution, Judge Story asserts that the sense in which the word "commerce" is used in that instrument includes not only traffic, but intercourse and navigation; and in the Passenger Cases, 48 U. S. (7 How.) 416, 12 L. Ed. 702, it was said "commerce" consists in selling the superfluities in purchases, articles of necessity, as well productions as manufactures, in buying from one nation and selling to another, or in prospecting the merchandise from the seller to the buyer; nor does it make any difference whether this interchange of commodities is by land or by water, in either case the bringing of the goods from the seller to the buyer is commerce. Among the states it must have been principally by land when the Constitution was adopted. Hence a tax on freight brought into a state is a regulation of commerce. *State Freight Tax Case*, 82 U. S. (15 Wall.) 232, 275, 21 L. Ed. 146.

"Commerce," as used in Const. art. 1, § 8, empowering Congress to regulate commerce with foreign nations and among the several states, includes the transportation of property by a common carrier, including the rates to be charged therefor. *State v. Chicago, St. P., M. & O. Ry. Co.*, 41 N. W. 1047, 40 Minn. 267, 3 L. R. A. 238, 12 Am. St. Rep. 730. *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1, 190, 6 L. Ed. 23; *In re State Freight Tax*, 82 U. S. (15 Wall.) 232, 241, 21 L. Ed. 164; *Lord v. Goodall S. S. Co.*, 102 U. S. 541, 544, 26 L. Ed. 224; *Wabash, St. L. & P. R. Co. v. Illinois*, 4 Sup. Ct. 4, 11, 118 U. S. 557, 30 L. Ed. 244; *Philadelphia & S. M. S. S. Co. v. Pennsylvania*, 7 Sup. Ct. 1115, 1123, 122 U. S. 326, 30 L. Ed. 1200; *Fargo v. Michigan*, 7 Sup. Ct. 857, 860, 121 U. S. 230, 30 L. Ed. 888; *United States v. Joint Traffic Ass'n*, 19 Sup. Ct. 25, 31, 171 U. S. 505, 43 L. Ed. 259; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 470, 24 L. Ed. 527; *Kaelser v. Illinois Cent. R. Co.* (U. S.) 18 Fed. 151, 153; *Carton v. Illinois Cent. R. Co.*, 18 N. W. 67, 68, 59 Iowa, 148, 44 Am. Rep. 672; *Hardy v. Atchison, T. & S. F. R. Co.*, 5 Pac. 6, 10, 32 Kan. 698. "Commerce," as used in a clause of the federal Constitution, providing that Congress shall regulate commerce with foreign nations and between the several states, includes the transportation of merchandise from place to place by rail. *Hardy v. Atchison, T. & S. F. R. Co.*, 5 Pac. 6, 9, 32 Kan. 698. The term "commerce" includes transportation upon a railroad passing through more states than one, or from a point in one state to a point in another. *Mobile & O. R. Co. v. Sessions* (U. S.) 28 Fed. 592, 598.

The term "commerce" includes the transportation of property, and therefore a tax upon property in its transportation from state to state is a regulation of commerce.

*Lehigh & W. Coal Co. v. Carrigan*, 39 N. J. Law (10 Vroom) 35, 37.

"Commerce" includes all the negotiations and contracts which have for their object, or involve as an element, such transmission or passage from one state to another. *In re Greene* (U. S.) 52 Fed. 104, 113.

"Commerce," as used in the federal Constitution, includes within its scope and meaning interstate passenger travel, and the power vested in Congress to regulate commerce as applied to such travel is so far exclusive in its character that the state may not by any act of legislation impose burdens upon either the carrier or the passenger which would obstruct or hinder the free course of travel. *Fry v. State*, 63 Ind. 552, 562, 30 Am. Rep. 238.

"Commerce," as the term is used in the federal Constitution, vesting in Congress the right to regulate commerce between the states, with foreign nations, and Indian tribes, is limited to the transportation and means for the transportation of goods and personal property in general, but does not include the regulation of the carriage of passengers, since they are in no sense an object of commerce. *City of New York v. Miln*, 36 U. S. (11 Pet.) 102, 136, 9 L. Ed. 648.

A law which prescribes the terms and conditions on which alone vessels can discharge their passengers is a regulation of commerce, and, in case of vessels and passengers coming from foreign ports, it is a regulation of commerce with foreign nations. *Henderson v. Wickham*, 92 U. S. 259, 271, 23 L. Ed. 543.

"Commerce," says Chief Justice Marshall, "undoubtedly is traffic, but it is something more—it is intercourse. Transportation is essential to commerce, or, rather, it is commerce itself, and every obstacle, debt, or burden laid upon it by legislative authority is regulation." By Code, § 1967, imposing a penalty on railroad companies for the detention of freight more than five days after delivery or shipment, without the consent of the shipper, as regards freight to be shipped to another state, does not conflict with Const. U. S. art. 1, § 8, cl. 3, delegating the power to regulate interstate commerce to the federal government, since its enforcement would expedite and not obstruct interstate commerce. *Bagg v. Wilmington, C. & A. R. Co.*, 14 S. E. 79, 80, 109 N. C. 279, 14 L. R. A. 596, 26 Am. St. Rep. 569.

"Commerce," as used in the clause of the federal Constitution giving Congress exclusive right to regulate interstate commerce, includes passengers traveling into or through a state, and hence a state statute imposing a tax upon persons passing through or beyond its territorial limits is unconsti-

tutional. *Crandall v. State of Nevada*, 73 U. S. (6 Wall.) 35, 43, 18 L. Ed. 744, 745.

#### Immigration.

Commerce cannot be carried without the agency of persons, and a tax, the effect of which is to diminish personal intercourse, is necessarily a tax upon commerce, and the power exercised in imposing it may be so used as not only to diminish, but to destroy, if we acknowledge the power, no limitation can be affixed to its exercise, for the power to tax is a sovereign power, and, wherever it exists, may be exercised at the will and discretion of the sovereign. Immigration is an ingredient of intercourse and traffic, so that the power to regulate commerce includes the power to regulate immigration; hence a state statute attempting to do so is unconstitutional. *Lin Sing v. Washburn*, 20 Cal. 534, 570.

Act N. Y. Feb. 11, 1824, requiring the masters of all vessels arriving at the port of New York from any other state or foreign country to make written reports, within 24 hours after arrival, to the mayor, of the names, ages, places of birth, etc., of all passengers landed, and making such masters subject to a certain specified tax for failure to comply, is not a "regulation of commerce," but of police. "It is apparent, from the whole scope of the law, that the object of the Legislature was to prevent New York from being burdened by an influx of persons brought thither in ships, either from foreign countries or from any other of the states. The provisions in the Constitution declaring that Congress shall have power to regulate commerce of the foreign nations among the several states, etc., does not apply to persons. They are not the subject of commerce, and, not being imported goods, cannot fall within the train of reasoning founded on the construction of a power given to Congress to regulate commerce, and the prohibition of the states from imposing a duty on imported goods." *City of New York v. Miln*, 36 U. S. (11 Pet.) 102, 130, 9 L. Ed. 648.

#### Insurance.

It is only by a strained construction that the word "commerce" can be made to embrace the business of insurance, and to say that insurance is an article of commerce is a construction still more strained. It is an aid to commerce, but not commerce itself, nor is it an article of commerce. *Queen Ina Co. v. State*, 24 S. W. 397, 401, 86 Tex. 250, 22 L. R. A. 483.

The term "commerce" cannot be applied to the business of insurance, as the contract of insurance is not an instrumentality of insurance. The making of such a contract is a mere incident of commercial intercourse, but in this respect there is no difference

whatever between insurance against fire and insurance against the perils of the sea. Thus the constitutional provision giving Congress power to regulate interstate commerce does not prevent the state from prescribing conditions on which a foreign insurance company may do business in the state, or from enforcing such conditions. *Hooper v. People of State of California*, 15 Sup. Ct. 207, 209, 155 U. S. 648, 39 L. Ed. 297; *Nutting v. Commonwealth of Massachusetts*, 22 Sup. Ct. 238, 239, 183 U. S. 553, 46 L. Ed. 634.

"Commerce," as used in the United States Constitution, providing that Congress shall have power to regulate commerce in foreign states and among the several states, cannot be construed to include the issuing of a policy of insurance, though the parties be domiciled in different states, for it is a simple contract of indemnity against loss. *List v. Commonwealth*, 12 Atl. 277, 279, 118 Pa. 322; *Paul v. Virginia*, 75 U. S. (8 Wall.) 168, 185, 19 L. Ed. 357; *State v. Phipps*, 31 Pac. 1097, 50 Kan. 609, 18 L. R. A. 657, 84 Am. St. Rep. 152.

The business of marine insurance cannot be regarded as commerce, or an instrumentality thereof. *Hooper v. People of State of California*, 15 Sup. Ct. 207, 210, 211, 213, 155 U. S. 648, 39 L. Ed. 297.

#### Manufacture distinguished.

"Manufacture" and "commerce" are two distinct and very different things. The latter does not include the former. Buying and selling are elements of commerce, but something more is required to constitute commerce, which, strictly considered, consists in intercourse and traffic, including in its term navigation, and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities. *United States v. El C. Knight Co.* (U. S.) 60 Fed. 934, 936.

Mr. Justice Lamar says, in *Kidd v. Pearson*, 9 Sup. Ct. 6, 128 U. S. 1, 32 L. Ed. 346, that manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling, and the transportation incident thereto, constitute commerce; and the regulating of commerce, in the constitutional sense, embraces the regulation, at least, of such transportation. If it be held that the term includes the regulation of all such manufactures as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it will also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the states, with the power to regulate, not only manufactures, but also agriculture, horticulture, stock raising, domestic fisheries, and mining; in short, every branch of human in-

dustry. The business of refining sugar is a manufacture, and not an operation of commerce, and therefore not within the commerce clause of the federal Constitution. *United States v. E. C. Knight Co.*, 15 Sup. Ct. 249, 254, 156 U. S. 1, 39 L. Ed. 325.

#### Navigation.

"From the adoption of the Constitution, the universal sense has been that the word 'commerce,' as used in that instrument, is to be construed as a generic term, comprehending navigation, or that a control over navigation is necessarily incidental to the power to regulate commerce." *The Wilson v. United States* (U. S.) 30 Fed. Cas. 239, 243.

"Commerce" embraces transportation by land and water, and all the means and appliances necessarily employed in carrying it on. *Cuban S. S. Co. v. Fitzpatrick* (U. S.) 66 Fed. 63, 67; *Chicago & N. W. R. Co. v. Fuller*, 84 U. S. (17 Wall.) 560, 568, 21 L. Ed. 710; *South Carolina v. Georgia*, 93 U. S. 4, 10, 23 L. Ed. 782; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 465, 470, 24 L. Ed. 527; *Gloucester Ferry Co. v. Pennsylvania*, 5 Sup. Ct. 826, 828, 114 U. S. 193, 29 L. Ed. 158; also *Justice Miller's Lectures*, p. 447; *Pacific Coast S. S. Co. v. Board of Railroad Com'rs* (U. S.) 18 Fed. 10, 11; *Pollock v. Cleveland Shipbuilding Co.*, 47 N. E. 582, 584, 56 Ohio St. 655 (citing *Sweatt v. Boston, H. & E. R. Co.* [U. S.] 23 Fed. Cas. 530); *North River Steamboat Co. v. Livingston* (N. Y.) 3 Cow. 713, 742; *Delaware & H. Canal Co. v. Lawrence* (N. Y.) 2 Hun, 163, 179; *Crow v. State*, 14 Mo. 237, 296; *Howell v. State* (Md.) 3 Gill, 14, 18.

"The acts of the Legislature of New York, granting licenses for the exclusive navigation of all the waters within the jurisdiction of that state, with boats moved by fire or steam, for a term of years, are repugnant to that clause of the federal Constitution which gives to Congress the power of regulating commerce, inasmuch as these acts prohibit vessels licensed by the United States from carrying on trade in the said waters by means of fire or steam." "The subject to be regulated is commerce. If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word 'commerce' to comprehend navigation. The power of Congress, then, comprehends navigation within the limits of every state in the Union, so far as that navigation may be in any manner connected with 'commerce with foreign nations, or among the several states, or with

the Indian tribes.' It may, of consequence, pass the jurisdictional line of New York, and act on the very waters to which the prohibition now under consideration applies. Steamboats may be enrolled and licensed in common with vessels using sails. They are, of course, entitled to the same privileges, and can no more be restrained from navigating the waters and entering ports which are free to such vessels than if they were wafted on their voyage by the winds instead of being propelled by the agency of fire. The one element may be as legitimately used as the other for every commercial purpose authorized by the laws of the Union, and the act of a state inhibiting the use of either to any vessel having a license under the act of Congress comes in direct collision with that act." *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1, 14, 6 L. Ed. 23.

"Commerce," as used in the clause of the federal Constitution authorizing Congress to regulate commerce with foreign nations and among the several states, "comprehends navigation, and extends to every species of commercial intercourse between the states and foreign nations, and to all commerce in the several states, except such as is completely internal, and which does not extend to or affect other states." *Webb v. Dunn*, 18 Fla. 721, 724; *State Tonnage Tax Cases*, 79 U. S. (12 Wall.) 204, 214, 20 L. Ed. 370; *Veazie v. Moor*, 55 U. S. (14 How.) 568, 573, 14 L. Ed. 545.

"Commerce," as used in Const. U. S. art. 1, § 8, providing that Congress shall have a right to regulate commerce with foreign nations, etc., includes navigation, as well as "traffic" in its ordinary signification, and embraces ships and vessels as the instruments of intercourse and trade, as well as officers and seamen employed in their navigation. *State Tonnage Tax Cases*, 79 U. S. (12 Wall.) 204, 216, 20 L. Ed. 370; *People v. Brooks* (N. Y.) 4 Denio, 469, 476.

"Commerce includes navigation. The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States which are accessible from a state other than those in which they lie. For this purpose they are the public property of the nation, and subject to all the requisite legislation by Congress. This necessarily includes the power to keep them open and free from obstruction as to their navigation interposed by the states or otherwise, to remove such obstruction when they exist, and to provide, by such sanctions as they may deem proper, against the occurrence of the evil, and the punishment of offenders. For these purposes, Congress possesses all the powers which existed in the states before the adoption of the national Constitution, and which have always existed in the Parliament of England." *Gilman v. Philadelphia*.



States court. *Georgia v. Bolton* (U. S.) 11 Fed. 217, 218.

**Filing præcipe.**

A suit is commenced when a plaintiff, by filing with the clerk a præcipe for the process he desires, submits himself and the subject-matter to the court's controversy. The jurisdiction which the court thus obtains is the power to hear and determine the cause. "It is coram judice whenever a case is presented which brings this power into action." *Bush v. Hanson*, 70 Ill. 480; *United States v. Arredondo*, 81 U. S. (6 Pet.) 691, 709, 8 L. Ed. 547. When the court thus has jurisdiction of the plaintiff and of the subject-matter, the action is commenced, though there be no jurisdiction as yet of the defendant. Therefore, where a præcipe was filed, and summons was issued to a fire insurance company within a year after a loss, but the summons was not served, and another process was issued on the return day of the first process, the suit was commenced within a year, though the second process did not issue until after the expiration of the year. *Schroeler v. Merchants' & Mechanics' Ins. Co.*, 104 Ill. 71, 76.

**Foreclosure notice.**

A fire policy provided that if the property should be sold, transferred, or become incumbered by mortgage or trust deed, or by judgment tax or mechanic's lien, or upon the "commencement" of proceedings for its foreclosure or sale, or levy thereon, the policy should become void. Held, that an advertisement for a mortgage sale was a "commencement" of foreclosure within the meaning of the word in the policy. *Springfield Steam Laundry Co. v. Traders' Ins. Co. of Chicago*, 66 Mo. App. 199, 203.

"Commencement of an action or suit," in a statute providing in effect that limitations will be sustained on all debts, grounded upon any contract in writing, by the commencement of an action or suit within four years next after the same could have been instituted, does not include the mere fact of posting notices of a trust sale by a trustee before the debt secured by the trust deed is barred, but not in time to make the sale before the bar of limitations would be complete. *Blackwell v. Barnett*, 52 Tex. 326, 335.

**Issuance of summons.**

The commencement of an action, prosecution, or suit is the issuance of the summons, and not the filing of the petition. *Butts v. Turner*, 68 Ky. (5 Bush) 435, 436.

"Proceedings in error are not commenced when personal service can be obtained, until a summons is issued, which shall be duly served." *Bemis v. Rogers*, 8 Neb. 149, 150.

The commencement of a suit in justice court happens on the issuing of the summons. *Boyce v. Morgan* (N. Y.) 8 Caines, 133.

**Issuance of warrant in criminal case.**

A criminal prosecution is deemed "commenced" by the issuing of a warrant within the Indiana statute requiring that prosecutions for certain offenses shall be commenced within two years after the examination thereof. *Flick v. State*, 51 N. E. 951, 952, 22 Ind. App. 550.

The commencement of prosecution is the issuance of a warrant in good faith, and its delivery to the officer to execute, and, where the defendant was afterwards arrested on such warrant and bound over for trial, such issuance constituted a sufficient commencement of a prosecution to satisfy the statute of limitations. *People v. Clark*, 33 Mich. 112, 120.

Rev. St. § 643 [U. S. Comp. St. 1901, p. 521], declares that, whenever any civil suit or criminal prosecution is commenced in a state court for any act done by an officer under the revenue laws of the United States, the same may be removed to the United States Circuit Court. Held, that the "commencement of an action" within such statute was the issuance of a warrant and the arrest made by a state officer, and that it was no objection to the removal that no indictment had been found against the federal officer in the state court. *North Carolina v. Kirkpatrick* (U. S.) 42 Fed. 689.

A warrant of arrest issued and returned by a proper officer is the commencement of a criminal prosecution. *Ross v. State*, 55 Ala. 177.

**Issuance of writ.**

The commencement of a suit in this country is usually the time of the issuance of the writ, and differs from the English rule, which fixes the filing of the bill or declaration as the time of the commencement of the suit. *Lowry v. Lawrence* (N. Y.) 1 Caines, 69, 72; *Cheetham v. Lewis* (N. Y.) 3 Johns. 42; *Burdick v. Green* (N. Y.) 18 Johns. 14, 17.

The time of the "commencement of a suit or action," in order to stop the running of the statutes of limitation, is the day when the writ is issued, provided the writ must be served and returned. *Day v. Lamb*, 7 Vt. 426, 429; *Chapman v. Goodrich*, 55 Vt. 354, 355.

The expression "commencement of the action," as used in a plea in an action of assumpsit alleging that the cause of action did not accrue to plaintiff at any time within six years before the commencement of the action, means the time when the writ issued. The receipt of the writ by the sheriff, or its service on the defendant, is not required in

order to constitute the commencement of an action. In contemplation of law the writ is issued, on the application of the creditor, by the sovereign power of the state, through the instrumentality of its officers. It is the state's precept or command, and is issued, and the action commenced, whenever it is in the hands of the plaintiff or his attorney, ready to fulfill its purposes. The commencement of the action depends wholly on the will or the diligence of the plaintiff. *Hall v. Spencer*, 1 R. I. 17, 19.

As used in the statute of limitations (Rev. St. c. 81, § 82), the "commencement" of an action is the time of actually making a writ with the intention of service. *Dodge v. Hunter*, 26 Atl. 1055, 1056, 85 Me. 121, 124.

The issuing of the *capias ad respondendum* is the commencement of a suit. *Hogan v. Cuyler* (N. Y.) 8 Cow. 203, 205.

The issuance of a *capias ad respondendum* to stay the statute of limitations is a mere matter of form, and the fact that the writ was delivered to the sheriff with instructions to return it non est, without any intention of its being served on the defendant, did not prevent it from constituting a good commencement of the suit for the purpose of defeating the operation of the statute of limitations, since the defendant is not thereby deprived of any defense. *Beekman v. Satterlee* (N. Y.) 5 Cow. 519, 526.

#### Issuance of writ of replevin.

The issuance of a replevin writ to a sheriff constitutes the commencement of a replevin suit. *Underwood v. Tatham*, 1 Ind. (1 Cart.) 276.

#### Motion to revive judgment.

"A motion to revive the lien of a judgment under the provisions of Code, § 323, is not the commencement of an action within the meaning of section 27, prescribing that an action on a judgment must be commenced within six years after its rendition, it being only a mode by which to secure the fruits of an action already had and determined between the parties." *Burns v. Conner*, 23 Pac. 836, 837, 1 Wash. St. 6.

#### Service of notice in ejectment.

The date of the issue of process is the commencement of an action. The service of notice in ejectment is the commencement of that action, although the suit is not pending until the return of the notice and filing of the declaration and notice in court. *Pindell v. Maydwell*, 46 Ky. (7 B. Mon.) 314.

#### Service of summons or writ.

An action is not commenced until service is made on the defendants, and, where one of the defendants dies before service is made

on either, the action does not survive. *Clark v. Helms* (Conn.) 1 Root, 486, 487.

The commencement of a suit or action is the service of the writ, and not the signing or issuance of the writ. *Jencks v. Phelps*, 4 Conn. 149, 152; *Spalding v. Butts*, 6 Conn. 28, 30; *Reliance Trust Co. v. Atherton* (Neb.) 93 N. W. 150.

Within Kan. Rev. St. 1868, pp. 624, 634, § 20, declaring that if any action be commenced within due time and a judgment thereon for plaintiff be reversed, or if plaintiff fail in such action otherwise than on the merits, and the time and limit for the same shall have expired, the plaintiff may commence a new action within a year after the reversal or failure, held, that the service of a summons and the return thereof constituted the commencement of an action contemplated by such section. *Isaacs v. Price* (U. S.) 13 Fed. Cas. 154, 156.

Where an attorney sues out a summons and shows it to a defendant, requesting him to sign his appearance thereto, and defendant promised so to do, if he cannot arrange with plaintiff, and afterwards appears by himself or attorney, the commencement of the suit was at the time when summons was first shown to the defendant. *Whitaker v. Turnbull*, 18 N. J. Law (3 Har.) 172, 174.

A suit is to be construed as commenced or brought when the writ is sued out and completed in order to have it served on the defendant, and hence, although the writ be completed and put into the hands of an officer, yet if he be directed not to serve it until after the happening of some contingency, the suit is not commenced until after such happening. *Mason v. Cheney*, 47 N. H. 24, 25.

The actual service of the original notice in a personal action by a person other than the sheriff is the commencement of the action. *Elliott v. Stevens*, 10 Iowa, 418, 422; *Mather v. Butler County*, 16 Iowa, 59, 61; *Hagan v. Burch*, 8 Iowa (8 Clarke) 309, 311.

Paschal's Dig. art. 4604, providing that limitations will be suspended on all debts grounded upon contract in writing by the commencement of an "action or suit" within four years next after the same could have been instituted, is not met by the posting of notices of a trust sale by a trustee before the debt secured by the trust is barred, but not in time to make the sale before the bar of limitation would be complete. *Blackwell v. Barnett*, 52 Tex. 326-335.

An action to redeem property sold for taxes is not commenced within Code 1873, § 3157, until notice has been served on defendant as provided by section 2599, even for the purpose of avoiding the time limitation. *Hawley v. Griffin* (Iowa) 92 N. W. 113, 117.

Sabbath day, is a regulation of internal police, and not a regulation of commerce, even as to freight trains passing through the state from and to adjacent states, and laden exclusively with goods and freights received on board before the trains entered the state, and consigned to points beyond its limits. *Hennington v. State*, 17 S. E. 1009, 1011, 90 Ga. 896.

It is not a "regulation of commerce" within Const. art. 1, § 8, conferring the right to regulate commerce among the states on Congress, for a state to require locomotive engineers to be examined and licensed by a board appointed by the Governor, even when it applies to the case of an engineer operating a locomotive attached to a passenger and express train running from a point in that state to points in other states. *Smith v. Alabama*, 8 Sup. Ct. 564, 566, 124 U. S. 465, 31 L. Ed. 508.

#### **Sale of liquors.**

"Code Iowa 1873, § 1553, which forbids any common carrier to bring within the state any intoxicating liquors from any other state or territory of the United States without first having been furnished with a certificate, under the seal of the county auditor, to the county to which said liquor is to be transported or is consigned for transportation, certifying that the consignee or person to whom said liquor is to be transported is authorized to sell intoxicating liquors in such county, is void, as acting against section 8, art. 1, of the Constitution, which gives the power to regulate commerce to Congress. It is an attempt to exert jurisdiction over persons and property within the limits of other states. \* \* \* It is not one of those local regulations designed to aid and facilitate commerce; it is not an inspection law to secure the due quality and measure of a commodity; \* \* \* it is not a regulation confined to the purely internal and domestic commerce of the state. It is \* \* \* a regulation affecting interstate commerce in an essential and vital point. \* \* \* It is therefore a regulation of that character which constitutes an unauthorized interference with the power given to Congress over the subject. \* \* \* The power to regulate or forbid the sale of a commodity after it has been brought into the state does not carry with it the right and power to prevent its introduction by transportation from another state." *Bowman v. Chicago & N. W. R. Co.*, 8 Sup. Ct. 689, 125 U. S. 465, 31 L. Ed. 700.

The exclusive power to regulate commerce has reference to burdens or restraints imposed directly on the articles themselves, and not upon the materials of which they are composed, nor upon the vehicles of commerce. Hence a law regulating the sale of liquor within the state is not in violation of the

constitutional provision. *McGuire v. State*, 42 Ohio St. 530, 534.

"The term 'commerce,' in the clause of the federal Constitution which gives Congress power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes, extends to all lawful commerce with foreign nations, and in the same terms to all lawful commerce among the states; and 'among' means between two only, as well as among more than two. If it was otherwise, then an intermediate state might interdict and obstruct the transportation of imports over it to a third state, and thereby impair the general power." Thus, trading in ardent spirits falls within the provision of the Constitution, as they have been for ages, and now are, subjects of sale and of lawful commerce, and that of a large class throughout a great portion of the civilized world. *License Cases*, 46 U. S. (5 How.) 504, 599, 12 L. Ed. 256.

#### **Telegrams.**

"Commerce," as used in the federal Constitution, giving Congress the exclusive power to regulate interstate commerce, means trade in articles of property. Telegrams or correspondence by any other method, although between citizens of different states, though they may relate to commercial transactions, are not commerce. *Western Union Tel. Co. v. Mayer*, 28 Ohio St. 521, 531.

#### **Telegraph and telephone.**

The Supreme Court of the United States, by one of its ablest members, has given a plain and comprehensive exposition of the term "commerce," less general than the word "intercourse," used without qualification, but sufficient to include all the ramifications of commerce. Says Marshall, C. J.: "It describes the commercial intercourse between nations and parts of nations in all of its branches, and is regulated by prescribing rules for carrying on that intercourse." The telegraph constitutes a branch of commercial intercourse. "So interwoven has the custom of communication by telegraph become with trade and traffic, that to separate itself without serious disturbance of vast trade relations and financial transactions would be a task as difficult as to cut the pound of flesh without a drop of blood." *Western Union Tel. Co. v. Atlantic & Pacific States Tel. Co.*, 5 Nev. 102, 108.

As used in the clause of the federal Constitution giving Congress the power to regulate commerce with foreign nations, between the states, and with Indian tribes, "commerce," is not confined to the instrumentalities of commerce in use when the Constitution was adopted. They keep pace with the progress of the country, and adapt themselves to the new developments of time

and circumstances. They extend from the horse with its rider to the stagecoach, from the sailing vessel to the steamboat, from the coach and steamboat to the railroad, and from the railroad to the telegraph. As these new agencies are successfully brought into use to meet the demands of increasing population and wealth, they were intended for the government of the business to which they relate, at all times and under all circumstances. *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1, 9, 24 L. Ed. 708.

"Commerce," as used in the Constitution of the United States, providing that Congress shall have power to regulate commerce among the several states, includes the foreign and interstate business of telegraph companies. "A telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods. Both companies are instruments of commerce, and their business is commerce itself." *Western Union Tel. Co. v. Texas*, 105 U. S. 460, 464, 26 L. Ed. 1067; *Leloup v. Port of Mobile*, 8 Sup. Ct. 1380, 1382, 127 U. S. 640, 32 L. Ed. 311; *State v. Indiana & I. S. R. Co.*, 32 N. E. 817, 821, 133 Ind. 69, 18 L. R. A. 502.

Though intercourse by telegraphic messages between the states is held to be interstate commerce, it differs in material particulars from that portion of commerce with foreign countries and between the states which consists in the carriage of persons and the transportation of commodities. It differs not only in the subjects which it transmits, but in the means of transmission. Other commerce deals only with persons, or with visible and tangible things, but the telegraph transports nothing visible or tangible; it carries only ideas, wishes, orders, and intelligence. Other commerce requires the constant attention of the carrier for the safety of the person and property carried; the message of the telegraph passes at once beyond the control of the sender, and reaches the office to which it is sent almost instantaneously. It is plain that the regulations necessary for one of these kinds of commerce will be entirely inapplicable to the other. *Western Union Tel. Co. v. Pendleton*, 7 Sup. Ct. 1126, 1127, 122 U. S. 347, 30 L. Ed. 1187.

"Commerce," as used in the clause of the federal Constitution giving Congress control over interstate commerce, includes telephone communication between places in separate states, and therefore cannot be prohibited or regulated by injunction in either state because the operatives do not pay state taxes. *In re Pennsylvania Tel. Co.*, 20 Atl. 846, 48 N. J. Eq. (3 Dick.) 91, 27 Am. St. Rep. 462.

#### Trade distinguished.

The words "trade" and "commerce" are said by Jacobs in his Law Dictionary not to

be synonymous; that commerce relates to dealings with foreign nations, and trade, on the contrary, means mutual traffic among ourselves, or the buying, selling, or exchanging articles between members of the same community. Where the owners of five separate and powerful lines of boats operating on the public canals enter into a combination to establish and maintain rates of freight, and equalize the business among themselves and thereby prevent competition, the transaction amounts to a conspiracy to commit an act injurious to trade or commerce. *Hooker v. Vandewater* (N. Y.) 4 Denio, 849, 353, 47 Am. Dec. 258. See, also, *People v. Fisher* (N. Y.) 14 Wend. 9, 15, 28 Am. Dec. 501.

"Commerce," as used in Act July 2, 1890, c. 647, § 1, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], declaring illegal every contract or combination in the form of a trust or otherwise in restraint of trade or commerce among the states or with foreign nations, is not synonymous with "trade" as used in the common-law phrase "restraint of trade," but is the meaning of that word in that clause of the Constitution which grants to Congress the power to regulate interstate and foreign commerce. *United States v. Debs* (U. S.) 64 Fed. 724, 740. It has in such act a broader meaning than the word "trade," which has been defined as the exchange of commodities for other commodities or for money; the business of buying and selling; dealing by way of sale or exchange. Pullman cars in use upon the railroads are instrumentalities of commerce. *United States v. Cassidy* (U. S.) 67 Fed. 698, 705.

In the Statutes of the United States of 1890, c. 647, making it a misdemeanor for any person to engage in combinations with others to monopolize any part of the trade or commerce among the several states or with foreign nations, the words "trade" and "commerce" are synonymous. The word "commerce" is undoubtedly, in its usual sense, a larger word than "trade" in its usual sense. Sometimes "commerce" is used to embrace less than "trade," and sometimes "trade" is used to embrace as much as "commerce." *United States v. Patterson* (U. S.) 55 Fed. 605, 639.

"Commerce," as used in the Constitution, has a broader meaning than the word "trade." Commerce among the states consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale, and exchange of commodities. Such commerce cannot stop at the external boundary line of each state, but may be introduced into the interior. Thus a combination of coal dealers who regulate the price arbitrarily and provide against competition is one in restraint of commerce. *United*

*States v. Coal Dealers' Ass'n* (U. S.) 85 Fed. 252, 285.

Commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property, and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities; and any agreement or combination which directly operates, not only upon the manufacture, but upon the sale, transportation, and delivery of an article of interstate commerce, by preventing or restricting its sale, etc., thereby regulates interstate commerce to that extent, and to the same extent trenches upon the power of Congress, and violates the anti-trust act of Congress passed July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200], in so far as it applies to sales for delivery beyond the state in which the sale is made. Such a contract was that of the Addyston Pipe & Steel Company and other manufacturers of iron pipe, fixing the amount of the output and prices, and apportioning the territory each manufacturer should supply. *Addyston Pipe & Steel Co. v. United States*, 20 Sup. Ct. 96, 107, 175 U. S. 211, 44 L. Ed. 136.

**Transactions between individuals.**

By its universal signification when applied to governmental polity, "commerce" can mean nothing less than commercial intercourse carried on between states or governments. Without a palpable perversion of the term, it cannot be held applicable to ordinary business transactions occurring between individuals. *Hicks v. Ewharthonah*, 21 Ark. 106, 107.

**Water supply.**

"Commerce," as used in Act April 14, 1853, as amended by Act April 30, 1855, authorizing the formation of corporations for the purpose of engaging in any "species of trade or commerce," foreign or domestic, includes a corporation organized for the purpose of furnishing a city with water. *People v. Blake*, 19 Cal. 579, 694.

**COMMERCE AMONG STATES.**

See "Commerce"; "Interstate Commerce"; "Regulate Commerce."

**COMMERCE WITH FOREIGN NATIONS.**

"Commerce with foreign nations," as used in Const. U. S. art. 1, § 8, providing that Congress shall have power to regulate commerce with foreign nations, means commerce between the citizens of the United States and the citizens or subjects of foreign governments. It means trade and commercial intercourse between nations and parts

of nations, in all its branches, and includes intercourse as the principal means by which foreign intercourse is effected; and to "regulate" this trade and intercourse is to prescribe the rules by which it shall be conducted. *Henderson v. Wickham*, 92 U. S. 259, 270, 23 L. Ed. 543; *United States v. Steffens*, 100 U. S. 82, 96, 25 L. Ed. 550.

"Commerce with foreign nations," as used in Const. U. S. art. 1, § 8, providing that Congress shall have power to regulate commerce with foreign nations, means commerce between the citizens of the United States and the citizens or subjects of foreign governments as individuals. *United States v. Holliday*, 70 U. S. (3 Wall.) 407, 409, 417, 18 L. Ed. 182.

"Commerce with foreign nations," as used in the commerce clause of the federal Constitution, is limited to commerce which, either immediately or at some stage of its progress, is extraterritorial. The phrase can never be applied to transactions between citizens of the same state, nor can it properly be concluded that, because products of domestic enterprise may ultimately become subjects of foreign commerce, the control of the means or the engagements by which such enterprise is fostered and protected is legitimately within the import of the phrase "foreign commerce," or fairly implied in any investiture of the power to regulate such commerce. *Veazie v. Moor*, 55 U. S. (14 How.) 568, 573, 14 L. Ed. 545.

"Commerce with foreign nations," within the meaning of the clause of the federal Constitution giving Congress exclusive power to regulate such commerce, "must signify commerce which in some sense is necessarily connected with these nations; transactions which, either immediately or at some stage of their progress, must be extraterritorial. The phrase can never be applied to transactions wholly internal between citizens of the same community, or to a polity and laws whose ends and purposes and operations are restricted to the territory and soil and jurisdiction of such community. Nor can it be properly concluded that, because the products of domestic enterprise in agriculture or manufactures or in the arts may ultimately become the subjects of foreign commerce, the control of the means or the encouragements by which enterprise is fostered and protected is legitimately within the import of the phrase 'foreign commerce,' or fairly implied in any investiture of the power to regulate such commerce." The clause does not preclude a state from granting the exclusive right to navigate a river wholly within the state, the lower portion of which is not navigable, and the upper portion only subject to imperfect navigation. *Veazie v. Moore*, 55 U. S. (14 How.) 568, 573, 14 L. Ed. 545; *Winder v. Caldwell*, 55 U. S. (14 How.) 434,

444, 14 L. Ed. 487; *Lord v. Goodall Steamship Co.*, 102 U. S. 541, 544, 26 L. Ed. 224.

"Commerce with foreign nations" signifies transactions which, either immediately or at some stage of their progress, is extraterritorial, and when vessels on a voyage between ports of the same state are required to navigate the ocean they are not engaged in purely domestic commerce, and when they go beyond the marine limit they pass from under the jurisdiction of the state and come under the exclusive control of Congress; and, to bring transportation within the control of the state as a part of its domestic commerce, the subject transported must be within the exclusive jurisdiction of the state during the entire voyage. *Lord v. Goodall Steamship Co.*, 102 U. S. 541, 544, 26 L. Ed. 224.

#### COMMERCE WITH INDIAN TRIBES.

The Constitution is an instrument of enumeration, and not of definition, and, in order to ascertain the extent of the power conferred on Congress "to regulate commerce with foreign nations and among the several states and with the Indian tribes," it becomes necessary to determine the meaning of words. The words being general, so the sense must be general, and embrace all subjects comprehended under them, unless there be some limit in the nature of the power itself, or a repugnance to some other parts of the Constitution. "Commerce" is traffic, but it is more: it is intercourse between nations, in relation to foreign nations, and intercommunication by the coast trade among the states. The main object was the government of navigation and intercourse by this means. In the phrase "commerce among the several states," the word "among" means "intermingled with." Commerce among the states cannot stop at the external boundary of each, but must be introduced into the interior. It means commerce which concerns more states than one, not mere internal regulation and traffic. This being the admitted meaning of the sentence in its application to foreign nations and the states, it must carry the same meaning throughout the sentence. *Gibbons v. Ogden*, 22 U. S. (9 Wheat.) 1, 194, 6 L. Ed. 23; 2 Story's Comm. 510. Therefore, as to the Indian tribes, it includes intercourse and traffic, that interests more than one, in which the United States and the Indians are both concerned. *State v. Foreman*, 16 Tenn. (8 Yerg.) 256, 316.

Commerce relates to trade. Intercourse may be carried on without trade. Commerce, therefore, includes no intercourse but that which consists in trade or traffic, and certainly does not include jurisdiction. In conferring upon Congress the power to regulate commerce with the Indian tribes, the states had no more intention to surrender their sovereignty over those tribes than they

had to divest foreign nations of jurisdiction within their own territories by placing in the hands of the federal government the power to regulate commerce with them, and an offense committed in the Indian territory, to which the Indian title has not been extinguished, but over which territory the jurisdiction of the state courts has been extended, is properly cognizable in the courts of the state. *Caldwell v. State (Ala.)* 1 Stew. & P. 327, 430.

"Commerce with the Indian tribes," as used in Const. U. S. art. 1, § 8, providing that Congress shall have power to regulate commerce with the Indian tribes, means commerce with the individuals composing the Indian tribes, and relates to buying and selling and exchanging commodities, which is the essence of all commerce; and hence, if traffic or intercourse is carried on with the Indian tribe or with a member of such tribe, it is a subject to be regulated by Congress, though within the limits of a state. The locality of the traffic can have nothing to do with the power. The right to exercise the power is absolute, without reference to the locality of the traffic, or locality of the tribe, or of the member of the tribe with whom it is carried on. *United States v. Holliday*, 70 U. S. (3 Wall.) 407, 409, 417, 18 L. Ed. 182.

The power to regulate commerce with the Indian tribes which is given to Congress by the federal Constitution does not necessarily cease on their being included within the limits of the state. *United States v. Ciska (U. S.)* 25 Fed. Cas. 422, 424.

The power to regulate commerce with the Indian tribes, as given to Congress by the federal Constitution, does not authorize Congress to pass laws for the punishment of crimes having no relation to the Indians, which are committed on the Indian territory situated within a state. *United States v. Bailey (U. S.)* 24 Fed. Cas. 937, 938.

#### COMMERCIAL.

"Commercial," as used in a rule that, in fixing the classification of goods for the payment of duties, the name or designation thereof is to be understood in its known commercial sense, is to be understood in its comprehensive sense of buying, selling, and exchange in the general sales or traffic of our own markets. *Zante Currants (U. S.)* 73 Fed. 183, 189 (citing *Earnshaw v. Cadwalader*, 145 U. S. 247, 258, 12 Sup. Ct. 851; 36 L. Ed. 693).

When a term is spoken of in reference to its meaning in a "commercial sense," not merely the sense among merchants, but among buyers and sellers generally in the domestic trade, is meant. *United States v. Breed (U. S.)* 24 Fed. Cas. 1222, 1223.

**COMMERCIAL AGENCY.**

See "Special Mercantile Agency."

See, also, "Mercantile Agency."

A "commercial agency" is the same thing as a mercantile agency. Between the words "commercial" and "mercantile," as adjectives qualifying the noun "agency," there is no material distinction, and the adoption of the name of the "United States Commercial Agency" was an infringement on the name of the "United States Mercantile Agency." In re United States Mercantile Reporting & Collection Co., 4 N. Y. Supp. 916, 917, 52 Hun, 611.

Mercantile commercial agencies are establishments which make a business of collecting information relating to the credit, character, responsibility, general reputation, and other matters affecting persons, firms, and corporations engaged in business, for the purpose of furnishing this information to its customers for a cash consideration. These agencies have become recognized and permanent adjuncts to the world of trade. Their rise and progress are of but recent date. The mercantile and commercial agencies were originally established for the purpose of reporting the credit of buyers. Later there have been established what are termed "special agencies," which confine themselves to reporting a particular business, such as furniture, stationery, jewelry, and hardware. The United States and Canada are divided into districts, each district reporting its territory, but there is a daily interchange of information between the districts. Correspondents are usually selected residing in the several towns and cities, whose special business is to collect information relating to the resident business firms of their respective places. The agency is the agent of the merchant or subscriber. These agencies are not instruments of commerce, though as necessary to modern commerce as railroads and telegraphs, without which the free interchange of commerce would be hindered and delayed, so as to bring them within the exclusive regulation of commerce and free from state control. Information or intelligence is not an article of "commerce" in any proper meaning of that word. Neither are they subjects of trade and barter, offered in the market as something having an existence and value independent of the parties to them. Neither are they commodities to be shipped or forwarded from one state to another, and there put up for sale. The information furnished by mercantile agencies to subscribers of their rating books is like other personal contracts between parties; it is individual in its character, and has no relation to the general public. The mercantile agency is not a common carrier. It is no intermediate instrument to disseminate its information, but it is a collector, storer, and holder of it, to

be given directly to those who wish to purchase or pay for it. The business as conducted by mercantile agencies may be an adjunct of commerce and of commercial transactions, but it is a separate and distinct appliance, and does not come within the principles of law which govern or regulate either of them. *State v. Morgan*, 48 N. W. 314, 321, 2 S. D. 32.

Commercial agencies are agencies whose business it is to collect information as to the circumstances, means, and pecuniary ability of merchants and dealers throughout the country, and keep accounts thereof, so that the subscriber to the agency, when applied to by a customer to sell goods to him on credit, by referring to the agency or to the lists which it publishes, may ascertain the standing and responsibility of the customer to whom it is proposed to extend credit. *Eaton, Cole & Burnham Co. v. Avery*, 83 N. Y. 31, 34, 38 Am. Rep. 389; *Genesee Sav. Bank v. Michigan Barge Co.*, 17 N. W. 790, 793, 52 Mich. 164.

**COMMERCIAL AGENT OR BROKER.**

See "Sale by Commercial Broker."

In the revenue statutes a "commercial broker" is defined to be one who negotiates the sale of merchandise without possession or control of it, as commission merchants have in their business. A person who solicits orders by samples solely for nonresident merchants, and whose employment is confined exclusively to the negotiation of sale of goods which are not in the state, is a broker. *Adkins v. City of Richmond*, 34 S. E. 967, 968, 98 Va. 91, 47 L. R. A. 583, 81 Am. St. Rep. 705.

"Commercial agent," within the meaning of a statute providing that every person whose business it is, as agent, to offer for sale goods, wares, or merchandise by samples, catalogue, or otherwise, shall be regarded as commercial agents, only includes persons offering goods for sale, whether the offer is made by samples or by catalogues or otherwise, and has no reference to those who sell and deliver the goods at the time of the sale. In re *Wilson*, 19 D. C. 341, 349, 12 L. R. A. 624.

Acts 1881-82, in reference to licensing commercial brokers, declares "that every person who negotiates the sale of merchandise after having possession or control of it as commission merchants, shall be deemed a commercial broker." *Henderson v. Commonwealth*, 78 Va. 488, 489.

**Diplomatic officer.**

"Consul general," "consul," and "commercial agent," as used in the title relating to diplomatic and consular officers, shall be deemed to denote full, principal, and permanent consular officers, as distinguished from

subordinates and substitutes. U. S. Comp. St. 1901, p. 1149.

### COMMERCIAL CORPORATIONS.

Within Bankr. Act 1867, § 37, providing that the provision of the act shall apply to moneyed business and commercial corporations, railroad corporations are commercial corporations. *Sweatt v. Boston, H. & E. R. Co.* (U. S.) 23 Fed. Cas. 530, 535.

### COMMERCIAL DOMICILE.

A commercial domicile is a domicile which is acquired by the maintenance of a commercial establishment. The residence of the person holding such domicile is immaterial to its existence. *United States v. Chin Quong Look* (U. S.) 52 Fed. 208, 204.

"Commercial domicile" is the domicile which the citizen of a foreign country may acquire by the conduct of a business in a different country. "By general international law, foreigners who have become domiciled in a country other than their own acquire rights and must discharge duties in many respects the same as possessed by and imposed upon the citizens of that country, and no restriction on the footing on which such person stands by reason of his domicile of choice or commercial domicile is to be presumed." *Lau Ow Bew v. United States*, 12 Sup. Ct. 517, 521, 144 U. S. 47, 36 L. Ed. 340.

### COMMERCIAL FERTILIZERS OR MANURES.

The term "commercial fertilizer," as used in the act relating thereto, shall be taken to mean any and every substance imported, manufactured, prepared, or sold for fertilizing or manurial purposes, except barnyard manure, marl, lime, wood ashes, and plastering. *Horner's Rev. St. Ind. 1901*, § 4899.

The words "commercial manures, artificially manufactured or manipulated fertilizers," shall be taken and construed to include all manures and fertilizers which shall be sold for a greater price than one cent per pound. *Pub. Gen. Laws Md. 1888*, p. 972, art. 61, § 7.

The term "commercial fertilizers," as used in an act regulating the sale of fertilizers, shall be taken to mean any or every substance imported, manufactured, prepared, or sold for fertilizing or manuring purposes, except barnyard manure, marl, lime, and wood ashes. *P. & L. Dig. Laws Pa. 1894*, vol. 1, col. 2092, § 6.

The term "commercial fertilizer" shall mean compounds and manufactured substances containing, or represented as containing, two or more of the following ingredients, namely, nitrogen, ammonia, potash, and

phosphoric acid, but shall not apply to the separate ingredients used to manufacture the same, or to bone meal, land plaster, lime, or any substance, the product of nature, which has not been compounded. *V. S. 1894*, 4346.

The words "commercial manures, artificially manufactured, or manipulated fertilizers," shall be taken and construed to include all manures and fertilizers which shall be sold for a greater price than three-fourths of one cent per pound. *Code Va. 1887*, § 1894.

### COMMERCIAL INDORSEMENT.

The words "transferred, and its collection guaranteed," indorsed on the back of a negotiable note, is not in any sense a commercial indorsement of the note, but only constitutes a transfer and a guaranty of payment. *Omaha Nat. Bank v. Walker* (U. S.) 5 Fed. 899, 402.

### COMMERCIAL INSURANCE.

"Commercial insurance" is defined as having reference to indemnity agreements, issued in the form of insurance bonds or policies, whereby parties to commercial contracts are to a designated extent guaranteed against loss by reason of a breach of contractual obligations on the part of the other contracting party. To this class belong policies of contract credit and title insurance. *Cowles v. United States Fidelity & Guaranty Co.*, 72 Pac. 1032, 1033, 32 Wash. 120.

### COMMERCIAL LAW.

See "Law Merchant."

"Commercial law" is that branch of the law which comprises and includes rules established for the government of commercial transactions. The general commercial law is not circumscribed within local limits, nor committed for its administration to any particular jurisdiction, and, the Constitution and laws of the United States having conferred on the citizens of the several states and on aliens the privilege of enforcing their rights acquired under and defined by that general commercial law before the judicial tribunals of the United States, it must follow by regular consequence that any state law or regulation, the effect of which would be to impair the rights thus secured, or to divest the federal courts of jurisdiction thereof, would be nugatory and unavailing. *Watson v. Tarpley*, 59 U. S. (18 How.) 517, 521, 15 L. Ed. 509.

"Commercial law" is a phrase employed to denote that branch of the law which relates to the rights of property and the relation of persons engaged in commerce. Persons engaged in commercial adventures, wherever they may have their domicile, have business relations throughout the civilized



world, from which it results that commercial law is less local and more international than any other system of law except the law of nations. *R. R. Co. v. Nat. Bank*, 102 U. S. 14, 55; *Williams v. Gold Hill Min. Co.* (U. S.) 96 Fed. 454, 464. Thus the decision of the Supreme Court of California, holding that judgment creditors of a mining corporation may question the validity of a mortgage given by the corporation on the ground that it was not ratified by the stockholders as required by the state statute, does not relate to any question of commercial law. *Williams v. Gold Hill Min. Co.* (U. S.) 96 Fed. 454, 464.

"Law" is defined as a rule prescribed by the sovereign power, and incidentally it is said there is no such thing as a general commercial or general common law separate from and irrespective of a particular state or government whose authority makes it law. By whom, says the court, is a general commercial law prescribed, and what tribunal has authority or recognition to declare or enforce it outside of the local jurisdiction of the government it represents? Even the law of nations, the widest reaching of all, is a law only in name. The so-called "commercial law" is likewise only a name. Upon many questions arising in the business dealings of men, the laws of modern civilized states are substantially the same, and it is therefore common to say that such is the commercial law, but, except as a convenient phrase, such general law does not exist. There must be a state or government of which every law can be predicated, and to whose authority it owes its existence as a law. Without such sanction it is not law at all. *Forepaugh v. Delaware, L. & W. R. Co.*, 18 Atl. 503, 504, 128 Pa. 217, 5 L. R. A. 508, 15 Am. St. Rep. 672.

#### COMMERCIAL MANURE.

See "Commercial Fertilizers or Manures."

#### COMMERCIAL MARK OR NAME.

The two terms "commercial mark" and "commercial name," as used in the treaty with France of April 16, 1869, are translations of terms used in the civil law of France. The distinction between a trade-mark and a commercial mark is pointed out by Pouillet in his work on *Marques de Fabrique*, in which he says a trade-mark is not a commercial mark, and it is with reason that the law mentions both. The trade-mark is specially or purely the mark of the manufacturer, or him who creates the product or manufactures it; the commercial mark is that of the dealer, who, receiving the product of the manufacturer, sells it in turn to the consumer. The name of a town, or, more generally, the name of a locality, may serve as a trade-mark, yet here still it is on con-

dition that the name shall be presented under a distinct special form, always the same. It is this peculiar expression which constitutes the mark, and not the name taken separately and for itself. The commercial name is the name of an individual, or any name which is the property of the merchant, without reference to its use as a mark or trade-mark in distinctive form. The name "Vichy" is a commercial name. *La Republique Francaise v. Schultz* (U. S.) 57 Fed. 37, 41.

#### COMMERCIAL PAPER.

His commercial paper, see "His."

"Commercial paper," as used in the bankrupt act of 1867, providing that any merchant, banker, or trader who fraudulently fails to pay his commercial paper for a period of 14 days shall be deemed to have committed an act of bankruptcy, means bills of exchange, promissory notes, bank checks, and other negotiable instruments for the payment of money, which by their form and their face purport to be such instruments as are by the law merchant recognized as falling under the designation of "commercial paper." In *re Hercules Mut. Life Assur. Soc.* (U. S.) 12 Fed. Cas. 12, 15; In *re Nickodemus* (U. S.) 18 Fed. Cas. 222, 223. Such paper is usually denominated "commercial paper," and it is to be presumed that Congress used the term in this common acceptance, rather than in the more restricted sense of paper which grows out of and is part of a strictly commercial transaction. In *re Nickodemus* (U. S.) 18 Fed. Cas. 222, 223. The terms are descriptive of the kind of paper, and not of the mode in which it was in fact issued or used. In *re Chandler* (U. S.) 5 Fed. Cas. 447, 448. See, also, *Bank of Newport v. Cook*, 30 S. W. 35, 36, 60 Ark. 288, 29 L. R. A. 761, 46 Am. St. Rep. 171.

"Commercial paper," as used in the bankrupt act of 1867, means "negotiable paper; that is, promissory notes or bills of exchange made by a banker, merchant, or trader in the due course of his business as such banker, merchant, or trader, whether the elements of negotiability be given the instrument by the law merchant or by statute." In *re Sykes* (U. S.) 23 Fed. Cas. 582.

A note and duebill given for money loaned to a manufacturing company, payable on demand, is not "commercial paper" within Bankr. Act 1867, § 39. In *re McDermott Patent Bolt Mfg. Co.* (U. S.) 16 Fed. Cas. 16, 17.

"Where obligations are issued to secure the payment of money upon time, and contain on their face an expression showing that they are expected to pass from one person to another, and thus to perform the office of bills and notes or of money, as the words 'bearer' or 'assigns' or 'holder,' or the like, the courts of this country, with a single ex-

ception, have concurred in attaching to them the attributes of commercial paper." *Chase Nat. Bank v. Faurot*, 44 N. E. 164, 165, 149 N. Y. 532, 35 L. R. A. 605 (citing *Brainerd v. New York & H. R. Co.*, 25 N. Y. 496).

The term "commercial paper" does not include receiver's certificates. *Central Nat. Bank v. Hazard* (U. S.) 30 Fed. 484, 485.

### COMMERCIAL PROPERTY.

Property of a charitable institution leased out for revenue is no part of the asylum proper, but is "commercial property," and not exempt from taxation under the Constitution. *Female Orphan Soc. v. Board of Assessors*, 33 South. 592, 593, 109 La. 537.

### COMMERCIAL RAILROAD COMPANY.

A "commercial railroad" is a railroad properly equipped for the running of passenger trains, freight trains, and doing and conducting general freight and railway passenger business. *Demaree v. Bridges*, 65 N. E. 601, 602, 30 Ind. App. 181.

A commercial railroad company is one whose general business is not carried on within a city. *Savannah, T. & I. H. Ry. v. City of Savannah*, 37 S. E. 393, 112 Ga. 164.

### COMMERCIAL TRAVELER.

See, also, "Drummer"; "Commerce"; "Traveling Salesmen."

An agent, such as is usually denominated a "drummer" or "commercial traveler," who simply exhibits samples of goods kept by his principal, and takes orders from his purchasers for such goods, which goods are afterwards delivered by the principal to the purchaser, and payment for the goods is to be made by the purchaser to the principal on such delivery, is neither a peddler nor a merchant. *City of Kansas v. Collins*, 8 Pac. 865, 867, 34 Kan. 434.

It has never been understood that a commercial traveler—that is, one who sells to retail dealers or others by sample—is either a hawker or a peddler, within a statute requiring a peddler to be licensed. *City of Olney v. Todd*, 47 Ill. App. 439, 440.

Commercial travelers are not men of a like character with grocers, merchants, brokers, peddlers, and junk dealers, so as to be liable to a license tax authorized by a city charter for such callings. They are more nearly like merchants and peddlers than any of the others named, and yet they are quite unlike either. They follow no independent business, they make no contracts for themselves, nor do they come, ordinarily, under any sort of personal obligation. They are merely solicitors of orders for others, and differ in no respect from clerks or salesmen,

except that they are ambulatory in their operations, and do not usually carry or deliver the goods sold. *Ex parte Taylor*, 58 Miss. 478, 481, 38 Am. Rep. 336.

As laborer or merchant.

See "Day Laborer"; "Merchant."

### COMMINGLE.

The word "commingle" means to put together in one mass; so that an allegation that an officer commingled funds in his hands is sufficient to show that the funds were blended so as to become indistinguishable, and facts constituting the commingling need not be alleged. *Pfau v. State*, 47 N. E. 927, 929, 148 Ind. 539.

### COMMISSION.

See "Del Credere"; "Usual Commission." Brokers or brokerage commission, see "Brokerage."

The word "commission" means a brokerage or allowance made to a factor or agent for the transacting of business for another. *Jackson v. Stanfield*, 37 N. E. 14, 15, 137 Ind. 592, 23 L. R. A. 588; *Woolsey v. Jones*, 4 South. 190, 192, 84 Ala. 88.

"Commission" legally imports a sum allowed as compensation to a servant, factor, or agent, who manages the affairs of others, in recompense for his services. The right to such allowance may either be the subject of a special contract or it may rest on implied contract to pay quantum meruit. *Ralston v. Kohl's Adm'r*, 30 Ohio St. 92, 98.

"Commissions" of executors or trustees are compensation for labor and responsibility, and the rate is graduated by the responsibility incurred, the amount of the estate, and the sum of the labor expended. *Appeal of Ziegler (Pa.)* 4 Atl. 837, 839 (citing *In re Harland [Pa.]* 5 Rawle, 323).

"Commissions," in reference to a sale of land by a trustee under a trust deed, mean compensation for selling. *Whitaker v. Old Dominion Guano Co.*, 31 S. E. 629, 630, 123 N. C. 368.

A carrier contracted with defendant to deliver certain leather to the French government, by the terms of which contract the leather was to be paid for on delivery. Defendant, in a letter of instructions to plaintiff, stated that the "commissions upon sales and investments" would be a certain per cent., and directed how the leather should be delivered and how plaintiff was to obtain payment, but gave no authority whatever to sell. Held that, plaintiff having only delivered the leather to the French government, and not made any sale of it or investment, he was not entitled to commis-

sions. "Commissions" means an allowance or compensation made upon the sale or purchase of goods. *Miller v. Livingston* (N. Y.) 1 Caines, 349, 357.

"Commissions" is a word without technical meaning, but, when used to express compensation for services rendered, it usually denotes a percentage on the amount of moneys paid out or received. *Purifoy v. Godfrey*, 16 South. 701, 703, 105 Ala. 142; *Brenan v. Perry* (Pa.) 7 Phila. 242, 243.

Where a policy of reinsurance against loss which insured may sustain on certain policies in excess of 50 per cent. of the net premiums received by insured during the term of such policy provides that the net premiums shall be determined by deducting from the gross premiums the commissions paid, the term "commissions paid" includes the entire compensation paid by the insurer to its attorneys in fact, and is not confined merely to commissions paid for business procured. *Alker v. Rhoads*, 76 N. Y. Supp. 808, 811, 73 App. Div. 158.

The word "commissions," as used in the bankruptcy act of 1898, can mean nothing more nor less than the compensation allowed to referees and trustees, other than the fees deposited for them with the clerk. *In re Sabine* (U. S.) 1 Am. Bankr. R. 322, 326.

#### Discount distinguished.

In its technical as well as its ordinary sense, commission generally signifies a percentage upon the amount of money involved in the transaction, as distinguished from discount, which is a percentage taken from the face value of the security or property negotiated. *Swift & Courtney & Beecher Co. v. United States* (U. S.) 18 Ct. Cl. 42, 57.

"Commission," as used in Revenue Act 1863 (12 Stat. 714), which provides that the proprietors of certain articles, who furnish their dies for stamps, shall be allowed the following commission from amounts purchased at one time, etc., means the sum to be paid the purchaser on the purchase of stamps at par, it being calculated as a per cent. on the amount of the purchase money, and it necessarily implies that the amount is to be paid in money. It is synonymous with the word "discount" in Act 1862, c. 119, § 102 (12 Stat. 477). *Swift & Courtney v. United States*, 4 Sup. Ct. 244, 245, 111 U. S. 22, 28 L. Ed. 341.

#### As fees.

See "Fees."

#### In tariff act, as commission paid.

"Commissions," as used in Act April 20, 1818, c. 74, § 4, directing that duties on ad valorem goods shall be estimated upon the actual cost, including all charges except

commissions, etc., means "whatever sum is bona fide charged and paid as commissions." It does not include a mere charge of commissions which is not paid. *United States v. May* (U. S.) 26 Fed. Cas. 1224.

#### As wages.

See "Wages."

#### COMMISSION (Of Crime).

"Commission" means the act of committing, doing, or performing the act of perpetrating. Thus, within the rule that in order to constitute the offense of an attempt to commit a crime the accused must do some act towards its commission, mere acts of preparation not proximately leading to the consummation of the intended crime will not suffice to establish an attempt to commit it. *Groves v. State*, 42 S. E. 755, 756, 116 Ga. 516, 59 L. R. A. 598.

#### COMMISSION (Of Officer).

See "Duly Commissioned and Sworn."

The commission of a militia officer is the evidenced authority of the officer. The authority itself is derived from the choice of the company, and is not conferred by the commission. *Scofield v. Lounsbury*, 8 Conn. 109, 111.

From the organization of the first Republican government in the state, officers have been appointed by a "commission"—a term which, whether regarded according to its ordinary meaning or its legal sense, imports a delegation of authority, and is defined to be a delegation by warrant of an act of Parliament or of common law, whereby jurisdiction, power, or authority is conferred to others. Our earliest books draw a distinction between a grant of an office and a commission, and inform us that the former, as its name implies, is not revocable, but that the latter, which is only the delegation of an authority, is. *State v. Dews* (Ga.) R. M. Charit. 443.

A commission is a warrant of office, a written authority or license granted by a person or persons duly constituted by law for the purpose of a public officer, empowering and authorizing him to execute the duties of the office to which he may be appointed; and, where there is no particular form for such commission prescribed by law, those who are constituted for the purpose may use such form and language as to them may seem proper, so that the purport of such commission be clearly understood. *Dew v. Judges of Sweet Springs District Court* (Va.) 8 Hen. & M. 1, 43, 3 Am. Dec. 639.

An officer's commission which the Governor may think proper to give him on his appointment is only evidence of the appoint

ment, and does not fix the tenure by which the office is held, which must depend upon the provisions of the act creating the office or upon the Constitution. *State v. Jeter* (S. C.) 1 McCord, 233, 235.

In the schedule to the new Constitution, § 16, providing that, after the expiration of the term of any present judge of any court of common pleas in commission at the adoption of this Constitution, the judge of said court learned in the law and "oldest in commission" shall be the president judge thereof, will be construed to mean oldest in continuous service, without regard to the date of the commission under which he was then serving. *Commonwealth v. Pattison*, 109 Pa. 165, 170.

A commission grants the right to hold and discharge the duties of a certain office. *United States v. Planter* (U. S.) 27 Fed. Cas. 544, 546.

The commission of a public officer is his letters patent granted by the government under the public seal, giving him authority to perform the duties of his office. A judgment for the possession of an office is not a "commission of office," within Pol. Code, § 936, providing, when the title of the incumbent of the office is contested by proceedings in court, no warrant for his salary can be drawn until the proceedings are finally determined; provided, that this shall not apply to one who holds the certificate of election or commission of office. *Bledsoe v. Colgan*, 70 Pac. 924, 138 Cal. 34.

#### COMMISSION (Of Vessel).

The word "commission," as used with reference to a vessel *ex vi* terminal, imports a written authority, given under the hand of a government officer, to the vessel, to do a particular thing or to travel on a particular voyage. *United States v. Reyburn*, 31 U. S. (6 Pet.) 352, 365, 8 L. Ed. 424.

#### COMMISSION BUSINESS.

The term "commission business" in its largest signification may mean any and every kind of business for the transaction of which a commission is paid, and includes any vendible commodity. *De Wolf v. Crandall*, 31 N. Y. Super. Ct. (1 Sweeney) 556, 566.

#### COMMISSION DE LUNATICO INQUIRENDO.

The main purpose of a commission de lunatico inquirendo is to determine, in the first place, whether the subject of the inquiry is a lunatic or not, and, if he is found to be a lunatic, then to provide for the safeguarding of both his person and his property. *In re Misselwitz*, 35 Atl. 722, 177 Pa. 159.

#### COMMISSION MERCHANT.

A "commission merchant" is generally defined to be an agent employed to sell goods or merchandise consigned or delivered to him by or for his principal for a compensation, commonly called "factorage" or "commission." *State v. Thompson*, 25 S. W. 346, 348, 120 Mo. 12.

A commission merchant is an agent employed to sell goods to another which are in his possession, his possession being a commission. *Spears v. Loague*, 46 Tenn. (6 Cold.) 420, 422.

A "commission merchant," within the meaning of Acts 1881-82, pp. 511, 513, "is one who buys and sells on commission, and may sell any personal property which is left with or consigned to him for sale, except such as is expressly excepted by the act." *White v. Commonwealth*, 78 Va. 484, 485.

"'Commission merchant' is synonymous with the legal term 'factor,' and means one who receives goods, chattels, or merchandise for sale, exchange, or other disposition, and is to receive a compensation for his services, to be paid by the owner or derived from the sale of the goods." *Perkins v. State*, 50 Ala. 154; *Thompson v. Woodruff*, 47 Tenn. (7 Cold.) 401, 410.

A commission merchant is one who receives goods, chattels, or merchandise for sale or exchange, and possession of the thing to be sold or exchanged, and authority either to sell or exchange or otherwise dispose of it for a compensation to be paid by the owner or derived from the disposition, are essential to the character of the commission merchant. *Perkins v. State*, 50 Ala. 154, 156.

#### As acting in fiduciary capacity.

See "Fiduciary Capacity or Character."

#### Broker distinguished.

See "Broker."

#### As drummer.

See "Drummer."

#### As factor.

See "Factor."

#### Merchant distinguished.

As distinguished from merchants who purchase in bulk and sell at retail, there is another class of traders called "commission merchants." Their particular designation is derived from the fact that they are the mere agents to sell the goods of others for a commission. They are distinguished from the former class sometimes by an advertised or proclaimed line of business in which they are engaged, sometimes by the fact that they disclose their principals and profess on-

ly to be intermediaries to bring seller and buyer together, sometimes by selling in the name of the vendor, and possibly in other ways. A commission business is confined to the making of sales for others. *Alabama Fertilizer Co. v. Reynolds*, 79 Ala. 497, 502.

#### **As wholesale dealer.**

See "Wholesale Dealer."

#### **COMMISSION OF LUNACY.**

Pol. Code, § 906, providing that a vacancy occurs in an office on the happening of the incumbent's insanity, found on a "commission of lunacy" issued to determine the fact, should be construed to mean only a commission issued out of chancery for the purpose of inquiring into the sanity of the person, and not to the superior proceedings taken to send a person to the insane asylum. *In re Moore*, 9 Pac. 164-166, 68 Cal. 281.

#### **COMMISSION TO TAKE DEPOSITIONS.**

A commission is a process issued under the seal of the court and the signature of the clerk, directed to one or more persons, designated as "commissioners," authorizing them to examine the witness upon oath, on interrogatories annexed thereto, and to take and return the deposition of the witness, according to the directions given with the commission. Cr. Code N. Y. 1903, § 638.

A commission is a process issued under the seal of the court and the signature of the clerk, directed to some person designated as "commissioner," authorizing him to examine the witness upon oath or on interrogatories annexed thereto, to take and certify the deposition of the witness, and to return it according to the directions given with the commission. Pen. Code Cal. 1903, § 1351.

"Commission," as the term is used with reference to depositions, is a writ or process issued by a special order of the court under seal, empowering another officer in a distant place or province to take testimony of a witness by deposition. A seal is essential to its validity, and a paper containing no seal conferred no authority on the commissioner, and depositions annexed and taken thereunder were void and extrajudicial. *Tracy v. Suydam* (N. Y.) 30 Barb. 110, 115.

#### **COMMISSIONED OFFICER.**

The words "commissioned officers," as understood in the United States army, do not include cadets at the military academy, but the latter are inferior officers, who for purposes of instruction may be required to serve as officers, noncommissioned officers, or privates. *Babbitt v. United States* (U. S.) 16 Ct. Cl. 202, 203.

#### **COMMISSIONER.**

See "County Commissioners"; "Railroad Commission"; "Special Commission"; "Special Commissioner"; "Statehouse Commissioners"; "Street Commissioner"; "United States Commissioner."

"The term 'commissioners' is a legal and appropriate designation of such persons as have a commission, letters patent, or other lawful warrant to examine any matters or to execute any public office, etc. 1 Jac. Law Dict. 507." It "is nomen generale, designating the office of a public or private nature, permanent or temporary, and, although the term be not used in constituting the office, they may be nevertheless commissioners if their duties be confined to a particular case or class of cases. Thus, we may have commissioners who make partitions of lands, street commissioners, or commissioners of bankruptcy." *State v. Morris Canal & Banking Co.*, 14 N. J. Law (2 J. S. Green) 411, 437.

The term "commissioner," as used in the statute in relation to the taking of depositions, has no limited or specific meaning. It is merely the legal designation or characterization of a person having the lawful warrant to do a certain act. It is a general term, not a specific title, involving in its conception, as applicable thereto, any particular set of legal principles. A person becomes a commissioner simply by being named in the commission. *In re Canter*, 81 N. Y. Supp. 338, 340, 40 Misc. Rep. 126.

The word "commissioners," as used in the chapter relating to towns and cities, shall be construed to mean aldermen or other municipal authorities. Code N. C. 1883, § 3827.

#### **As master in chancery.**

The term "commissioner," as used in an order of court appointing a certain person as commissioner, and directing him to hear the parties and to report facts and such of the evidence as either party may desire, and to make report thereof to the court as soon as it may be, will be construed to mean "master in chancery," and hence the order is sufficient to authorize the person so named to act as master. *Dean v. Emerson*, 102 Mass. 480, 482.

#### **COMMISSIONER OF CIRCUIT COURT.**

Commissioners of the Circuit Court are officers appointed by the court, and authorized by law to exercise important jurisdiction and ministerial functions in aid of the Circuit and District Courts in the administration of justice. They are appointed by the Circuit Court, but their powers are expressly conferred upon them by law. And they are not strictly officers of such courts and subject to their supervisory control. *In re Com-*

missioners of Circuit Court (U. S.) 65 Fed. 814, 317 (citing *In re Eaves* [U. S.] 30 Fed. 21).

#### COMMISSIONER OF COUNTY COURT.

The words "commissioner of the county court" and "county commissioner" shall be construed to mean and have reference to the commissioners, or one of them, composing the county court of an existing tribunal created in lieu of a county court. Code W. Va. 1899, p. 134, c. 13, § 17.

#### COMMISSIONER OF HIGHWAYS.

The word "commissioner," whenever used in the act relating to highways, excepting some special commissioner be mentioned, shall be construed to mean the commissioner of highways elected in and for each township. Comp. Laws Mich. 1897, § 4192.

#### COMMISSIONER OF ROADS AND REVENUES.

The term "commissioners of roads and revenues," as used in Const. 1880-81, art. 11, § 3, par. 1, providing that whatever tribunal or officer may hereafter be created by the General Assembly for the transaction of county matters shall be uniform throughout the state, and of the same name, jurisdiction, and remedies, except that the General Assembly may provide for the appointment of commissioners of roads and revenues in any county, was used as naming the tribunal, and was derived from the principal functions of those officers, and is not restrictive of its powers when created *Conley v. Poole*, 67 Ga. 254, 257.

#### COMMISSIVE WASTE.

Voluntary or commissive waste consists of injury to the demised premises or some part thereof, when occasioned by some deliberate or voluntary act, as, for instance, the pulling down of a house or the removal of wainscots, floors, benches, furnaces, windows, doors, shelves, or other things fixed to and constituting a material part of the freehold. *Regan v. Luthy*, 11 N. Y. Supp. 709, 710, 18 Daly, 413 (citing 1 Washb. Real Prop. p. 125).

#### COMMIT.

To "commit an assault" means to perpetrate an assault, and, when used in an indictment that the defendant did commit an assault, is equivalent to the words "make an assault," and the use of the word "commit" instead of the word "make" did not render the indictment obscure as constituting a mere implication or the statement of an opinion that the offense had been committed, but constituted a distinct averment of an act done. *State v. Murphy*, 35 La. Ann. 622, 623.

2 Wds. & P.—20

In order that one accused of crime should be "legally committed" it is necessary only that he should be committed by a magistrate who has jurisdiction to hold the examination, and who has actually heard the evidence and determined that probable cause exists for holding the defendant. *People v. Beach*, 54 Pac. 369, 370, 122 Cal. 37.

#### As confine.

"Committed," as used in St. 1841, c. 77, providing that whenever any lunatic shall be committed to the state lunatic hospital from any town in which he has not a legal settlement, etc., includes the action of the overseers of a town in sending a lunatic pauper to the state hospital, though there was no adjudication by any court or magistrate as to his lunacy. *Inhabitants of Cummington v. Inhabitants of Wareham*, 63 Mass. (9 Cush.) 585, 589.

"Committed" is the act of carrying a person to prison after his arrest. *French v. Bancroft*, 42 Mass. (1 Metc.) 502, 504.

#### As commitment after conviction.

The word "commit" in Code Civ. Proc. § 6, providing that magistrates' courts shall not be open on Sunday, except where it is necessary to preserve the peace, or, in a criminal case, to arrest, commit, or discharge a person charged with an offense, "covers a commitment after conviction as well as a commitment to await trial." The regular word or term used to describe the act by which a magistrate sentences in cases such as the one before us is "commit," and this is the word used in the various statutes and codes as meaning conviction and sentence by a magistrate. As said in *Perkins v. Smith*, 116 N. Y. 441, 23 N. E. 21: "Words having a precise and well-settled meaning in the jurisprudence of a country are to be understood in the same sense when used in its statutes, unless a different meaning is unmistakably intended." There appears in the present instance nothing to indicate that the Legislature intended, after a hearing, if a situation was disclosed calling for punishment, a magistrate might not commit or sentence forthwith, as well as discharge. On the contrary, the long continued and uniform custom has been for magistrates, after the hearing, which is necessary to ascertain whether there be grounds for holding the persons arrested, to commit, if the guilt of the person is apparent. The purpose of the provision was to preserve the peace, and, while doing so, at the same time to accord to persons who might otherwise be injured by longer detention an opportunity to be at once heard, and in proper cases set at liberty. *People v. Warden of New York State Reformatory*, 76 N. Y. Supp. 728, 73 App. Div. 174.

Wag. St. p. 626, § 14, allowing sheriffs a fee of one dollar for "committing any person to jail," relates to the execution by the sher-

iff of an order or warrant of commitment made or issued by some officer exercising judicial functions, and does not contemplate cases where the prisoner is arrested under a capias, and for default of bail is committed by the sheriff to the county jail to await examination. *Thomas v. St. Louis County*, 61 Mo. 547, 548.

**Convict distinguished.**

Code, § 3466, declares that for the preservation of such persons as shall be committed to jail the commissioners shall mark out a parcel of land, not exceeding six acres, adjoining the prison, and every person not committed for treason or felony, giving bond, etc., shall have the liberty to walk therein. Held, that the term "committed" was not synonymous with "convicted," and that the statute did not apply to one imprisoned under sentence in a criminal case, but was intended to apply to persons who in civil cases are committed to jail on mesne process, or on final judgment, and in criminal cases when the prisoner is committed to jail for lack of bail, in order to secure his presence before the appropriate court to answer the criminal charge preferred against him. *State v. Pearson*, 6 S. E. 387, 389, 100 N. C. 414.

**COMMIT SUICIDE.**

"Commit suicide," as used in a life policy exempting the company from liability if the insured "commits suicide," is limited to the deliberate act of the insured in ending his own existence, or committing any unlawful malicious act, the consequence of which is his own death. The insured must be of years of discretion, and in his senses when committing such act, as "It would be unreasonable to interpret it as including death by accident or by mistake, though the direct or immediate act of the insured may have contributed to it." *Supreme Commandery of Knights of the Golden Rule v. Ainsworth*, 71 Ala. 436, 448, 46 Am. Rep. 332.

**COMMIT TO JAIL.**

The words "committing any person to jail," as used in a statute relating to the fee bill of a sheriff, relate to the execution by the sheriff of an order or warrant of commitment made or issued by some officer exercising judicial functions. *State v. Clark*, 70 S. W. 489, 492, 170 Mo. 67 (citing *Thomas v. St. Louis County*, 61 Mo. 547).

A statute authorized the sheriff to charge for every person committed to jail 35 cents, and for every person discharged from jail 35 cents. Held, that the words "committed" and "discharged" should be construed to mean a technical committal and discharge, and could not be so liberally construed as to authorize the sheriff to charge 35 cents for taking out, and 35 cents for returning, a pris-

oner to jail in the course of the proceedings against them. *Lee v. Ionia County Sup'rs*, 36 N. W. 83, 68 Mich. 330.

**COMMITMENT.**

**See "Legal Commitment."**

The term "commitment" merely describes the process by which a person is confined under the order of a court at any time before or after final sentence. *People v. Rutan*, 3 Mich. 42, 49.

"Commitment" has in law a well-defined meaning, and signifies the act of sending an accused or convicted person to prison. *Guthmann v. People*, 67 N. E. 821, 822, 203 Ill. 280 (citing *And. Law Dict.* 210; *Bouv. Law Dict.* 296).

A commitment is a warrant or order by a court or magistrate directing a ministerial officer to take a person to prison. *Commonwealth v. Barker*, 133 Mass. 399, 400.

The commitment is the sending of a person charged with an offense to prison to await his being held to answer. It is not the warrant or mittimus by which such person is sent to prison. *People v. Lee Ah Chuck*, 6 Pac. 859, 861, 66 Cal. 662.

A commitment is a warrant, order, or process by which a court or magistrate directs a ministerial officer to take a person to prison or to detain him there. From the earliest times, as appears from the reported cases on the subject, this process was required to contain a statement of the nature of the crime with which the prisoner was charged. The legal requisites of such a process are thus described by an acknowledged authority on the subject of crimes and criminal procedure as defined by the common law: "It must be in writing, under the hand and seal of the person by whom it is made, and expressing his office or authority, and the time and place at which it is made, and must be directed to the jailer or the keeper of the prison. It may be made either in the name of the King, and only tested by the person who makes it, or may be made by such person in his own name. It may command the jailer to keep the party in safe and close custody; for, if every jailer be bound by the law to keep his prisoner in such custody, surely it can be no fault in a mittimus to command him to do so. It ought to set forth the crime alleged against the person with convenient certainty, whether the commitment be by the privy council or any other authority; otherwise, the officer is not punishable by reason of such mittimus for suffering the party to escape, and the court before whom he is removed by habeas corpus ought to discharge or bail him. And this doth not only hold where no cause at all is expressed in the commitment, but also where it is so loosely set forth that the court can-

not adjudge whether it were a reasonable ground of imprisonment. *Allen v. Hagan*, 62 N. E. 1086, 1087, 170 N. Y. 46 (citing 2 Hawk. P. C. p. 119, c. 16).

A commitment, in the absence of any statutory provisions prescribing its form and contents, does not sufficiently state the offense by simply designating it by the species or class of crimes to which the committing magistrate may consider it to belong, but in order to be a sufficient or valid commitment it ought to state the facts charged or found to constitute the offense with sufficient particularity to enable the court, on a return to the habeas corpus, to determine what particular crime is charged against the prisoner. *State v. Birchim*, 9 Nev. 95, 100.

#### COMMITTEE.

A committee is a bailiff whose power is limited to the mere care of an estate under the direction of the court. *Lloyd v. Hart*, 2 Pa. (2 Barr) 473, 478, 45 Am. Dec. 612.

A committee may be defined as a person or persons to whose consideration or determination certain business is referred or confided, and need not consist of more than one person. *Farrar v. Eastman*, 5 Me. (5 Greenl.) 345, 350.

#### COMMITTEE OF LUNATIC.

As agent, see "Agent."

As trustee, see "Trustee."

#### COMMODATUM.

Commodatum is the bailment created when useful goods and chattels "are lent to a friend gratis to be used by him." It is called "commodatum" because the thing is to be returned in specie. *Coggs v. Bernard*, 2 Ld. Raym. 909, 913.

A bailment of the kind called "commodatum" in the civil law is where the thing lent remains the property of the lender and is to be returned, if it be money, in the identical bills and coins lent. *Adams v. Colonial & United States Mortg. Co.* (Miss.) 34 South. 482, 525.

In an action by the Republic of France for the loss of exhibits at the World's Columbian Exposition it was contended that the exhibits constituted a bailment made by the former at the request and for the sole use and benefit of the latter, and so constituted a bailment, known as "commodatum"; but it was held that inasmuch as such exhibit was not made solely for the benefit of the local corporation, and without thought for the commercial advantage and for the glory of France, it was a bailment for the benefit of both parties. *World's Columbian Exposition Co. v. Republic of France* (U. S.) 96 Fed. 687, 693, 88 C. C. A. 483.

#### COMMODITY.

Commodities "are the productions of a country which become articles of sale, or, in the language of Webster in his dictionary, in commerce, including everything movable that is bought and sold, unless, perhaps, animals may be excepted. The word includes all the movables which are the objects of commerce." *Best v. Bauder* (N. Y.) 29 How. Prac. 489, 492.

In a statute providing that no person whatever shall buy or receive from any slave any coin or commodity whatever, without the consent of the owner of the slave, the term "commodity" is opposed to coin, and the two words mean the same thing, which is now frequently expressed by the vulgar and popular language of "money and property." The term "commodity" is properly used to signify almost any description of article called movable or personal estate. *Barnett v. Powell*, 16 Ky. (Litt. Sel. Cas.) 409, 410.

In a statute providing that any person who buys or receives from any slave any article or commodity of any kind or construction, without the consent of the master, shall on conviction be fined or imprisoned, the words "article" and "commodity" are used in the same sense, and at least embrace most movable things which can become the subject of commerce between white persons and slaves. A black bottle comes clearly within this definition. *Shuttleworth v. State*, 35 Ala. 415, 417.

#### Business privileges.

Const. art. 4, § 1, authorizing the Legislature to impose and levy reasonable duties and excises on any produce, goods, wares, merchandise, and "commodities" brought into, produced, manufactured, or being within the state. Held, that the word "commodity," as there used, was a general term, and included the privilege and conveniences of transacting business, and therefore authorized a privilege tax imposed on savings banks. *Commonwealth v. Lancaster Sav. Bank*, 123 Mass. 493, 495.

Commodities "embrace everything which may be subject to taxation, and sometimes mean the privilege of using particular branches of business or employment, as the business of an auctioneer, of an attorney, of a tavern keeper, of a retailer of spirituous liquors, etc. In this sense it signifies conveniences, privilege, profit, and gains, as well as goods and wares, which are only its vulgar signification." *Portland Bank v. Apthorp*, 12 Mass. 252, 256.

"Commodities," as used in a constitutional provision authorizing the taxation of commodities, will be construed to mean "convenience, privilege, profits, and gains," and will not be confined to goods and wares only.



Hamilton Mfg. Co. v. Massachusetts, 73 U. S. (6 Wall.) 632, 640, 18 L. Ed. 904.

#### Corporate franchise.

A privilege granted by a sovereign authority, such as an act of incorporation, is a commodity. Commonwealth v. People's Five Cents Sav. Bank, 87 Mass. (5 Allen) 428, 435.

"Commodities," as used in Const. c. 1, art. 4, authorizing the Legislature to tax commodities brought into, produced, manufactured, or being within the state, has been given a very broad and extensive meaning. It has been universally held to include corporate franchises. So with franchises granted by a foreign government, which by comity are permitted to be exercised within the state of Massachusetts. Gleason v. McKay, 134 Mass. 419, 424, 425.

#### Cotton.

"Commodity," as used in Act March 6, 1850, § 1, for the suppression of trade and barter with slaves, providing that any person buying, selling, or receiving of, to, or from any slave any corn, fodder, hay, meal, spirituous liquors, or other produce or commodity whatsoever, should be punished, should be construed to include cotton, and an indictment charging the selling of cotton charges a sale of produce or commodity. State v. Borroum, 23 Miss. (1 Cushm.) 477, 481.

#### Devise and inheritance.

The privilege of transmitting and receiving, by will or descent, property on the death of the owner, is a "commodity," within the meaning of this word in Const. art 4, c. 1, § 1, pt. 2, authorizing the laying of an excise on goods, wares, merchandise, and commodities. Minot v. Winthrop, 38 N. H. 512, 515, 162 Mass. 113, 26 L. R. A. 259.

#### Horse.

A statute forbidding any person to buy, sell, or receive of, to, or from any slave "any commodity whatsoever," without leave of his master, means any movable article or piece of personalty, and embraced a mare. Barnett v. Powell, 16 Ky. (Litt. Sel. Cas.) 409, 410.

#### Insurance.

The word "commodity" has two significations. In its most comprehensive sense it means convenience, accommodation, profit, benefit, advantage, interest, commodiousness; but according to Webster's International Dictionary, p. 286, the word in this sense is obsolete. The word is ordinarily used in the commercial sense of any movable or tangible thing that is ordinarily produced or used as the subject of barter or sale. Thus, it was held that commodity did not apply to a combination of fire insurance companies to fix

uniform rates. Queen Ins. Co. v. State, 24 S. W. 397, 401, 86 Tex. 250, 22 L. R. A. 483.

"Commodity" is defined to be that which affords advantage, profit, or convenience; and hence insurance is a commodity, within the provisions of McLain's Code, § 5454, prohibiting combinations to fix the price of oil, lumber, etc., or other commodity. Beechley v. Mulville, 70 N. W. 107, 109, 102 Iowa, 602, 63 Am. St. Rep. 479.

#### Labor.

Hiring a slave to man railroads without the written consent of the owner is not "purchase of any commodity" whatsoever from the slave, within a statute prohibiting the same, as the statute was obviously designed to prevent the slaves from trading, selling, or dealing in any commodity—that is, anything movable that is bought and sold—with a person, without the master's permission. State v. Henke, 19 Mo. 225, 226.

#### Oysters.

Cove oysters, packed, canned, and sold as merchandise, are a "commodity," within Code 1892, c. 140, § 4437, declaring any agreement to limit, increase, or reduce the price of a commodity, etc., to be a criminal conspiracy, and declaring all such contracts to be void; and a contract by which the defendant agreed to sell plaintiff all the cove oysters which defendant should pack during certain months, except three car loads per month, and reciting that such three car loads should not be sold to the trade at a lower price than the price offered the trade by the plaintiff, was invalid as an agreement to limit the price of a commodity. Barataria Canning Co. v. Jouliau, 31 South. 961, 962, 80 Miss. 555.

### COMMON.

See "In Common"; "Public Common"; "Tenant in Common"; "Things Common."

"Common" is defined as frequent, usual, customary, habitual. State v. O'Conner, 49 Me. 594, 596.

"Common" is said by Webster to denote primarily that in which many share, and hence that which is often met with. Koen v. State, 53 N. W. 595, 596, 35 Neb. 676, 17 L. R. A. 821.

"The word 'common' means, according to Webster: (1) Belonging equally to more than one or to many indefinitely; (2) belonging to the public; (3) general; (4) universal; (5) public. And such is its meaning in the provision of the Constitution which guarantees the right to keep and bear arms for common defense." Aymette v. State, 21 Tenn. (2 Humph.) 154, 158.

**Dedication to public implied.**

Where, at an intersection of two streets crossing diagonally, there was a piece of ground marked on the plat "Common," it indicated an intention on the part of the owner to dedicate it to the public for any use which the proper authorities might deem proper and which could be legitimately regarded as public; and though, at the time the plat was made, the proprietor did not fully understand the meaning of the word "Common" as there used, this can make no difference. *White v. Smith*, 37 Mich. 291, 295.

Where the owner of land lying on the bank of a river caused the land to be platted into lots, blocks, streets, alleys, and a strip lying along the river bank, to be marked on the plat as "Common," reserving on said strip a ferry landing at a point where such ferry landing was then and previously had been established, such act was a dedication of such strip as public ground for the convenience and accommodation of the town and the public, and for such appropriate uses, exclusive of the ferry right so reserved, and not inconsistent with such right. *City of Newport v. Taylor's Ex'rs*, 55 Ky. (16 B. Mon.) 699, 807.

Where, on the plat of a town, an open space appeared marked "The Esplanade. To remain a common forever," the word "common" must be understood, not in its technical sense as being a right or profit which one man may have in the land of another, but in its popular sense as a piece of ground left open for common and public use for the convenience and accommodation of the inhabitants of the town, and its dedication by the plat and by the act establishing the town was dedication of it as public ground for the convenience and accommodation of the town and public, and for such appropriate uses as are to be implied in the dedication of a narrow strip of open ground between the lots and a navigable river, which include the right of constructing wharves and charging wharfage. *City of Newport v. Taylor's Ex'rs*, 55 Ky. (16 B. Mon.) 699, 807.

**Highway.**

A "common" is an inclosed or uninclosed tract of ground for pasturage, for pleasure, etc., the use of which belongs to the public or a number of persons. A highway is not uninclosed land or public common within the meaning of such word as used in *Burns' Rev. St. 1894*, § 2833 (*Horner's Rev. St. 1896*, § 2639), authorizing the impounding of animals found pasturing in such places. *Beeson v. Tice*, 45 N. E. 612, 613, 17 Ind. App. 78.

**As land belonging to public.**

The word "common" is not to be understood as used by the proprietors of a

town in its strict legal sense, as being a right or profit which one man may have in the land of another, but in its popular sense, and means a piece of ground left open for common or public use for the convenience and accommodation of the inhabitants of the town. *City of Cincinnati v. White*, 31 U. S. (6 Pet.) 431, 435, 8 L. Ed. 452.

The term "common," as used in the plat of a city in which it is provided that the land designated thereon by a certain mark is to be and remain a common forever, is not to be construed as being used "in any technical sense, but in its popular signification as a parcel of ground set apart for public and common use for the convenience and accommodation of the inhabitants of the city." The city has no authority to sell such lands. *Cummings v. City of St. Louis*, 2 S. W. 180, 131, 90 Mo. 259.

The word "common" in Act 1827, providing for the laying off of the town in the Coweta Reserve, and incorporating the town of Columbus and dedicating to such town a common of 1,200 acres, did not mean common of pasture, estovers, etc., but common in the higher sense of a common appurtenant to the town and for the advancement of its interests as a town. *Crawford v. Mobile & G. R. Co.*, 67 Ga. 405, 416.

Where land had been dedicated to a town for the convenient common about a meeting house and for other necessary public uses at its discretion, and, after a schoolhouse had been built on a part of said tract, a bequest was made to the town for a reclamation and embellishment of the common, the presumption is that the testator used the word "common" in a sense consistent with the legal public uses which the town could make of the common under the original grant, and did not mean the lawn or park not occupied by buildings. *Newell v. Town of Hancock*, 35 Atl. 253, 254, 67 N. H. 244.

In the act of 1729, entitled "An act to confirm Bath town common," and providing that "the tract of land herein described shall be and hereby is appolloted a common to lie perpetually for the use and benefit of the inhabitants of the town of Bath," the term "common" which is used in the act includes and means the land itself, and not the mere incorporeal right existing in idea, an abstract contemplation of which is called the right of common, by virtue whereof one man or set of men is entitled to have the profit in the lands of another, such as the right of feeding one's beast on another man's land, or fishing in another man's water, of cutting necessary wood from another man's estate, of digging turf upon another man's ground. *Commissioners of Town of Bath v. Boyd*, 23 N. C. 194, 197.

**Park synonymous.**

In legal contemplation a "common" is not synonymous with "park." The legal definition of a common is "an uninclosed piece of land set apart for public or municipal purposes in many cities and villages of the United States." Black, Law Dict. The adjudged cases hold the same views. Thus the Supreme Court of the United States, when speaking of the word, says: "We are not to understand the term in its strict legal sense of being a right of profit, which one man may have in the lands of another, but in its popular sense, as a piece of ground left open for common or public use, for the convenience and accommodation of the inhabitants of the town." The lexicographers define "park" as a piece of ground inclosed for public recreation or amusement (Worcester); a piece of ground within a city or town inclosed and kept for ornament and recreation (Webster). The use of the term "common" in a plat of certain land in which a strip was designated to be and remain a common forever does not exclude the use of such plat for railroad trains in lieu and instead of the slow moving wagons of former times, which is but a change in the method of the public use and not of the use itself, and such method is entirely germane to the purposes of the original dedication and control of the municipal authority. *Goode v. City of St. Louis*, 20 S. W. 1048, 1051, 113 Mo. 257.

**As right or privilege in land.**

"Common or a right of common is a right of privilege which several persons have to the produce of the land or waters of another." *Van Rensselaer v. Radcliff* (N. Y.) 10 Wend. 639, 647, 25 Am. Dec. 582.

Common is an estate well known to the law. It is an incorporeal hereditament giving to the owner of one tract of land the privilege of common in other lands. It is a privilege annexed to the land, and passing by a conveyance of the land to which it is annexed. *Trustees of Western University v. Robinson* (Pa.) 12 Serg. & R. 29, 31.

Common is an incorporeal hereditament, being a profit which one man has in the land of another, as to feed his beasts, take fish, dig turf, cut wood, or the like. *Smith v. Floyd* (N. Y.) 18 Barb. 522, 527.

**COMMON APPENDANT.**

Common appendant is a right belonging to the owners or occupants of arable lands. *Smith v. Floyd* (N. Y.) 18 Barb. 522, 527 (citing 2 Bl. Comm. 33).

Common appendant is a right annexed to the possession of arable land, by which the owner is entitled to feed his beasts on the lands of another, usually of the owner of the manor of which the lands entitled to

common are a part. This kind of common must have existed from time immemorial, and can be claimed by prescription only, and is confined to such, and so many cattle as are necessary to plow and manure the land which is entitled to common, and which are levant and couchant; that is, so many as the land will sustain during the winter. *Van Rensselaer v. Radcliff* (N. Y.) 10 Wend. 639, 648, 25 Am. Dec. 582.

**COMMON APPURTENANT.**

Common appurtenant is a right annexed to lands in other manors. *Smith v. Floyd* (N. Y.) 18 Barb. 522, 527 (citing 2 Bl. Comm. 33).

Common appurtenant of pasture does not necessarily arise from any connection of tenure, "but must be claimed by grant or prescription, which may be created by grant, and may be annexed to any kind of land, whether arable or not." *Van Rensselaer v. Radcliff* (N. Y.) 10 Wend. 639, 649, 25 Am. Dec. 582.

**COMMON BARRATOR.**

Lord Coke defines a barrator to be "a common mover and exciter, or maintainer, of suits, quarrels, or parts, either in courts or elsewhere in the country. In courts, as in courts of record, or not of record, as in the county, hundred, or other inferior courts. In the country, in three manners: First, in the disturbance of the peace; second, in taking and keeping possession of lands in controversy, not only by force, but also by subtilty and deceit, and most commonly by suppression of truth and right; thirdly, by false inventions and sowing of calumniation, rumors, and reports, whereby discord and disquiet may grow between neighbors." Co. Litt. 368a, 368b. "He is not a barrator," it is said, "who prosecutes an infinite number of his own suits, although they are unjust, for, if such a person shall be a barrator, then he that sues for cause may be comprehended." 4 Vin. Abr. 208, *Barretors A.* "Lord Coke has applied to a barrator the cognomen of 'busy-body.' 8 Rep. 72. According to others he is a deceiver, a vile knave, and unthrift, and a maintainer of quarrels, etc., and the vilest of all is he who deals in criminal process or enforces the poor party, ad redimendam vexationem, to give him money or to make other composition. So that he who promotes or excites unjust suits, although an offender of high rank, is not exclusively so. The busy-body, the deceiver, the vile knave, or unthrift who excited others to litigation with an intention to vex and to oppress, and by these means to extort money, is no less an offender against public justice." *State v. Chitty* (S. C.) 1 Bailey, 379, 397, 400. See, also, *Commonwealth v. Davis*, 28 Mass. (11 Pick.) 432, 434.

**COMMON BARRATRY.**

Common barratry is the practice of exciting groundless judicial proceedings. *Cook's Pen. Code N. Y. § 132.*

**COMMON BAWDYHOUSE.**

The definition of a bawdyhouse embraces the facts that lewd persons of both sexes resort thereto and commit acts of prostitution therein, and these acts are embraced in the charge of keeping the house. *Nelson v. Territory, 49 Pac. 920, 5 Okl. 512.*

**COMMON BENEFITS.**

Common benefits arising from municipal improvements are such as are enjoyed by the public at large, without reference to the ownership of private property adjacent to the public improvement out of which arose the benefits under consideration. *Kirkendall v. City of Omaha, 39 Neb. 1, 6, 57 N. W. 752.*

**COMMON BRAWLER.**

Where defendant in his own dwelling was in the habit of using loud and violent language, consisting of opprobrious epithets and exclamations, in such a manner as to attract crowds of persons passing and living in the neighborhood, he was a common railer or brawler. *Commonwealth v. Foley, 99 Mass. 497, 499.*

**COMMON BUSINESS.**

A person owning or cultivating two or more farms, and passing from one to another with teams engaged in his ordinary agricultural pursuits, is within that provision of the act of incorporation which exempts from toll any "person passing to or from his common business upon his farm." *Camden, E. & M. Turnpike Co. v. Fowler, 24 N. J. Law (4 Zab.) 205, 208.*

**COMMON CARRIER.**

Business of common carrier, see "Business."

A common carrier is one who, by virtue of his calling, undertakes for compensation to transfer personal property from one place to another for all such as may choose to employ him; and every one who undertakes to carry, for compensation, the goods of all persons indifferently, is, as to liability, to be deemed a common carrier. *Jackson Architectural Iron Works v. Hurlbut, 52 N. E. 665, 158 N. Y. 34 (affirming 36 N. Y. Supp. 808, 15 Misc. Rep. 93); Lough v. Outerbridge, 88 N. E. 292, 293, 143 N. Y. 271, 25 L. R. A. 674, 42 Am. St. Rep. 712; Alexander v. Greene (N. Y.) 7 Hill, 533, 544 (citing Story, Bailm. § 495); Orange County Bank v. Brown*

*(N. Y.) 3 Wend. 158, 161; Spears v. Lake Shore & M. S. R. Co. (N. Y.) 67 Barb. 513, 517; Blanchard v. Isaacs (N. Y.) 3 Barb. 388, 389; Cole v. Goodwin (N. Y.) 19 Wend. 251, 257, 32 Am. Dec. 470; Beckman v. Shouse (Pa.) 5 Rawle, 179, 28 Am. Dec. 653; Fuller v. Bradley, 25 Pa. (1 Casey) 120; Verner v. Sweltzer, 32 Pa. (8 Casey) 208, 212; Schloss v. Wood, 17 Pac. 910, 911, 11 Colo. 287 (citing Hutch. Carr. § 47); Wyatt v. Larimer & W. Irr. Co., 29 Pac. 906, 909, 1 Colo. App. 480; Shelden v. Robinson, 7 N. H. 157, 159, 26 Am. Dec. 726; Moses v. Norris, 4 N. H. 304, 306; Elkins v. Boston & M. R. Co., 23 N. H. 275, 284; McDuffee v. Portland & R. R. Co., 52 N. H. 430, 447, 13 Am. Rep. 72; Central R. & Banking Co. v. Lampley, 76 Ala. 357, 363, 52 Am. Rep. 334; Lang v. Brady, 49 Atl. 199, 200, 73 Conn. 707; Naugatuck R. Co. v. Waterbury Button Co., 24 Conn. 468, 479; Murphy v. Staton (Va.) 3 Munt. 239; Mershon v. Hobensack, 22 N. J. Law (2 Zab.) 372, 377; Buckland v. Adams Exp. Co., 97 Mass. 124, 129, 93 Am. Dec. 68; Dwight v. Brewster, 18 Mass. (1 Pick.) 50, 11 Am. Dec. 133; Harrington v. Lyles (S. C.) 2 Nott & McC. 88, 89; Cook v. Gourdin (S. C.) 2 Nott & McC. 17, 21; McClures v. Hammond (S. C.) 1 Bay, 99, 1 Am. Dec. 598; Campbell v. Morse (S. C.) Harp. 468, 469; Bamberg v. South Carolina R. Co., 9 S. C. (9 Rich.) 61, 67, 30 Am. Rep. 13; United States v. Adams (U. S.) 24 Fed. 348, 354; The Huntress (U. S.) 12 Fed. Cas. 984, 985; The Neaffle (U. S.) 17 Fed. Cas. 1260, 1261; Sumner v. Caswell (U. S.) 20 Fed. 249, 251; Niagara v. Cordes, 62 U. S. (21 How.) 723, 16 L. Ed. 41; Illinois Cent. R. Co. v. Frankenberg, 54 Ill. 88, 95, 5 Am. Rep. 92; Doty v. Strong (Wis.) 1 Pin. 313, 326, 40 Am. Dec. 773; Maslin v. Baltimore & O. R. Co., 14 W. Va. 180, 188, 35 Am. Rep. 748; Michigan S. & N. I. R. R. Co. v. McDonnough, 21 Mich. 165, 4 Am. Rep. 466; Lake Shore & M. S. R. Co. v. Perkins, 25 Mich. 329, 338, 12 Am. Rep. 275; Varble v. Bigley, 77 Ky. (14 Bush) 698, 703, 29 Am. Rep. 435. This definition has been held to be very broad, and its application to facts is subject to certain limitations, holding that a better definition is "one who offers to carry goods for any person between certain termini, or on a certain route, and who is bound to carry for all who tender their goods and the price of carriage." *The Neaffle (U. S.) 17 Fed. Cas. 1260, 1261; Varble v. Bigley, 77 Ky. (14 Bush) 698, 703, 29 Am. Rep. 435.* It is the readiness to carry for all who will employ which gives character to the bailment, rather than the extent of his business or the number of trips performed. *Fuller v. Bradley, 25 Pa. (1 Casey) 120; Verner v. Sweltzer, 32 Pa. (8 Casey) 208, 212.* Though the number of instances employed in carrying may be evidence of the character of a common carrier, it is not the rule which constitutes it. The law fixes no number of instances which shall stamp him with that character. If a person holds himself forth to the public to carry for*

hire, he is a common carrier as much in his first trip as in his subsequent trips. *Fuller v. Bradley*, 25 Pa. (1 Casey) 120. A common carrier exercises a public employment, and consequently has public duties to perform. He cannot, like the tradesman or mechanic, receive or reject a customer at pleasure, or charge any price that he chooses to demand. If he refuse to receive a passenger or carry goods, according to the course of his particular employment, without a sufficient excuse, he will be liable to an action; and he can only demand a reasonable compensation for his services and the hazard which he incurs. *Hollister v. Nowlen* (N. Y.) 19 Wend. 234, 239, 32 Am. Dec. 455. "He is, in general, bound to take the goods of all who offer, unless his complement for the trip is full, or the goods be of such a kind as to be liable to extraordinary danger or such as he is unaccustomed to convey." *Sumner v. Caswell* (U. S.) 20 Fed. 249, 251 (quoting *Niagara v. Cordes*, 62 U. S. [21 How.] 7, 16 L. Ed. 41). He cannot refuse to carry a proper article tendered to him at a proper time and place on the offer of the usual reasonable compensation. "A common carrier is a public carrier. He engages in a public employment, takes upon himself a public duty, and exercises a sort of public office. His duty being public, the correlative right is public. A public right signifies a reasonably equal right." Hence he is not allowed to decline the duties and responsibilities of his occupation as they are defined and fixed by the law. In the carriage of passengers he cannot exercise any unreasonable discrimination, neither can he do so in the carriage of freight. He may be a common carrier of one kind of property and not of another, but as to those goods of which he is a common carrier he cannot discriminate unreasonably against any individual. *McDuffee v. Portland & R. R. Co.*, 52 N. H. 430, 447, 13 Am. Rep. 72; *Scofield v. Lake Shore & M. S. R. Co.*, 3 N. E. 907, 920, 43 Ohio St. 571, 54 Am. Rep. 846. A common carrier serves both the public and itself. It has public and private functions. The public part is the exercise of its franchise for the accommodation of the parties; the private part is its incidental business with which the public is not concerned, and which the company manages for its own interests. In *re Rhode Island Suburban Ry. Co.*, 48 Atl. 591, 592, 22 R. I. 457, 52 L. R. A. 879.

"'Common,' in its legal sense, used as the description of a carrier and his duty, and the correlative right of the public, contains the whole doctrine of the common law on the subject. The defendants are common carriers. That is all that need be said. All beyond that can be no more than an explanation or application of the legal meaning of 'common' in that connection." *McDuffee v. Portland & R. R. Co.*, 52 N. H. 430, 457, 13 Am. Rep. 72.

The true test of the character of a party, as to the fact whether he is a common carrier or not, is his legal duty and obligation with reference to transportation. Is it optional with him whether he will or will not carry? or must he carry for all? If it is his legal duty to carry for all alike, who comply with the terms as to freight, etc., then he is a common carrier, and is subject to all those stringent rules which, for wise ends, have long since been adopted and uniformly enforced, both in England and in all the states, upon common carriers. If, on the contrary, he may carry or not, as he deems best, he is but a private individual and is invested, like all other private persons, with the right to make his own contracts, and, when made, to stand upon them. While the law has imposed duties and heavy responsibilities on common carriers, which they cannot avoid, limit, or shake off, yet it has never attempted to hamper those who are not common carriers with the stringent rules applicable to carriers, or to prevent them from exercising their own judgment as to the responsibilities which they are willing to assume in a special case. *Piedmont Mfg. Co. v. Columbia & G. R. Co.*, 19 S. C. 353, 364.

The distinction between a common carrier and a private one is that the former holds himself out in common—that is, to all persons who choose to employ him as ready to carry for hire—while the latter agrees in some special case with some private individual to carry for hire. The employment of a common carrier is a public one, and he assumes a public duty, and is bound to receive and carry the goods of any one who offers. *Allen v. Sackrider*, 37 N. Y. 341, 342.

A distinction is made between carriers of goods and those whose business it is to convey passengers, who were said to be common carriers. A carrier of goods undertakes to deliver them at all hazards, while a carrier of passengers is not responsible for accidents which happen in spite of every precaution. *Elkins v. Boston & M. R. Co.*, 23 N. H. (3 Fost.) 275, 284.

To render a person liable as a common carrier, he must exercise the business of carrying as a public employment, and must undertake to carry goods for all persons indiscriminately, and hold himself out as ready to engage in the transportation of goods as a business. If a carrier be employed in carrying for one or a definite number of persons by way of special undertaking, he is only a private carrier. *Wyatt v. Larimer & W. Irr. Co.*, 29 Pac. 906, 909, 1 Colo. App. 480.

What constitutes a common carrier is a question of law, but whether a party comes within that meaning is a question of fact. *Pennewill v. Cullen* (Del.) 5 Har. 238, 241.

The word "common" is added to the word "carrier" to distinguish a common car

rier from one who undertakes for hire on a particular occasion. — *v. Jackson*, 2 N. C. 14, 15.

Every one who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry. Civ. Code Cal. 1903, § 2168; Civ. Code Mont. 1895, § 2870; Rev. St. Okl. 1903, § 700; Rev. Codes N. D. 1899, § 4224; Civ. Code S. D. 1903, § 1577.

One who pursues the business of transporting to another place for a compensation, constantly and continuously, for any time or period of time, or any distance of transportation, is a common carrier. Civ. Code Ga. 1895, § 2264.

All persons carrying goods for another for hire or pay shall be deemed "common carriers," within the provisions of the lien laws. Comp. Laws N. M. 1897, § 2245.

Where a slave is employed by his master to carry travelers and others over a river for a reward, this places the master in the light of a common carrier. *Spivey v. Farmer's Adm'r*, 8 N. C. 339, 840.

An owner of a wagon train who, without any special agreement, sends his train to transport goods for all who may employ him, is a common carrier. *Seligman v. Armijo*, 1 N. M. 459, 463.

#### Carriage as part of business only.

A common carrier is one who undertakes for hire or reward to transport the goods of such as choose to employ him from place to place; and the business of a common carrier may be carried on at the same time with other business, and the practice of taking parcels for hire to be conveyed in a stagecoach was sufficient to constitute those operating the stagecoach common carriers. *Dwight v. Brewster*, 18 Mass. (1 Pick.) 50, 53, 11 Am. Dec. 133.

Where the owners of a steamboat took produce to be carried and sold by them for certain freight, and agreed to bring back the money obtained therefor, the fact that they also acted as a factor in the disposition of the property carried did not the less render them liable for the safe return of the money, or the loss of the goods, in their capacity of common carriers. *Harrington v. MoShane* (Pa.) 2 Watts, 443, 27 Am. Dec. 321.

#### As carrier as a business.

The distinguishing feature of a common carrier is that he holds himself out as ready to engage in the transportation of goods for hire as a business, and not as a mere casual occupation *pro hac vice*. *Alexander v. Greene* (N. Y.) 7 Hill, 533, 564; *Place v. Union Exp. Co.* (N. Y.) 2 Hilt. 19, 26; *Varble v. Bigley*, 77 Ky. (14 Bush) 698, 703, 29

Am. Rep. 435; *Chevallier v. Straham*, 2 Tex. 115, 117, 47 Am. Dec. 639; *Gordon v. Hutchinson* (Pa.) 1 Watts & S. 285, 286, 37 Am. Dec. 464; *Samms v. Stewart*, 20 Ohio, 69, 71, 55 Am. Dec. 445.

"To constitute one a common carrier he must make that a regular and constant business, or at all events he must for a time hold himself ready to carry for all persons indefinitely who choose to employ him." A dock and bridge builder who in his business had occasion to transport dirt and stones, for which purpose he owned and used several scows moved by means of tugs, which he employed for the most part in his own business, but sometimes chartered to other parties by the day or month, but was not in the carrying trade and not in the habit of transporting any cargo except his own, the scows, when employed by him, being used solely to transport his own articles in his own business, and, when chartered to others, the transporting being done at the expense of the charterers, was not a common carrier, and hence he was not liable as an insurer for the loss of property carried by him on his scows. *Bell v. Pidgeon* (U. S.) 5 Fed. 634, 637.

So far as the responsibility of a "carrier" is concerned, the term includes a wagoner, who carries goods for hire, no matter whether transportation be his principal and direct business or an occasional and incidental employment. *Gordon v. Hutchinson* (Pa.) 1 Watts & S. 285, 286, 37 Am. Dec. 464.

#### Carrier by water.

A common carrier, says Judge Kent, consists of two distinct classes of persons, namely, inland carriers by land or water, and carriers by sea; and in the aggregate body are included the owners of stagecoaches who carry goods for hire, wagoners, teamsters, cartmen, the masters and owners of ships, and all water crafts, including steam vessels, and steam towboats belonging to internal, as well as coasting and foreign, navigation, lightermen, and ferrymen. *Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539, 543, 39 Am. Dec. 398 (citing *Story*, Bailm. 319, 323); *The Montana* (U. S.) 22 Fed. 715, 726. Owners of a steam vessel carrying for hire the goods of all persons indefinitely from place to place are common carriers. *Hale v. New Jersey Steam Nav. Co.*, 15 Conn. 539, 543, 39 Am. Dec. 398.

In 1 Pars. Mar. Law, c. 7, § 5, p. 173, it is said that one who carries by water in the same way and on the same terms as a common carrier by land is also a common carrier; or, in other words, it is not the land or water which determines whether a carrier of goods is a common carrier, but other considerations, which are the same in both cases; and a common carrier is said to be (page 74) one who offers to carry goods for any

person between certain termini, as on a certain route. A vessel which advertises for cargo and passengers, and carried general cargo, but refused to carry cargo which would taint other cargo or be dangerous to passengers or would overload the vessel, is a common carrier. *The Montana* (U. S.) 22 Fed. 715, 726.

One who undertakes for reward to convey produce or goods of any sort from one place upon a river to another by boat is a common carrier. *Craig v. Childress*, 7 Tenn. (Peck) 270, 271, 19 Am. Dec. 751.

The phrase "common carrier" includes one who carries by water. *McCaffrey v. Knapp, Stout & Co. Company*, 74 Ill. App. 80, 85.

The owner of a steamboat employed to carry passengers and merchandise between port and port is a common carrier. *The Huntress* (U. S.) 12 Fed. Cas. 984.

#### **Carrier of live stock or animals.**

Carriers of live stock are held not to be common carriers. *Michigan S. & N. I. R. Co. v. McDonough*, 21 Mich. 165, 4 Am. Rep. 466; *Lake Shore & M. S. R. Co. v. Perkins*, 25 Mich. 329, 333, 12 Am. Rep. 275.

A common carrier is one who undertakes for hire or reward to transport the goods of those who choose to employ him from place to place. A common carrier who does not assume to act as such in the carriage of dogs is not liable as a common carrier. *Honeyman v. Oregon & C. R. Co.*, 10 Pac. 628, 13 Or. 352, 57 Am. Rep. 20.

#### **Carrier of mails.**

A railroad company is not a common carrier as to mails, even though being engaged in the regular business of transporting goods for the public. *Central R. & Banking Co. v. Lampley*, 76 Ala. 357, 365, 52 Am. Rep. 334.

#### **Carrier of passengers.**

A common carrier is defined to be one whose business, occupation, or regular calling is to carry chattels for all persons who may choose to employ or remunerate him. A common carrier is one who undertakes as a business, for hire or reward, to carry from one place to another the goods of all persons who may apply for such carriage. Code, § 2263, defines a common carrier as one who undertakes to transport goods for a compensation, and who pursues the business constantly or continuously for any period of time or any distance of transportation. Under such definition the term "common carrier" does not include a carrier of passengers. *Central of Georgia Ry. Co. v. Lippman*, 36 S. E. 202, 205, 110 Ga. 665, 50 L. R. A. 673.

Common carriers are carriers of property, unless from the context it appears that carriers of persons are intended, for, when

carriers of persons are spoken of, they are designated as common carriers of passengers or passenger carriers; and in an act providing that no preference for the transaction of the business of a common carrier upon the cars, in the depots, or upon the grounds shall be granted, the term must be limited to carriers of freight, and hence does not include hackmen. *New York Cent. & H. R. Co. v. Sheeley*, 27 N. Y. Supp. 185, 192.

A common carrier of persons is not a "common carrier" in the strict sense of the term. While a common carrier, in the transportation of property, is an insurer of its safe transit when the obligation is not qualified by contract, the negligence of a carrier of persons is essential to liability for injury to them. *Brewer v. New York, L. E. & W. R. Co.*, 26 N. E. 324, 325, 124 N. Y. 59, 11 L. R. A. 483, 21 Am. St. Rep. 647.

#### **Commercial agency.**

See "Commercial Agency."

#### **Elevators in buildings.**

See, also, "Carrier of Passengers"; "Common Carrier of Passengers."

No one can be considered as a common carrier unless he has in some way held himself out to the public as a carrier in such a manner as to render him liable to an action if he should refuse to carry for any one who wished to employ him. *Allen v. Sackrider*, 37 N. Y. 341. Hence the United States is not a common carrier in the operation of an elevator in a government building devoted to government purposes. *Bigby v. United States* (U. S.) 103 Fed. 597, 599.

#### **Express and messenger companies.**

An express company whose business it is to take for hire goods from the custody of the owner, assume entire possession and control of them, transfer them from place to place, and deliver them at a point of destination to consignees or agents authorized to receive them, though it transmits the goods by steamboats, railroads, coaches, etc., owned and controlled by other parties, is a common carrier. *Buckland v. Adams Exp. Co.*, 97 Mass. 124, 129, 93 Am. Dec. 68; *Christenson v. American Exp. Co.*, 15 Minn. 270, 279 (Gil. 208, 212) 2 Am. Rep. 122.

An express company which pursues continuously, for any period of time, the business of transporting goods, packages, etc., is a common carrier; and in case of loss of the goods, etc., the presumption of law is against it, and no excuse will avail it unless the loss was occasioned by the act of God or the public enemies of the state. Rev. Code, § 2040. *Southern Exp. Co. v. Newby*, 36 Ga. 635, 643, 91 Am. Dec. 783 (citing *Fish v. Chapman*, 2 Ga. [2 Kelly] 349, 46 Am. Dec. 393). See, also, *Place v. Union Exp. Co.* (N. Y.) 2 Hill 19, 26.

An express company is to be regarded as a common carrier, and its responsibility for the safe delivery of the property intrusted to it is the same as that of a carrier. *Southern Exp. Co. v. McVeigh* (Va.) 20 Grat. 264, 286 (citing *Belger v. Dinsmore* [N. Y.] 51 Barb. 69).

A messenger company is a common carrier, as it undertakes as a business to carry from one place to another the goods of all persons who may apply for such carriage, provided the goods be of the kind which it professes to carry. *Sanford v. American District Tel. Co.*, 34 N. Y. Supp. 144, 145, 13 Misc. Rep. 88.

#### **Ferryman.**

A ferryman holding himself out as carrying such goods as are offered to him for carriage is a common carrier. *Dudley v. Camdemr & P. Ferry Co.*, 45 N. J. Law (16 Vroom) 368, 369, 46 Am. Rep. 781; *Miles v. James* (S. C.) 1 McCord, 157, 159; *Cook v. Gourdin* (S. C.) 2 Nott & McC. 19, 21.

The proprietors of a ferry are not under the obligations of a common carrier, but are bound only to use due care and diligence. *City of New York v. Starin*, 12 N. E. 631, 632, 106 N. Y. 1.

A common carrier is one who undertakes for hire or reward to transport the goods of such as choose to employ him from place to place. A public ferryman who, according to the statutes, has given bond, is a common carrier. *Babcock v. Herbert*, 3 Ala. 392, 396, 37 Am. Dec. 695.

#### **Forwarder.**

See "Forwarder."

#### **Hackmen and truckmen.**

A person who holds himself out to carry goods of all persons indiscriminately is a common carrier; and while a hackman comes within the general definition as stated in text-books, yet, when speaking of common carriers, we would not ordinarily understand his business to be included within that term. He transports passengers here and there about the streets of a village or city, having no established route over which his conveyance runs nor any specified times for making his trips. He assumes the right to let his rig for a day or any other specified time, to suit the convenience or wishes of his patrons. He gives exclusive use of his carriage to a less number of persons than it can conveniently accommodate, and is not a common carrier under the provisions of Laws 1892, c. 676, providing that no preference in the transaction of business of a common carrier on its cars or in its depots or buildings or on its grounds shall be granted by any railroad corporation to any one of two or more persons or corpo-

rations competing in the same business or in the business of transporting property for itself or others. *Brown v. New York Cent. & H. R. R. Co.*, 27 N. Y. Supp. 69, 71, 75 Hun, 355. See, also, *New York Cent. & H. R. R. Co. v. Sheeley*, 27 N. Y. Supp. 185, 192.

One who is the proprietor of a line of omnibuses and baggage wagons, and engaged in carrying, for hire, passengers and their baggage, and also baggage alone, for all persons choosing to employ him, from, to, and between the various railroad depots and hotels of a city, and who has agents to solicit such business on the incoming trains, is a common carrier of goods as well as passengers, and as such is answerable for all losses which do not fall within the excepted cases of the act of God or the public enemy. *Parmelee v. Lowitz*, 74 Ill. 116, 117, 24 Am. Rep. 276.

A hackman who has no established route, place of business, or time of employment, though a carrier in a restricted sense, is not a common carrier. *Godbout v. St. Paul Union Depot Co.*, 81 N. W. 835, 839, 79 Minn. 188, 47 L. R. A. 532.

A common carrier is one who, by virtue of his calling, undertakes, on recompense, to transfer personal property from one place to another for all such as may choose to employ him. The criterion is whether he carries for particular persons only or whether he carries for every one. If a man holds himself out to do it for every one who asks him, he is a common carrier. To be a common carrier one must exercise the business as a public employment; he must undertake to carry the goods for persons generally, and must hold himself out to engage in the transportation of goods for hire as a business, not as a casual occupation. One may be a common carrier who has no fixed terminal, but leaves the course of transportation in each case to depend upon his customers' wishes. A firm describing themselves as truckmen and forwarding agents, who make a business of moving heavy machinery from place to place for hire for all who are willing to pay for it, are common carriers. *Jackson Architectural Iron Works v. Hurlbut*, 36 N. Y. Supp. 808, 809, 15 Misc. Rep. 93 (affirmed in *Jackson Architectural Iron Works v. Hurlbut*, 52 N. E. 665, 158 N. Y. 34, 70 Am. St. Rep. 432).

Common carriers are those who make a business of transporting goods from place to place, either by themselves or servants, and includes draymen, cartmen, porters, drivers of ox sleds, etc. *Robertson v. Kennedy*, 32 Ky. (2 Dana) 430, 431, 26 Am. Dec. 466.

#### **Log boom company.**

"One who transports property from one place to another without the use of any car-



riage, vehicle, or artificial motive power is not a common carrier. A boom company engaged in the business of driving and booming logs, though resembling a common carrier in the universality of its duty, and given by statute a lien upon these specific logs for the charges of transportation, is not a common carrier, since its chief business is to prevent the property from straying or stopping, and not to furnish motive power. The function of guiding and regulating things which move themselves or are moved by some independent force is not sufficient to establish the relation of common carrier." *Mann v. White River L. & B. Co.*, 8 N. W. 560, 46 Mich. 38, 41 Am. Rep. 141.

#### **Railroad company.**

A railroad company is not a common carrier beyond its own termini, over connecting lines, unless it become so by usage, character of business, or contract; and the payment of freight or fare beyond such termini does not make it such common carrier. *Piedmont Mfg. Co. v. Columbia & G. R. Co.*, 19 S. C. 353, 364.

#### **Sleeping car company.**

A sleeping car company is not a common carrier. *Welding v. Wagner*, 1 City Ct. R. 66.

The term "common carrier" cannot be applied to a sleeping car company whose cars are attached to, and movements controlled by, a railroad company which sells the tickets and collects the fares of passengers. *Blum v. Southern Pullman Palace Car Co.* (U. S.) 3 Fed. Cas. 755.

The proprietors of sleeping cars, who only furnish sleeping accommodation for travelers who have paid their transportation to the railroad company, over whose road the sleeping car runs, no part of which pay for transportation is received by the owners of the sleeping cars, are not common carriers, so as to be liable as such for property lost by, or stolen from, passengers while in their cars. *Pullman Palace Car Co. v. Smith*, 73 Ill. 360, 20 Am. Rep. 232.

The term "common carrier" does not include a sleeping car company, as its cars are under the control of the railroad company, except as to furnishing lodging to those who may pay for it; and the agents of the railroad company are entitled to determine who shall occupy the sleeping cars as a part of the train. *Lemon v. Pullman Palace Car Co.* (U. S.) 52 Fed. 262; *Pullman Palace Car Co. v. Gavin*, 23 S. W. 70, 93 Tenn. 53, 21 L. R. A. 298, 42 Am. St. Rep. 902; *Welding v. Wagner* (N. Y.) 1 City Ct. R. 66.

#### **Special employment.**

It is not sufficient to prove the owner of a sloop to be a common carrier, to prove

that he was specially employed to make a trip for a load of grain for which he was to receive a sum of money. *Allen v. Sack-rider*, 37 N. Y. 341, 342.

Where a ship is chartered to carry the goods of a single freighter only upon a single voyage, it seems she is not a common carrier. *Sumner v. Caswell* (U. S.) 20 Fed. 249, 251.

#### **Street railway.**

See, also, "Common Carrier of Passengers."

A street railway company, by undertaking the transportation of passengers for hire, assumes toward its patrons the relation of common carrier; and the character of the easement possessed by it in its right of way is not material, so that it is still a common carrier, though its right of way passes over private property. *East Omaha St. R. Co. v. Godola*, 70 N. W. 491, 492, 50 Neb. 906.

#### **Telegraph or telephone company.**

See "Telephone Company."

A telegraph company, in the absence of a statutory enactment of that effect, is not a common carrier, and its obligations and liabilities are not to be measured by the rules applied to common carriers. *Western Union Tel. Co. v. Carew*, 15 Mich. 525, 532.

Telegraph companies are not common carriers, but they are governed by the law applicable to that class of bailments which are styled "locatio operis faciendi." *Pinkney v. Western Union Tel. Co.*, 19 S. C. 71, 84, 45 Am. Rep. 765.

A common carrier is one who undertakes for hire or reward to carry from place to place the goods of those who choose to employ them. The fact that a corporation is declared by an ordinance to be a common carrier does not make it so, and, where the corporation was a telegraph company, it is not a common carrier. *State v. City of St. Louis*, 46 S. W. 981, 988, 145 Mo. 551, 42 L. R. A. 113.

#### **Towboats, tugs, etc.**

"Common carriers are those whose trade is to carry goods for hire. A common carrier cannot be held to the full measure of his liability as an insurer of goods unless they are absolutely under his control; as, for instance, the law regulating the responsibility of common carriers has been held not to apply to the carrying of intelligent beings, such as negroes, since the carrier has not over them the same absolute control that he has over inanimate matter. But the owner of a towboat is held liable as a common carrier of ships which he tows, even though the rudders of the ships might have some control over the course of the boats, since the vessels which are towed

are almost entirely passive. By the contract for towing, the master of the towboat is bound to carry them safely to their destination, and, if the boat be so much under the influence of the rudder of the ship, it is the duty of the master to look to it. His undertaking is to tow the vessel in safety, and he has a right to assume all the authority necessary to effect that purpose. The commission and care of the vessel towed should be either subject to his commission whilst she is carried by his boat, or the rudder should be placed in the hands of one of his own men. A vessel thus towed should be considered as property carried for hire, in which her crew should not be regarded as having any lawful agency." *Smith v. Pierce*, 1 La. 349, 356. See, also, *Adams v. New Orleans Steam Towboat Co.*, 11 La. 46; *Walston v. Myers*, 50 N. C. 174; *White v. The Mary Ann*, 6 Cal. 462, 470, 65 Am. Dec. 523; *Ashmore v. Pennsylvania Steam Towing & Transportation Co.*, 28 N. J. Law (4 Dutch.) 180.

The owners of a steamboat who undertook to tow a freight boat for hire are not quoad hoc common carriers. *Caton v. Rumney* (N. Y.) 13 Wend. 387, 389. Nor a steamboat engaged in towing a barge. *The James Jackson* (U. S.) 9 Fed. 614. See, also, *Wells v. Steam Nav. Co.*, 2 N. Y. (2 Comst.) 204; *Leonard v. Hendrickson*, 18 Pa. (6 Harris) 40, 55 Am. Dec. 587.

The owners of a steam tug or towboat engaged in the business of towing vessels from point to point, but not receiving the vessels or property on board of them into their care or custody otherwise than is involved in the mere act of towage, are not liable as common carriers. *The Neaffle* (U. S.) 17 Fed. Cas. 1260, 1261; *Bothwell v. Vessel Owners' Towing Ass'n* (U. S.) 3 Fed. Cas. 967. So, also, a steamboat towing a canal boat which remained in possession of its master and crew. *Alexander v. Greene* (N. Y.) 7 Hill, 533, 544.

Owners of towboats jobbing and towing on the Ohio river and its tributaries are not common, but are private, carriers. *Varble v. Bigley*, 77 Ky. (14 Bush) 698, 703, 29 Am. Rep. 435.

The weight of authority is that the owner of a steamboat engaged in the business of towing is not a common carrier. *McCaffrey v. Knapp, Stout & Co. Company*, 74 Ill. App. 80, 85.

#### COMMON CARRIERS OF CATTLE.

Railway carriers are not by the common law common carriers of live stock, and can only make themselves common carriers of that species of property by assuming to convey it as common carriers. *Lake Shore & M. S. R. Co. v. Perkins*, 25 Mich. 329, 333,

12 Am. Rep. 275 (citing *Michigan S. & N. I. R. Co. v. McDonough*, 21 Mich. 163, 4 Am. Rep. 466).

A railroad is a common carrier of cattle, and as such is not responsible for losses occasioned by the cattle dying or being injured by heat, unless the loss or damage has been occasioned by the negligence of the company or its servants. Such a common carrier does not become a private carrier by a special contract whereby it is relieved from its responsibility as a common carrier. *Maslin v. Baltimore & O. R. Co.*, 14 W. Va. 180, 188, 35 Am. Rep. 748.

#### COMMON CARRIER OF PASSENGERS.

A common carrier of passengers is one who undertakes for hire to carry all persons who may apply for passage. *Gillingham v. Ohio River R. Co.*, 14 S. E. 243, 35 W. Va. 588, 14 L. R. A. 798, 29 Am. St. Rep. 827.

To constitute one a common carrier it is necessary that he should hold himself out as such. A carrier of passengers who undertakes to carry all persons who apply to him for transportation is engaged in a public employment, and is a public or common carrier of passengers. "A common carrier of passengers," says Judge Thompson, "is one who undertakes for hire to carry all persons indefinitely who may apply for passage." It is true that carriers of passengers are not common carriers as to the persons of those whom they carry, but common carriers are classified as carriers of goods and as carriers of passengers. *Thompson & Houston Electric Co. v. Simon*, 25 Pac. 147, 148, 20 Or. 60, 10 L. R. A. 251, 23 Am. St. Rep. 86.

A common carrier of passengers is one who undertakes for hire to carry all persons, indifferently, who may apply for passage. A railroad company is under no obligations to carry passengers on freight trains, or freight on passenger trains, but if it voluntarily designates freight trains to carry passengers, and permits its agents to sell tickets therefor to passengers generally, it becomes a common carrier of passengers, by the means so adopted. *Richmond v. Southern Pac. Co.*, 67 Pac. 947, 949, 41 Or. 54, 57 L. R. A. 616, 93 Am. St. Rep. 694.

#### Elevators in buildings.

The law is well settled that persons operating elevators in buildings for the purpose of carrying persons from one story to another are common carriers of passengers. *Springer v. Ford*, 59 N. E. 953, 189 Ill. 430, 52 L. R. A. 930, 52 Am. St. Rep. 464 (citing *Hartford Deposit Co. v. Sollitt*, 172 Ill. 222, 50 N. E. 178, 64 Am. St. Rep. 35; *Goodsell v. Taylor*, 41 Minn. 207, 42 N. W. 873, 4 L. R. A. 673, 16 Am. St. Rep. 700); *Western*

Union Tel. Co. v. Woods, 88 Ill. App. 375; Field v. French, 80 Ill. App. 78.

The owner of a passenger elevator for the use of tenants and others in a building, being under no obligation to carry passengers, is not a common carrier of passengers, within the meaning of Pub. St. c. 73, § 6, relating to the liability of common carriers of passengers. *Seaver v. Bradley*, 60 N. E. 795, 179 Mass. 329, 88 Am. St. Rep. 384; *Bigby v. United States* (U. S.) 103 Fed. 597, 599.

#### **Street railway.**

A street railway company is a common carrier of passengers. *Spellman v. Lincoln Rapid Transit Co.*, 55 N. W. 270, 36 Neb. 890, 20 L. R. A. 316, 38 Am. St. Rep. 753; *Dean v. Chicago General Ry. Co.*, 64 Ill. App. 165, 166; *Omaha St. R. Co. v. Boeson* (Neb.) 94 N. W. 619, 621.

#### **COMMON CEDAR BLOCKS.**

A resolution directing the paving of a street with common cedar blocks meant cedar blocks which were not necessarily sapless or free from sap, and hence a change in the specifications directing that the paving be done with sapless cedar blocks, which made a difference in the cost of the work of from \$1,200 to \$1,500, was a material change beyond the power of the board of public works. *Common Council of City of Grand Rapids v. Grand Rapids Board of Public Works*, 58 N. W. 335, 99 Mich. 392.

#### **COMMON CONSENT.**

The expression "common consent," as used in Ordinance 1787 providing that it shall be binding until "abrogated by common consent," means that, whenever the United States and this state shall agree that the whole or any part of the ordinance shall be repealed, it will, so far as it affects this state, become a dead letter. *Phoebe v. Jay*, 1 Ill. (Breese) 268, 272.

#### **COMMON CONTROL.**

Where a railroad company and a steamship company each receives and forwards freight which has been transported by the other and delivers freight to the other, but each makes its own rate and undertakes for the carriage and delivery of goods not otherwise than over its own route, the fact that both are interested in maintaining the traffic over their joint route, and so secure it against competition, does not bring such lines within the provisions of the interstate commerce act as "lines under a common control, management, or arrangement for a continuous carriage or shipment from one state or territory of the United States to another." To make these carriers subject to the act, the railway and vessel must be operated or

used under a common control—a control to which each are alike subject, and by which rates are prescribed and bills of lading given for the carriage of goods over both routes as one. *Ex parte Koehler* (U. S.) 30 Fed. 867, 870.

#### **COMMON CONVENIENCE AND NECESSITY.**

The phrase "common convenience and necessity," as used in reference to constructing a railroad in the highways from town to town, so as to parallel another railroad, when common convenience and necessity requires, has no legal meaning except when used to indicate a public necessity, which justifies some act affecting the rights of person or property which would not be justifiable if that necessity did not exist. *In re Shelton St. Ry. Co.*, 38 Atl. 362, 363, 69 Conn. 626.

A city ordinance authorized the construction of a street when required by common convenience and necessity. Held, that a finding that public convenience and necessity of the city required the street was a sufficient finding of common convenience and public necessity; "public convenience" and "common convenience" being synonymous, public convenience being common to all citizens of the city. *Dorman v. City Council of Lewiston*, 17 Atl. 316, 318, 81 Me. 411.

"Common convenience and necessity," as used in Gen. St. § 2700, forbidding the layout of a highway, not crossing a railroad track, within 100 yards of such a track, unless first approved by a judge of the superior court on a finding that common convenience and necessity required it there, is an expression not very easy to define, but its meaning may be sufficiently well understood by considering the elements of which it is composed. When it is applied to a new highway, one element which properly enters into it is the one of expense—expense of laying out and constructing the highway, and the expense of maintaining it after it is laid out. It is not, however, the simple question of cost that is to be considered in such case, but the mixed question of cost compared with the ability of the municipality upon which the expense is cast to bear it. *City of Hartford v. Day*, 29 Atl. 480, 64 Conn. 250.

#### **COMMON COUNCIL.**

The phrase "common council," as used in an act relative to a municipal corporation, means the governing body of the city. *Oliver v. Jersey City*, 42 Atl. 782, 783, 63 N. J. Law, 96.

The use of the word "common" in a city ordinance making various appropriations for the fiscal years, which in its title describes the enacting body as the common council instead of the city council, as is required by

the city charter, does not operate to render the ordinance void. *Law v. People*, 87 Ill. 385, 403.

### COMMON COUNTS.

Different forms of the action of assumpsit at common law were divided into four classes: (1) The indebitatus count; (2) the quantum meruit count; (3) quantum valebant; and (4) the account stated. The indebitatus count included a count for real property sold, and such count was used to recover the price or value of the estate sold by the plaintiff to the defendant. *Nugent v. Teauchot*, 35 N. W. 254, 255, 67 Mich. 571.

### COMMON CURRENCY.

"Common currency," as used in a note executed in 1840, at a time when gold and silver or lawful coin had ceased to circulate as money and their place was supplied by bank issues or paper money, meant such bank notes or paper issues, and therefore the note was not payable in money, but in such bank notes as a commodity. *Dillard v. Evans*, 4 Ark. (4 Pike) 175, 178.

### COMMON DILIGENCE.

See, also, "Ordinary Diligence."

"Common or ordinary diligence is that degree of diligence which men in general exercise in respect to their own concerns." *Union Pac. R. Co. v. Rollins*, 5 Kan. 167, 180; *Litchfield v. White*, 7 N. Y. (3 Seld.) 438, 442, 57 Am. Dec. 534. It is distinguished from high or great diligence, which is that with which prudent persons take care of their concerns, and slight diligence, which is that with which persons of less than common prudence, or, indeed, of any prudence at all, take care of their own concerns. *Litchfield v. White*, 7 N. Y. (3 Seld.) 438, 442, 57 Am. Dec. 534.

### COMMON DRUNKARD.

See, also, "Habitual Drunkard."

In a statute expressly making the being a common drunkard an offense, the words by which the offense is created and defined are fully descriptive of it, and are therefore technical; and, because they are so, a party may well be charged in the general words of the statute in a complaint charging such offense. *Commonwealth v. Boon*, 68 Mass. (2 Gray) 74, 75.

In construing a statute authorizing the imprisonment in any inebriate or insane asylum of any person convicted of being an inebriate, habitual or common drunkard, it was said: "Just what would make a person such is not very clearly defined. Manifestly, it was intended that the drunkenness should

be repeated to the extent of becoming habitual, but just how frequent it should occur, or the extent of the delirium or stupefaction, is left, as a matter of fact, to be determined by those who might differ widely in regard to it. Such conviction is not made dependent upon his inability to attend to business, nor to any want of physical self-control, nor upon his being dangerous to himself or others." Such a statute is in violation of Const. U. S. Amend. art. 14, § 1, which declares that no state shall deprive any person of liberty without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. *State v. Ryan*, 36 N. W. 823, 827, 70 Wis. 676.

"The exact degree of intemperance which constitutes a drunkard, it may not be easy to define, but speaking in general terms, and with the accuracy of which the matter is susceptible, he is a drunkard whose habit is to get drunk—whose ebriety has become habitual. To convict a man of the offense of being a common drunkard, it is at the least necessary to show that he is an habitual drunkard. Indeed, the terms 'drunkard' and 'habitual drunkard' mean the same thing. The word 'common' would seem to be used in the sense of 'public.'" *Commonwealth v. Whitney*, 71 Mass. (5 Gray) 85, 86.

The word "common" imports frequency, and it has been held that to convict a man on a charge of being a common drunkard it must be shown that he is an habitual drunkard. The law in no case undertakes to define how many instances of intoxication in any given time shall be deemed sufficient to fix upon a man the imputation of being a common drunkard. *Commonwealth v. McNamee*, 112 Mass. 285, 286.

The two phrases "common drunkard" and "habitual drunkard" have been held in some states to be synonymous in meaning. Either of the expressions may, in general terms, be defined as one who drinks intoxicating liquors to excess, with habitual frequency. Indulgence by a person, on the one hand, in occasional acts of drunkenness, would not be sufficient to bring him within the scope of the definition, nor, on the other hand, need he be constantly drunk every day or week in the year in order to be an habitual drunkard. Common observation, however, shows that there are people who are in the habit of getting drunk almost regularly every week, while they indulge in drink at no other time, and there are still others whose formed habit is to fall into drunken debauches lasting for days, and even weeks, and repeated from one year to another with a periodicity more or less regular, according to the peculiar temperament of the man. *State v. Savage*, 7 South. 183, 89 Ala. 1, 7 L. R. A. 426.

St. c. 244, § 24, declares that "every person who shall have been convicted three

times, within a period of six months, of intoxication, under such circumstances as to amount to a violation of decency, or who shall be proved to have been thus intoxicated three times within the period of six weeks, shall be deemed a common drunkard. *State v. Flynn*, 11 Atl. 170, 171, 18 R. I. 10.

Within the contemplation of the statutes, to constitute a person a common drunkard who has not been convicted of intoxication under such circumstances as will amount to a violation of decency, he must be proved to have been so intoxicated three several times within a period of six weeks. The offense is not complete until he has been so intoxicated the third time. Then, and not until then, has he acquired the character of a "common drunkard," within the meaning of, and so as to be liable to prosecution under, the statute. *State v. Kelly*, 12 R. I. 535, 536.

Habitual intoxication from the use of chloroform will not sustain a complaint under St. p. 143, § 5, providing a punishment for "common drunkards." *Burt v. Burt*, 46 N. E. 622, 623, 168 Mass. 204 (citing *Commonwealth v. Whitney*, 65 Mass. [11 Cush.] 477).

#### COMMON EMPLOYMENT.

See "Same General Business"; "Same Grade of Employment."

"Servants, it is said, are engaged in a common employment when each of them is occupied in service of such kind that all the others, in the exercise of ordinary sagacity, ought to be able to foresee, when accepting their employment, that it may probably expose them to the risk of injury in case he is negligent." *Baird v. Pettit*, 70 Pa. (20 P. F. Smith) 477, 482; *McAndrews v. Burns*, 39 N. J. Law (10 Vroom) 117, 119. Thus, a draftsman in locomotive works is not engaged in the same common employment as workmen excavating a cellar under the building. *Baird v. Pettit*, 70 Pa. (20 P. F. Smith) 477, 482. So, also, a laborer whose duty it was to deliver appliances at the mouth of a mine shaft, or keep in repair the instrumentalities provided by the master for the safe conduct of laborers to and from such tunnel, was, in the view of the law, a fellow servant of one whose place of labor was in the tunnel, and they were engaged in a common employment. *McAndrews v. Burns*, 39 N. J. Law (10 Vroom) 117, 119.

Under the rule that the common employer is not responsible for injuries resulting from neglects committed by fellow servants upon each other in their common employment, by the term "common employment" is meant that the work upon which the servants are engaged is of the same general character. The trade of a carpenter differs from work of cutting and preparing ice for the purpose of storage, and servants thus engaged, each upon his appropriate work, cannot

be said to be in common employment. Yet, where a carpenter by trade was engaged in cutting ice for storage, he was in the same occupation and common employment with the icemen, who were engaged in the same work. *Johnson v. Armour* (U. S.) 18 Fed. 490, 492.

#### COMMON FIELD LOTS.

"Town lots, outlots, common field lots, and commons were known and recognized parts of the Spanish town or commune of St. Louis. They existed by public authority, whether by concession, custom or permission." *Vasquez v. Ewing*, 42 Mo. 247, 256.

"Common field lots," as used in Act Cong. June 13, 1812, declaring that the rights, titles, and claims of town or village lots, outlots, common field lots, and commons adjoining and belonging to the several towns and villages named in the act, including St. Louis, which lots had been inhabited, cultivated, or possessed prior to the 20th of December, 1803, were thereby confirmed to the inhabitants of the respective towns and villages according to their several rights or rights in common thereto, is a term of American invention, and adopted by Congress to designate small tracts of ground of a peculiar shape, usually from one to three arpents in front by forty in depth, used by the occupants of the French villages for the purpose of cultivation, and protected from the inroads of cattle by a common fence. The peculiar shape of the lot, its contiguity to places of similar shape, and the purposes to which it was applied, constituted it a common field lot. It could not be confounded with lots or tracts of land of any other character. *Glasgow v. Hortiz*, 66 U. S. (1 Black) 595, 599, 17 L. Ed. 110.

In Act Cong. June 13, 1812, the term "common field lots" means lots in the vicinity of the village occupied and cultivated by the inhabitants of the village in a common field. *Harrison v. Page*, 16 Mo. 182, 203.

#### COMMON FISHERY.

See "Common of Fishery."

A "common fishery" is a very different thing from a "common of fishery"—the latter being a right held by an individual in common with the owner of the soil covered by the water in question; the former being a public or common right, which is or may be exclusive of the owner of the soil. *Bennett v. Costar*, 8 Taunt. 183. Sir William Blackstone, indeed, while he classifies the common fishery among the rights of profits a prendre which are capable of being held by private grant or private prescription, seems inclined to treat a free fishery as a species of royal franchise conferring upon the citizen an exclusive right in a public river; but in this he is criticised by Mr. Hargreave in Co.

Litt. 122a, note 7, who seems to think the term "free fishery" may appropriately be used to designate a common or public fishery. Certainly, the sort of fishing rights that were attempted to be set up in *Cobb v. Davenport*, 32 N. J. Law (3 Vroom) 369, and in *Albright v. Courtright*, 64 N. J. Law, 332, 45 Atl. 634, were common rights in the sense of being open to the inhabitants in general, and it was rights of this sort that the court decided could not be claimed under a custom, but must arise by grant or prescription. *Albright v. Sussex County Lake & Park Commission*, 53 Atl. 612, 618, 68 N. J. Law, 523.

#### COMMON FORM.

Under the English practice there were two modes of proving a will of personal property,—“the common form,” in which the will was propounded by the executor, and proved *ex parte*; “the solemn form,” in which the next of kin of the testator were cited to witness the proceedings, and in which the proof was taken *per testes*, or in form of law, as it was called. In Oregon probate in common form is the only one which appears to have been adopted by any positive enactment of the Legislature. *Hubbard v. Hubbard*, 7 Or. 42; *Richardson v. Green* (U. S.) 61 Fed. 423, 426, 9 C. C. A. 565; *Luther v. Luther*, 13 N. E. 166, 168, 122 Ill. 558.

A will is said to be proved in common form when the executor presents it for probate in absence of the parties in interest to be affected by the probate, and without citing them, proceeding *ex parte* with his proof; and it is said to be in solemn form when those in interest are cited to be present at the probate or approbation of the will. When a will is proved in common form, a court at any time within 30 years after probate may require the executor, of its own motion, or at the instance of the next of kin, or other person interested, to prove the will in solemn form. In *re Straub*, 24 Atl. 569, 570, 49 N. J. Eq. (4 Dick.) 264.

Probate of a will in common form is *ex parte*, and, when made, is *prima facie* only. It is allowed merely for convenience and on account of its informal character, and the fact that it is made without notice to any one is not conclusive from its date, but parties interested are allowed a given time within which to call for proof in solemn form. *Sutton v. Hancock*, 45 S. E. 504, 506, 118 Ga. 436.

#### COMMON GAMBLER.

The offense of being a common gambler consists in having acquired that character by acts of gambling; three or more acts being necessary for conviction. *State v. Groves*, 43 Atl. 181, 21 R. I. 252.

Pen. Code, § 344, defines a “common gambler” as a person who owns a place of gam-

bling, or who hires or allows a room to be used for such purposes, or who engages as dealer, gamekeeper, or player in any gambling or banking game. *Lyman v. Shenandoah Social Club*, 57 N. Y. Supp. 372, 373, 39 App. Div. 459.

Under Pen. Code, § 344, an indictment for being a common gambler, charging defendant in one count with having played at dice for money in a certain village on a certain day, and in another count with having played at dice for liquor on the same day and in the same village, was not invalid as charging more than one crime, as the acts charged are but a series of acts showing the crime charged. *People v. O'Malley*, 64 N. Y. Supp. 843, 52 App. Div. 46.

#### COMMON GAMING HOUSE.

The keeping of a common gaming house, indictable at common law, does not consist in the keeping of the house for the playing of any particular unlawful game, or in the playing of any particular game by the visitors. The common law judges such an establishment to be *per se* a common nuisance. Accordingly, an indictment which charged the defendant with keeping a gaming room and place in a certain house where people came together for “play,” and remained to “game and play together,” was sufficient, though it did not state an offense under a statute, prohibiting the carrying on of the “bank” gambling games. *Vanderwerker v. State*, 13 Ark. 700, 703.

A common gaming house is a house or room kept for the purpose of permitting persons to resort to it and gamble therein for money or other valuable thing. It is the keeping or using the house or room or like place for gaming purposes that determines its character. The manner of fitting it up does not constitute a house a gaming house. The fact that the keeper has his bed or takes his meals in the room where the gaming is done does not necessarily change the character of the house. *State v. Black*, 94 N. C. 809, 812.

A gaming house is a common nuisance at common law, and as such indictable. The offense was the causing and procuring many persons to resort to such a house for the purpose of gaming, and for the defendant's profit, either upon the game itself or the incidental sale of oysters or other things. Such a house is an encouragement to idleness, cheating, and other corrupt practices; tends to produce public disorder by congregating many people, and to draw the young and unwary from the paths of virtue. It is also a nuisance if it hold out inducements and attractions to bring together persons in such numbers or so often as to make it injurious to the public and dangerous to the neighborhood, by drawing the sober and industrious into habits of idleness and vice, and corrupting the young and unwary. But it must be

of such a character as to amount to a nuisance, or it is not an indictable offense; for a private person may allow gaming in his house without being guilty of a nuisance. *State v. Layman* (Del.) 5 Har. 510, 511.

The word "common," as applied to a gaming house, does not necessarily mean that it is open to all the public; and hence rooms used for gambling by a club, and such other persons as the members invite, constitute a common gaming house. *Commonwealth v. Blankinship*, 42 N. E. 115, 165 Mass. 40.

A common gaming house may be set up and kept in a single room of a house of many rooms, without any proof that the balance of the house was unoccupied. *State v. Mohr*, 55 Mo. App. 329, 332.

A common gambling house, within the meaning of the statute prohibiting such houses, may consist of a single room rented in a house of many rooms; and it may not necessarily be open to the whole public in common, nor the gambling be visible from the exterior, nor need gambling be the only business for which it is used, nor need it be constantly kept for that business, and it may be used for other business, and it may be also used as a sleeping room; but occasional games of poker privately played with acquaintances in a private room does not make it a common gambling house. *State v. Mosby*, 53 Mo. App. 571, 578.

The term "common gaming house" includes a house wherein the keeper permits persons to habitually assemble and engage in betting, winning, and losing money and property on the prospective rise and fall in stocks, bonds, grain, and other produce. *Kneffer v. Commonwealth*, 22 S. W. 446, 94 Ky. 359.

The term "common gaming house," as used in Cr. Code, § 129, providing for the punishment of any person who shall for his profit or gain keep, have, or maintain a common gaming house, cannot be construed to include a billiard saloon in which different persons play billiards on tables therein, it being the custom for the loser to pay a certain sum for the use of the table for each game that was played, for the billiard tables were merely kept for amusement and exercise of persons desiring to use them for that purpose, and not for the purpose of gaming for money. The fact that the persons using the tables may have played for the purpose of determining who should pay for their use does not render the saloon a common gaming house. *Harbaugh v. People*, 40 Ill. 294, 295.

A partly inclosed place within the inclosure of a race course, for the purpose of bookmaking and selling pools, contingent upon the result of horse racing, is a "common gambling house" within Ill. Rev. St. c. 38, § 127. *Swigart v. People*, 40 N. E. 432, 433, 154 Ill. 284.

## COMMON HIGHWAY.

See "Common Road."

An allegation in an indictment that a certain road is a common highway made and laid out for the people of the state to go, return, and pass at their pleasure, etc., is equivalent to an allegation that the road was and is an established highway, under the statute punishing the obstruction of any public road or established highway, and providing for the removal of the obstruction. *Palatka & I. R. Ry. Co. v. State*, 3 South. 158, 23 Fla. 546, 11 Am. St. Rep. 395.

## COMMON INFORMERS.

"Common informer" is a name used to designate the person commencing a qui tam action. In *re Barker*, 56 Vt. 14, 20.

At common law, suits for penalties were often prosecuted by informers. Some of these were called "common informers." These informers were empowered to bring action for penalties established by law in their names. *United States v. Stocking* (U. S.) 87 Fed. 857, 861.

## COMMON IN GROSS.

Blackstone, in discussing the rights of common and how they may be acquired and held, says: "Common in gross or at large is such as is neither appendant or appurtenant to land, but is annexed to a man's person, being granted to him and his heirs by deed, or it may be claimed by prescriptive right, as by a parson of a church or the like corporation sole. This is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor." *Mitchell v. D'Olier*, 53 Atl. 467, 469, 68 N. J. Law, 375, 59 L. R. A. 949 (citing 2 Bl. Comm. 34).

A common in gross is one which has no relation to the tenure of the land, but is annexed by deed or prescription to a man's person. *Van Rensselaer v. Radcliff*, 10 Wend. 639, 647, 25 Am. Dec. 582.

A common in gross or at large is neither appurtenant nor appendant, but is a right annexed to the person, and is granted by deed or gained by prescriptive right. *Smith v. Floyd*, 18 Barb. 522, 527 (citing 2 Bl. Comm. 33).

## COMMON INN.

"A 'common inn' is defined by Bacon to be a house for the entertainment of travelers and passengers in which lodging and necessities are provided for them and for their horses and attendants." *Cromwell v. Stephens* (N. Y.) 2 Daly, 15, 21, 8 Abb. Prac. (N. S.) 26, 33.

**COMMON LABOR.**

"Common labor," as used in Acts 1855, p. 159, making it criminal for any person to engage at common labor on Sunday, means "such acts of labor or business as may be performed on days of the week usually devoted to secular business in the pursuit of a legal employment." *State v. Conger*, 14 Ind. 396, 397.

A statute forbidding the exercise of any common labor on Sunday means "ordinary labor as contradistinguished from intellectual. Thus to construe it is to give to it both its strict and popular signification." *Bloom v. Richards*, 2 Ohio St. 387, 403.

**Contracts.**

"Common labor," as used in a statute prohibiting common labor on the Sabbath, does not include the making of a contract. *Horacek v. Keebler*, 5 Neb. 355, 358.

Rev. St. 1801, § 2000, providing that whoever, being over 14 years of age, is found on the first day of the week rioting, hunting, fishing, quarrelling, at common labor, or engaged in his usual avocation, is not to be restricted in its meaning to mere manual labor, but the execution of ordinary contracts and the transactions to which they relate are acts of "common labor," within the meaning of the statute. *Bryan v. Watson*, 26 N. E. 666, 667, 127 Ind. 42, 11 L. R. A. 63.

**Entertainments.**

Cr. Code, § 241, providing for the punishment of any person found at common labor on Sunday, except in works of necessity and charity, cannot be construed to include the giving of a performance consisting of music, dancing, and feats of contortion. *Wirth v. Calhoun*, 89 N. W. 785, 786, 64 Neb. 816.

**Execution of instruments.**

Rev. St. 1838, p. 219, forbidding common labor on Sunday, includes the execution of a bond. *Link v. Clemmens* (Ind.) 7 Blackf. 479, 480.

"Common labor," within the meaning of the Sunday statute, prohibiting common-law labor on Sunday, except, etc., includes the making of a promissory note. *Reynolds v. Stevenson*, 4 Ind. 619.

**Judicial or official business.**

The term "common labor," as used in the Sunday laws, forbidding common labor, etc., on Sunday, does not include the holding of courts, and does not include ministerial transactions of judicial business. *State v. Thomas*, 56 N. E. 276, 279, 61 Ohio St. 444, 48 L. R. A. 459.

1 Chase's Laws, pp. 97-101, § 22, prohibiting common labor on Sunday, does not include acts of a public officer in the perform-

ance of official duty for several very satisfactory reasons: (1) Such duty is not within the ordinary meaning of the words. (2) In *Bloom v. Richards*, 2 Ohio St. 387, *Thurman, J.*, in speaking of these words and the statute in which they occur, took occasion to say the law in question is a penal statute, and therefore to be strictly construed. Such statutes are not to be extended by implication. (3) An examination of the English statutes prohibiting labor, etc., on Sunday, shows the prohibition had no relation whatever to official duties. *Hastings v. Columbus*, 42 Ohio St. 585, 591.

**Trading.**

"Common labor," as used in the act prohibiting common labor on Sunday, neither in common parlance nor in its strict philological sense embraces the simple making of a bargain. *Bloom v. Richards*, 2 Ohio St. 387, 403.

As the term "common labor" is used in a statute prohibiting common labor on Sunday, it embraces the business of trading, bartering, selling, or buying goods, wares, and merchandise. *City of Cincinnati v. Rice*, 15 Ohio, 225, 241; *Eitel v. State*, 33 Ind. 201, 203; *Sellers v. Dugan*, 18 Ohio, 489, 493.

**COMMON LAW.**

See "Rules of Common Law."

Christianity as part of, see "Christianity."

"In every nation that has advanced a few steps beyond the first organization of political society and has made any progress in civilization, an extensive and important part of the rules which govern men is derived from what is called in certain countries 'common law,' and here 'jurisprudence.' This jurisprudence, or common law, in some nations is found in the decrees of their courts; in others it is furnished by private individuals eminent for their learned integrity, whose superior wisdom has enabled them to gain the proud distinction of legislating as it were for their country, and enforcing their legislation by the most noble of all means, that of reason alone. After a long series of years it is sometimes difficult to say whether these opinions and judgments were originally the effect of principles previously existing in society, or whether they were the cause of the doctrines which all men at last recognize. But whether the one or the other, when acquiesced in for ages, their force and effect cannot be distinguished from the statutory law. No civilized nation has been without such a system. None, it is believed, can be without it, and every attempt to expel it only causes it to return with increased strength on those who are so sanguine as to think it may be dispensed with." *Saul v. His Creditors* (La.) 5 Mart. (N. S.) 569, 582, 16 Am. Dec. 212.



The "common law" is not, in its nature and character, an absolute, fixed, and inflexible system, like the statute law, providing only for cases of a determinate form which fall within the letter of the language in which a particular doctrine or legal proposition is expressed. It is rather a system of elementary proceedings and of general juridical truths, which are conditionally explained with the progress of society, and adapting themselves to the gradual changes of trade and commerce and the mechanic arts, exigencies, and usages of the country. There are certain fundamental maxims in it which are never departed from, and there are others which, though true in a general sense, are at the same time susceptible of modifications and exceptions to prevent them from doing manifest wrong and injury. *Pierce v. Proprietors of Swan Point Cemetery*, 10 R. I. 227, 240, 14 Am. Rep. 687.

The "common law" consists of those principles, maxims, usages, and rules of action which observation and experience of the nature of man, the constitution of society, and the affairs of life have commended to enlightened reason as best calculated for the government and security of persons and property. Its principles are developed by judicial decisions as necessities arise from time to time demanding the application of those principles to particular cases in the administration of justice. The authority of its rules does not depend on positive legislative enactment, but on the principles they are designed to enforce, the nature of the subject to which they are to be applied, and their tendency to accomplish the ends of justice. It follows that these rules are not arbitrary in their nature nor invariable in their application, but from their nature, as well as the necessities in which they originate, they are and must be susceptible of a modified application, suited to the circumstances under which the application is to be made. *People v. Randolph*, 2 Parker, Cr. R. 174, 176.

The rule of civil conduct prescribed and recognized by the supreme power of a state, commanding what in its opinion is right or convenient, and prohibiting what is wrong or inconvenient, is based upon certain principles which can neither be ignored nor left out, and these principles, controlled in their application by custom, constitute "common law." *Hulings v. Hulings Lumber Co.*, 18 S. E. 620, 627, 38 W. Va. 351.

"The common law has been aptly called the 'lex non scripta,' because it is a rule prescribed by the common consent and agreement of the community as being applicable to its different relations, and capable of preserving the peace, good order, and harmony of society, and rendering unto every one that which of right belongs to him. Its sources are to be found in the usages, habits,

manners, and customs of a people; its seat in the breast of the judges who are its expositors and expounders. Every nation must of necessity have its common law, let it be called by what name it may, and it will be simple or complicated in its details as society is simple or complicated in its relations. A few plain and practical rules will do for a wandering horde of savages, but they must and will be much more extensively ramified when civilization has polished, and commerce and arts and agriculture enriched, a nation. The common law of a country will therefore never be entirely stationary, but will be modified and extended by analogy, construction, and custom so as to embrace new relations springing up from time to time from an amelioration or change of society." *Jacob v. State*, 22 Tenn. (3 Humph.) 493, 514.

"The common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy. \* \* \* It has its foundations in the principles of equity, natural justice, and that general convenience which is public policy." *Edgerly v. Barker*, 31 Atl. 900, 905, 66 N. H. 434, 28 L. R. A. 328 (quoting *Norway Plains Co. v. Boston & M. R. Co.*, 67 Mass. [1 Gray] 263, 267, 268, 61 Am. Dec. 423).

The common law "is a system of principles not capable of expansion, but always existing and attaching to whatever particular matter or considerations may arise or come within the one or other of them." "The common law is derived from immemorial usage or custom, originating from acts of Parliament not recorded, or which are lost or have been destroyed. It is a system of jurisprudence founded on the immutable principles of justice, and denominated by the greatest luminary of the law of England 'the perfection of reason.' Its evidences are the treatises of the sages of the law, the judicial records or adjudications of the courts of justice of England." Per Chase, C. J., in *State v. Buchanan* (Md.) 5 Har. & J. 317, 365, 9 Am. Dec. 534.

The common law of England may be said to consist of a collection of principles found in the opinions of sages, or deduced from universal and immemorial usage, and receiving progressively the sanction of the courts. The best evidence of the common law is found in the decision of the courts, contained in numerous volumes of reports, and in the treatises and digests of learned men. *Lux v. Hagglin*, 10 Pac. 674, 750, 69 Cal. 255.

The common law of England is derived from memorial usage and custom, originating from the acts of Parliament, not recorded, or which have been destroyed or lost. It is a system of jurisprudence founded on

the principles of justice, and in the United States is composed partly of the common law of England, and partly of the usages which have grown up and are indigenous to the United States. *Barry v. Village of Port Jervis*, 72 N. Y. Supp. 104, 112, 64 App. Div. 288.

"There is no common law of the United States, in the sense of a national customary law, distinct from the common law of England, as adopted by the several states each for itself, applied as its local law, and subject to such alterations as may be provided by its own statutes. *Wheaton v. Peters*, 33 U. S. (8 Pet.) 591, 8 L. Ed. 1055. A determination in a given case of what that law is may be different in a court of the United States from that which prevails in the judicial tribunals of a particular state. This arises from the circumstance that the courts of the United States, in cases within their jurisdiction, where they are called upon to administer the law of the state in which they sit or by which the transaction is governed, exercise an independent though concurrent jurisdiction, and are required to ascertain and declare the law according to their own judgment. There is, however, one clear exception to the statement that there is no national common law. The interpretation of the Constitution of the United States is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of its history. The code of constitutional and statutory construction which, therefore, is gradually formed by the judgments of this court in the application of the Constitution and laws, and treaties made in pursuance thereof, has for its basis so much of the common law as may be implied in the subject, and constitutes a common law resting on national authority." *Smith v. Alabama*, 8 Sup. Ct. 564, 569, 124 U. S. 465, 31 L. Ed. 508; *United States v. Wong Kim Ark*, 18 Sup. Ct. 456, 459, 169 U. S. 649, 42 L. Ed. 890.

"There can be no common law of the United States as a unit. What is common law in one state is not necessarily so in another. In the various states the common law as recognized is by no means uniform. This want of uniformity springs from the fact that in many of them the legislatures have adopted the common law and certain English statutes passed by Parliament prior to a particular date fixed in the act of adoption. In most of those states which were a part of the original thirteen colonies, and which have not adopted the common law and the British statutes by legislative enactment, the courts have defined the 'common law' to be the 'lex non scripta,' and such statutes of Great Britain of a general nature, in amendment of the common law, not locally inapplicable, nor in conflict with the Constitution of the United States, the acts

of Congress, or the constitution and laws of the particular states, and which are suitable to the condition of their inhabitants, in force at the time of the emigration of our ancestors. *Patterson v. Winn*, 30 U. S. (5 Pet.) 233, 8 L. Ed. 108. There are three classes of common law as recognized in the United States of America: First, in those states which were a part of the original colonies, and which have not by legislation adopted statutes passed prior to a particular date, the unwritten law, and such general British statutes applicable to their condition as were in force at the time of the formation of the colonial governments, and such as were afterwards adopted, expressly or tacitly, constituted the common law; second, in those states which have adopted the common law and the British statutes passed and in force prior to the date fixed in the act of adoption, and were of a general nature and suitable to their situation, such common law and statutes constitute their common law; and, third, in those states and territories which were not of the original colonies, and which have not in terms adopted any English statutes, but have adopted the common law, the unwritten or common law of England, and the acts of Parliament of a general nature, not local to Great Britain, which had been passed and were in force at the date of the War of the Revolution, and not in conflict with the Constitution or laws of the United States, nor of the state or territory, and which were suitable to the wants and conditions of the people, are the common law of such states and territories." *Browning v. Browning*, 9 Pac. 677, 682, 3 N. M. (Johns.) 871.

There is "no national common law in the United States distinct from that adopted by the several states, each for itself, except so far as the history of the English common law may be involved in the interpretation of the federal Constitution. The judicial decisions, the usages and customs of the respective states, determine to what extent the common law has been introduced. What is common law in one state may not be so considered in another. It must also be remembered that we have no such courts in this country deriving their existence from the common law. They are all established either by the provisions of the organic law or by legislative enactments." *In re Dean*, 22 Atl. 385, 386, 83 Me. 489, 13 L. R. A. 229.

There is within the boundaries of the several states no common law of the United States as a distinct sovereignty; neither the Congress or Constitution having adopted that law, and the power of the nation to make laws within the field of power assigned to it by the Constitution being exercised only by express enactments of Congress or by treaties. *Swift v. Philadelphia & R. R. Co.* (U. S.) 64 Fed. 59, 61.

In considering the question whether ministers were exempt from taxation, the Supreme Court of New Hampshire says that, if they are exempt, it must be so because by the usage of the state from the earliest times of which we have any knowledge, i. e., by the common law of the state, the estates of persons of his character and description have been exempt. *Kidder v. French*, Smith, 155, 158.

#### Civil law distinguished.

The act of 1850, in adopting the "common law of England," designates the common law as interpreted, as well in the English courts as in the states of the Union that have adopted the English common law, and does not designate the civil law, nor the *jus commune antiquum*, or Roman "law of nature" of some of the civil law commentators, nor the Mexican law, nor any hybrid system. *Lux v. Haggin*, 10 Pac. 674, 741, 69 Cal. 255.

#### As common law of England

The common law consists of those principles and forms which grew out of the customs and habits of the people, and therefore in its very nature involves only so much of the English law as is adapted to our circumstances and customs. In *re Pennock's Estate*, 20 Pa. 268, 274, 59 Am. Dec. 718.

"Every country has its common law. Ours is composed partly of the common law of England and partly of our own usages. When our ancestors emigrated from England, they took with them such of the English principles as were convenient for the situation in which they were about to place themselves. It required time and experience to ascertain how much of the English law would be suitable to this country. By degrees, as circumstances demanded, we adopted the English usages, or substituted others better suited to our wants, until at length, before the time of the Revolution, we had formed a system of our own, founded in general on the English Constitution, but not without considerable variations." *Guardians of the Poor v. Greene* (Pa.) 5 Bin. 554, 557.

The Constitution of the United States, amend. 7, provides that in suits at common law, where the value in controversy shall exceed \$20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any of the courts of the United States than according to the rules of the common law. It was held that the "common law" refers to the common law of England. *Capital Traction Co. v. Hof*, 19 Sup. Ct. 580, 582, 174 U. S. 1, 43 L. Ed. 878. As used in the clause of a constitution providing that in suits at common law, where the value in controversy shall exceed \$20, the right of trial by jury

shall be preserved, does not mean "the common law of any individual state, but the common law of England, the great reservoir of all jurisprudence." *United States v. Wonson* (U. S.) 28 Fed. Cas. 745, 750.

The term "common law," as used in Gen. St. § 3021, providing that the common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States or the Constitution and laws of this state, shall be the rule of decision in all the courts of this state, "was employed in the sense in which it is generally understood in this country, and the intention of the Legislature was to adopt only so much of it as was applicable to our condition. The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright, but they brought with them and adopted only that portion which was applicable to their situation. *Van Ness v. Pacard*, 27 U. S. (2 Pet.) 137, 144, 7 L. Ed. 374. 'The common law,' says Chancellor Kent, 'so far as it is applicable to our situation and government, has been recognized and adopted as one entire system by the Constitutions of Massachusetts, New York, New Jersey, and Maryland. It has been assumed by the courts of justice, or declared by statute, with the like modifications, as the law of the land in every state. It was imported by our colonial ancestors as far as it was applicable.'" *Reno Smelting, Milling & Reduction Works v. Stevenson*, 21 Pac. 317, 319, 20 Nev. 269, 4 L. R. A. 60, 19 Am. St. Rep. 364 (citing 1 Kent, Comm. 473).

As a rule the term "common law" means both the common law of England, as opposed to statutes or written laws, and the statutes passed before the immigration of the first settlers to America. *Cowhick v. Shingle*, 37 Pac. 689, 692, 5 Wyo. 87, 25 L. R. A. 608, 63 Am. St. Rep. 17.

"The common law of England has been considered as not put in force, directly or indirectly, by means of any clause in the Constitution of the United States, so as to create, make, or help to make anything an offense which has not been made so by the Constitution itself, or acts of Congress passed under it. Dup. Jur. p. 9, says the common law of the United States is no longer the source of power or jurisdiction, but the means or instrument through which it is exercised. At the same time, in deciding on private rights in civil cases, which must often be according to the laws of the respective states, the common law will govern so far as it is in force in each state. But it will be the law of that state rather than of the United States." *United States v. New Bedford Bridge* (U. S.) 27 Fed. Cas. 91, 107.

The term "common law of England," as used in Comp. St. 1901, c. 15a, refers to that general system of law which prevails in England and in most of the United States by derivation from England, as distinguished from the Roman or civil-law system. It does not require adherence to the English common-law courts prior to the Revolution in case the courts of the state consider subsequent decisions, either in England or America, better expositions of the general principles of that system. *Williams v. Miles* (Neb.) 94 N. W. 705, 708, 62 L. R. A. 888.

#### Equity and admiralty distinguished.

Mr. Justice Story, in *Parsons v. Bedford*, 28 U. S. (3 Pet.) 452, 7 L. Ed. 782, in defining the meaning of the phrase "common law" as used in the seventh amendment to the Constitution, providing that in suits at common law, where the value in controversy shall exceed \$20, the right to trial by jury shall be reserved, said the phrase "common law" found in this clause is used in contradistinction to "equity and admiralty and maritime jurisprudence." The Constitution had declared in the third article that the judicial power is extended to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority, and to all cases of admiralty and jurisdiction. It is well known that, in civil causes in courts of equity and admiralty, juries do not intervene, and that courts of equity use the trial by jury only in extraordinary cases to inform the conscience of the court. When, therefore, we find the amendment requires that the right of trial by jury shall be preserved in suits at common law, the natural conclusion is that this distinction was present to the minds of the framers of the amendment. By common law they meant what the Constitution denominated in the third article law; not merely suits which the common law recognized among its old and settled proceedings but suits in which legal rights were to be ascertained and determined in contradistinction to those where equitable rights alone were recognized and equitable remedies were administered, or where, as in the admiralty, a mixture of public law and of maritime law and equity were often found in the same suit. *Kleever v. Seawall* (U. S.) 65 Fed. 393, 395, 12 C. C. A. 661.

In the seventh amendment of the Constitution of the United States, and in the judiciary acts, by "common law" is meant what the Constitution denominated in the third article "law"; not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized and equitable remedies administered (*Fenn v. Holme*, 62 U. S. [21 How.] 481, 486, 16 L.

Ed. 198; *Michaelson v. Cautley*, 82 S. E. 170, 172, 45 W. Va. 533; *United States v. Block* [U. S.] 24 Fed. Cas. 1176, 1179); or where, as in admiralty, a measure of public law and of maritime law and equity was often found in the same suit (*United States v. Block* [U. S.] 24 Fed. Cas. 1176, 1179). Thus a fact once tried by a jury cannot be retried or re-examined except by another jury, if either party require it, according to such procedure. *Michaelson v. Cautley*, 82 S. E. 170, 172, 45 W. Va. 533.

#### Equity jurisprudence included.

The term "common law" in its broadest sense includes those doctrines of equity jurisprudence which have not been expressed in legislative enactments. *Campbell v. Colorado Coal & Iron Co.*, 10 Pac. 248, 250, 9 Colo. 60.

In the statute providing that "so much of the common law of England as is applicable and not inconsistent with the Constitution of the United States, the organic law of this territory, or any law passed or to be passed by the Legislature of this territory, is adopted and declared to be law within this territory," the phrase "common law" was not used in contradistinction to the rules of equity. It undoubtedly includes the law derived from the English Court of Chancery. *Bloomfield State Bank v. Miller*, 75 N. W. 569, 570, 55 Neb. 243, 44 L. R. A. 387, 70 Am. St. Rep. 381.

#### Statute law distinguished.

According to Kent, the "common law" includes those principles, usages, and rules of action applicable to the government and security of person and property which do not rest for their authority upon any expression and positive declaration of the will of the Legislature. 1 Kent, Comm. 471. As Blackstone says: "Whence it is that in our law the goodness of a custom depends upon its having been used time out of mind, or in the solemnity of our legal phrase time 'whereof the memory of man runneth not to the contrary.' This it is that gives it its weight and authority. And of this nature are the maxims and customs which compose the common law, or 'lex non scripta,' of this kingdom. This unwritten or common law is properly distinguishable into three kinds: (1) General customs, which are the universal rule of the whole kingdom, and form the 'common law' in its stricter and more usual signification." 1 Bl. Comm. 67. In Black's Law Dictionary, p. 232, it is thus defined: "As distinguished from law created by the enactment of legislatures, the 'common law' comprises the bodies of those principles and rules of action relating to the government and security of persons and property which derive their authority solely from usages and customs of immemorial antiquity, or from the judgment and decrees of the

courts recognizing, affirming, and enforcing such usages and customs, and in this sense particularly the ancient unwritten law of England." *Western Union Tel. Co. v. Call Pub. Co.*, 21 Sup. Ct. 561, 564, 181 U. S. 92, 45 L. Ed. 765.

The term "common law" is constantly and generally used in contradistinction to "statute law." It is used in such sense in Act 1776, providing a scheme of descents, and providing that, in all cases of descent not provided for by the act, the common law shall govern. "If it had been intended to recognize any state enactments of England, we should usually expect to find some clear expression of such an intention by some appropriate words." *Levy v. McCartee*, 31 U. S. (6 Pet.) 102, 110, 8 L. Ed. 334.

#### **Statute of frauds.**

In the case of *Pyeatt v. Powell* (U. S.) 2 C. C. A. 367, 51 Fed. 551, it was decided that while the common law could not presume to exist in the Indian Territory on March 1, 1889, when Congress created a United States court in the territory, yet, such court having been created, it would be inferred that Congress intended that such court should apply rules and principles of the common law to the adjudication of such cases as came before it. The phrase "common law" as so used was intended to signify those rules and principles of common law, not embodied in the provisions of any statute, which are termed "lex non scripta," and thus does not embrace the statute of frauds. So that a verbal lease of land for a seven years' term made prior thereto was valid. *Wilson v. Owens* (U. S.) 86 Fed. 571, 573, 30 C. C. A. 257.

#### **Statute of uses.**

Common law is composed of ancient maxims and customs. 1 Bl. Comm. (Cooley [3d Ed.] 67). In determining whether the common law of this country consists of the ancient common law or the common law with statutory definitions, it has been stated by the Massachusetts court, generally and particularly, with reference to the statute of uses: "The statute of uses being enforced in England when our ancestors came here, they brought it with them as an existing modification of the common law, and it has always been considered a part of our law." *Marshall v. Fisk*, 6 Mass. 24, 4 Am. Dec. 76. It has been observed that English statutes passed before the emigration of our ancestors, applicable to our situation, or in amendment or amelioration of the common law, are part and parcel of the common law of our country. 5 Am. Reg. 644. While there have been conflicting theories as to the origin of the law in America, it has been settled that the law of England as it existed at the time of the colonial settlement is the common law in this country, with the exception of Louisiana. But the statute of uses

is not a part of the common law in Nebraska. *Farmers' & Merchants' Ins. Co. v. Jensen*, 78 N. W. 1054, 1055, 58 Neb. 522, 44 L. R. A. 861.

#### **COMMON-LAW ACTION.**

Within the meaning of Act March 3, 1887, c. 373, § 1, 24 Stat. 552, Act Aug. 13, 1888, c. 866, § 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508] § 1, providing that courts of the United States shall have original cognizance of all suits of a civil nature, at common law or in equity, the expression "at common law" does not mean such a suit as existed at common law. It is used to distinguish it from a criminal action, or from an action to enforce a regulation arising under the police power of the state, or an action to recover penalty; but in such a sense proceedings for a condemnation of land are suits at common law. *Kirby v. Chicago & N. W. R. Co.* (U. S.) 106 Fed. 551, 555. See, also, *United States v. Block* (U. S.) 24 Fed. Cas. 1174, 1175.

#### **COMMON-LAW ASSIGNEE.**

A "common-law assignee," under our statute, is a representative of creditors. He is in effect a lienholder, in trust for creditors. *Emerson v. Detroit Steel & Spring Co.*, 100 Mich. 127, 130, 58 N. W. 659.

#### **COMMON-LAW ASSIGNMENT.**

The words "common-law assignment" in How. Ann. St. § 8739, providing that all instruments commonly called "common-law assignments for the benefit of creditors" shall be void unless without preference, etc., as construed by the Supreme Court of Michigan include such general assignments as were known to the common-law, in which the failing debtor undertook to divide his property to the payment of his debts through a trustee. An instrument creating a trust to sell lands for the benefit of creditors, which does not withdraw the debtor's equity of redemption in the property from the reach of his other creditors, and under which he or they could compel a reconveyance in payment of the debts secured, does not constitute a common-law assignment. *Ontario Bank of Toronto v. Hurst* (U. S.) 103 Fed. 231, 235, 43 C. C. A. 193.

#### **COMMON-LAW CERTIORARI.**

See "Certiorari."

#### **COMMON-LAW CHEAT.**

To constitute a common-law "cheat," the money or property must have been obtained by means of some false token, symbol, or device, as distinguished from mere words, however false and fraudulent. As the act of obtaining goods by false pretenses is

made indictable by another section, it must be held that, to constitute the crime of swindling, the property must have been obtained by some false token or device other than mere words. *State v. Wilson*, 75 N. W. 715, 716, 72 Minn. 522.

Perhaps the commonly accepted definition of "common-law cheat" is that it is a fraud wrought by some false symbol or token, of a nature against which common prudence cannot guard, to the injury of one in pecuniary interest; but it is also given a wider signification, and is sometimes defined as the fraudulent obtaining of the property of another by any deceitful practice or token, short of felony, which affects or may affect the public. Under this definition the cheat need not necessarily be accomplished through the use of a symbol or token. Where defendant, a married man, pretended, under a fictitious name to an unmarried woman, that he was single, and by these means, together with his promise to marry her, obtained money from her, he was not a false token, and hence was not guilty of obtaining money by false pretenses by means of a false token. *State v. Renick*, 56 Pac. 275, 276, 33 Or. 584, 44 L. R. A. 266, 72 Am. St. Rep. 758.

#### COMMON-LAW COMPOSITION.

See "Agreement for Common-Law Composition."

#### COMMON-LAW COURT.

The term "common-law courts" is used in England to designate the courts administering the common law. *Equitable Life Assur. Soc. v. Paterson*, 41 Ga. 338, 364, 5 Am. Rep. 535.

#### COMMON-LAW CRIMES.

"Common-law crimes" are crimes which are punishable by the force of the common law, as distinguished from crimes created by statute. There are no common-law crimes against the United States. *In re Greene* (U. S.) 52 Fed. 104, 111.

#### COMMON-LAW DEDICATION.

See "Dedication."

#### COMMON-LAW JURISDICTION.

The court authorized to hear and determine all complaints or prosecutions in like manner as justices of the peace and having jurisdiction of all civil suits and actions cognizable by a justice of the peace exercises a common law jurisdiction. *Ex parte Gladhill*, 49 Mass. (8 Metc.) 168, 170.

The state courts mentioned in the act of Congress as having common-law jurisdiction are such as exercise their powers

according to the course of the common law. It was not meant they should have all common-law jurisdiction over every class of subjects, including all civil and criminal matters. If this were so, it is apprehended but few courts could be found in any of the states that would possess the requisite common-law jurisdiction. As a matter of fact, some subjects are excluded from the original jurisdiction of circuit courts in this state and in the state of Missouri, and perhaps no court in either state could be found with such extended and unlimited jurisdiction as to include within that jurisdiction all subjects determinable in the various courts, either under the statute or under the common law. Courts having exclusive jurisdiction in criminal causes, with no civil jurisdiction, are nevertheless courts of general jurisdiction, though limited to a certain class of cases, and may and do exercise their powers, together with those having jurisdiction only in civil cases, according to the course of the common law, and their jurisdiction may, with as much propriety as with many of the common-law courts of England, be said to be general. *People v. McGowan*, 77 Ill. 644, 648, 20 Am. Rep. 254.

The expression "common-law jurisdiction," as used in Rev. St. U. S. § 2165 [U. S. Comp. St. 1901, p. 1329], conferring power to issue papers of naturalization upon every court of record in any individual state having a common-law jurisdiction, "is capable of no other meaning than jurisdiction to try and decide cases which were cognizable by the courts of law under what is known as the 'common law' of England. Our judicial system having been modeled chiefly after that of England, we have adopted the nomenclature which prevailed in her courts; hence when we speak, through our statutes and courts, of common-law actions, proceedings at common law, and common-law jurisdiction, we mean such actions, proceedings, and jurisdiction as appertain to the common law of England as administered through her courts." *In re Conner*, 39 Cal. 98, 100, 2 Am. Rep. 427; *Kenyon v. Kenyon*, 24 Pac. 829, 830, 8 Utah, 431; *United States v. Power* (U. S.) 27 Fed. Cas. 607, 608. But the statute does not require that the court shall exercise all the common-law jurisdiction which pertains to all classes of cases. *United States v. Power* (U. S.) 27 Fed. Cas. 607, 608; *In re Dean*, 22 Atl. 385, 386, 83 Me. 489, 13 L. R. A. 229.

#### COMMON-LAW JURY.

See "Jury."

#### COMMON-LAW LIEN.

Liens are, so far as the source of their creation is concerned, divisible into common law, equitable, maritime, and statutory.

Originally, by the common law, a lien consisted merely in the right to retain possession, under certain circumstances, of the property of another until some debt or charge was paid. Equitable liens did not depend upon possession, nor, strictly speaking, did they constitute a *jus in re* or a *jus ad rem*, but more properly constituted a charge upon the thing. 2 Story, Eq. Jur. § 1215; *Peck v. Jenness*, 48 U. S. (7 How.) 612, 12 L. Ed. 841. At common law, though ordinarily the delivery of possession by the one entitled to a lien destroyed or terminated the lien, yet by contract the parties might agree to continue the lien after delivery, or, in other words, might agree that the property, after delivery, should be subject to be taken and sold if the purchase price or other charge thereon was not paid. *Gregory v. Morris*, 96 U. S. 619, 24 L. Ed. 740. In equity, the lien consisted in the right to subject the property, even though not in possession of the lienor, to the payment of the debt or claim, as a charge upon the property; and a maritime lien is of like nature in this respect. Thus, in the *Case of Rock Island Bridge*, 73 U. S. (6 Wall.) 213, 18 L. Ed. 753, it is said: "A maritime lien, unlike a lien at common law, may in many instances exist without possession of the thing upon which it is asserted, either actually or constructively. It confers, however, upon its holder such a right in the thing that he may subject it to condemnation and sale to satisfy his claim for damages." *Bouvier* defines a "lien" to be "a hold or claim which one has upon the property of another as security for some debt or charge." When, therefore, a statute declares that under certain circumstances a person shall have a lien upon a certain class of property for a debt due or charge due, what is meant is that the person shall have the right to hold the property for, or subject it to, the payment of the claim or charge. On the other hand, if the statute declares that the person shall have the right, under the given circumstances, to hold certain property for, or subject it to, the payment of a certain claim or charge, this in like manner creates and confers a lien, although the word "lien" may not be used in the statute. It is the right to hold or subject the property to the payment of the claim or debt that constitutes the lien, and the mere words used in the statute are immaterial, so long as the substantial right itself is created. *The Menominee* (U. S.) 36 Fed. 197, 199.

#### COMMON-LAW MARRIAGE.

A marriage not solemnized in the ordinary way, but created by an agreement to marry, followed by cohabitation, is designated in the books and by counsel as a "common-law marriage." *Taylor v. Taylor*, 44 Pac. 675, 7 Colo. App. 549; *Taylor v. Taylor*, 50 Pac. 1049, 10 Colo. App. 303.

A common-law marriage exists when the man and woman enter into an agreement to become husband and wife, and live together as husband and wife, and in pursuance of such agreement do live together and cohabit as husband and wife, and hold each other to the public as husband and wife; and such agreement may be either express or implied, an express agreement being where the parties thereto expressly agree, and an implied agreement being one where the conduct of the parties with reference to the subject-matter is such as to induce the belief that they intended to do that which their acts indicate they have done. *Cuneo v. De Cuneo*, 59 S. W. 284, 285, 24 Tex. Civ. App. 436.

A common-law marriage is a consummated agreement to marry between a man and a woman, *per verba de præsenti*, followed by cohabitation.—*Morrill v. Palmer*, 33 Atl. 829, 830, 68 Vt. 1, 33 L. R. A. 411.

To constitute a common-law marriage, the contract and consent must be *per verba de præsenti*, or, if made *per verba de futuro cum copula*, it is presumed that the parties at the time of the copula accepted each other as man and wife. *Port v. Port*, 70 Ill. 484; *Hebblethwaite v. Hepworth*, 98 Ill. 126; *Cartwright v. McGown*, 121 Ill. 388, 12 N. E. 737, 2 Am. St. Rep. 105; *Stoltz v. Doering*, 112 Ill. 234; *Hiler v. People*, 156 Ill. 511, 41 N. E. 181, 47 Am. St. Rep. 221. It is not sufficient to agree to present cohabitation, and a future marriage when more convenient. *Robertson v. State*, 42 Ala. 509; *Duncan v. Duncan*, 10 Ohio St. 181, 182; *In re Beverson's Estate*, 47 Cal. 621; *Fryer v. Fryer* (S. C.) Rich. Eq. Cas. 85; *Maher v. Maher*, 56 N. E. 124, 126, 183 Ill. 61; *In re Maher's Estate*, 68 N. E. 159, 160, 204 Ill. 25.

#### COMMON-LAW MORTGAGE.

"A formal or common-law mortgage has the component parts of a deed, conveying the fee, with the condition added that it is to be void upon the payment of a specified debt, or the performance of some other designated thing charged. Covenants against waste are sometimes inserted." Citing *Jones Mortg.* § 60. Thus an act executed in the state of Michigan between citizens of that state, and which by the parties to the contract is intended to operate as a mortgage on real estate situated in the state of Louisiana, will be given effect as a conventional mortgage affecting third persons after due inscription. *Gates v. Gaither*, 15 South. 50, 53, 46 La. Ann. 286.

#### COMMON-LAW RECEIVER.

A person appointed to preserve the assets of a partnership during the pendency of an action was, in the absence of any statutory provision, what is known as a

"common-law receiver" or "custodian" merely. *Allen v. United Cigar Stores Co.*, 80 N. Y. Supp. 401, 402, 89 Misc. Rep. 500.

#### COMMON-LAW SEAL.

The "common-law seal" in use in this state (New York) consists simply of an impression made on a round bit of paper affixed to the instrument by muddle or by a wafer. *Metropolitan Life Ins. Co. v. Bender*, 124 N. Y. 47, 52, 28 N. E. 845, 846, 11 L. E. A. 708.

#### COMMON-LAW WIFE.

The term "common-law wife" is one not known to the law, and the law looks with no favor upon the connection indicated by it. As properly used, this term is a synonym for a woman who, having lived in a state of concubinage with a man during the time when she might have been openly declared to be his wife if she were such, only seeks to assume that relation openly after his death, and when she is impelled to it by the loss of the support he had given her, and by a desire to obtain that support by sharing in the proceeds of his property. In *re Brush*, 49 N. Y. Supp. 803, 806, 25 App. Div. 610.

#### COMMON MOB.

The difference between a "rebellious mob" and a "common mob" is that the first is in treason, and the latter a riot; the mob wants a universality of purpose to make it a rebellious mob or treason. *Harris v. York Mut. Ins. Co.*, 50 Pa. (14 Wright) 341, 350 (citing *Ang. Ins.* § 186).

#### COMMON NIGHT-WALKER.

A "common night-walker" is one whose habit is to be abroad at night for the purpose of committing some crime, of disturbing the peace, or doing some wrongful or wicked act. *State v. Dowers*, 45 N. H. 543, 544.

#### COMMON NUISANCE.

See "Public (or Common) Nuisance."

Private nuisance distinguished, see "Private Nuisance."

#### COMMON OF ESTOVERS.

A common of estovers "is the right a tenant has of taking necessary wood and timber from the woods of the lord for fuel, fencing, etc." *Van Rensselaer v. Radcliff*, 10 Wend. 639, 641, 649, 25 Am. Dec. 582.

#### COMMON OF FISHERY.

See "Common Fishery."

A "common of fishery" is a right held by an individual in common with the owner

of the soil covered by the water in question. *Albright v. Sussex County Lake & Park Commission*, 53 Atl. 612, 618, 68 N. J. Law, 523.

A "common of fishery" is the right to fish in the waters of another. *Hardin v. Jordan*, 11 Sup. Ct. 808, 814, 140 U. S. 371, 35 L. Ed. 423.

It differs from a "free" or "several" fishery in that it is not exclusive. *Freary v. Cooke*, 14 Mass. 488, 489 (citing 2 Bl. Comm. 89, 40).

#### COMMON OF PASTURE.

A "common of pasture" is the right to feed the beasts of one person on the lands of another. *Van Rensselaer v. Radcliff*, 10 Wend. 639, 647, 25 Am. Dec. 582.

#### COMMON OF PISCARY.

A "common of piscary" is the right the tenant has to take fish in the waters of the lord. *Van Rensselaer v. Radcliff*, 10 Wend. 639, 641, 649, 25 Am. Dec. 582.

#### COMMON OF TURBARY.

A "common of turbary" is the right of a tenant to cut turf on the grounds of the lord. *Van Rensselaer v. Radcliff*, 10 Wend. 639, 647, 25 Am. Dec. 582.

#### COMMON ORDER.

Under the practice of Virginia, when the defendant is brought into court by a summons requiring him to appear on a certain day, when a declaration will be or has been filed, if he fail to appear and plead, the clerk enters what is called a "common order." This rule is called "common order" because it is a usual order. *Mahoney v. New South Building & Loan Ass'n* (U. S.) 70 Fed. 513.

#### COMMON PERIL.

A "common peril," within the meaning of the rule that, to constitute a right of general average for goods thrown overboard, the act must have been the result of a common peril affecting vessel and cargo, means a peril which is from without, such as the sea, winds, waves, rocks, shoals, pirates, and the like. Certain it is we have found no case of a different character, none arising from the state and condition of the cargo, as fruit or fish in a putrid state, whether it arises from the nature and inherent qualities of the cargo, or has been superinduced by water getting upon it from some cause wholly unavoidable, and involving no fault in the carrier. It is doubtless true in the sense that a peril by fire threatens the whole property, but this is not enough to make the loss one of a peculiar



character denominated a "jettison." The peril is general, but the cause is not. The latter is special, local, and peculiar, and, when removed, the rest remains uninjured and secure. The peril must also be a sea peril. Fire aboard ship is not a common peril within the meaning of the rule. *Slater v. Hayward Rubber Co.*, 26 Conn. 128, 142.

### COMMON PLEAS.

"Common pleas," as the term is used to designate a court, is generally understood to mean a court having jurisdiction of actions or pleas brought by private persons against private persons, or by the government where the cause is of a civil nature. In England, whence the phrase was derived, the courts of "common pleas" were so called to distinguish them from "pleas of the crown." *Dallett v. Feltus* (Pa.) 7 Phila. 627, 628.

### COMMON PROCEEDING.

A "common proceeding," within Code, § 2606, defining a civil action to be a "common proceeding" in a court of justice, etc., is that kind of a proceeding which is instituted and conducted in a manner common to other civil actions. *Brown v. Crego*, 29 Iowa, 321, 322.

### COMMON PROPERTY.

See "Community."

Under the acts defining the rights of husband and wife, property of the wife owned by her before marriage, and that acquired afterwards by gift, bequest, etc., shall be her separate property, but the rents and profits of her separate property are common property. *Snyder v. Webb*, 3 Cal. 83, 87.

The words "common property," as used in the chapter relating to community land grants, is held to "be, mean, and intend to include only such lands as have been granted heretofore to a colony, community, or town, and which under the terms of this act shall be vested in a corporation hereby authorized to be formed." *Comp. Laws N. M.* 1897, § 2184.

### COMMON RECOVERY.

At common law a married woman's land could be alienated only by either levying a fine or suffering a "recovery," as the collusive suits to that end were technically called. "A common recovery is a collusive suit instituted by the intended grantee against the intended grantor, in which the land in question is supposed to be recovered by the grantee." *Christy v. Burch*, 2 South. 253, 259, 25 Fla. 942 (citing 2 Bl. Comm. 343).

Though it has the form of a suit at law and the effect of a judgment at common law, yet the whole transaction is one of common assurance, and the recovery is a creature and instrument of the tenant in tail for whose benefit the recovery is suffered. *Lyle v. Richards* (Pa.) 9 Serg. & R. 322, 363.

### COMMON REPUTE.

"Common repute" is nothing more than the prevailing belief in a certain community, and to allow that to be adduced as evidence, upon an issue of title, would be to substitute the belief or opinion of the community for that of the jury called on to pass upon such issue. *Brown v. Foster*, 41 S. C. 118, 121, 19 S. E. 299, 301 (citing *Sexton v. Hollis*, 26 S. C. 231, 235, 236, 1 S. E. 895).

### COMMON RESORT.

Though women with soiled reputations for chastity may visit a house kept for the purpose of selling beer and cigars, etc., and for a variety theater, in order that they may witness the theatrical performance and purchase such articles as are there kept for sale, it is not a house kept as a "common resort for prostitutes," within the meaning of a statute declaring a house kept for such purpose to be a disorderly house. *Johnson v. State*, 13 S. W. 1005, 1006, 28 Tex. App. 562.

### COMMON RIGHT.

Kent says: "Corporations or bodies politic are the most usual franchises known in our law." 3 Kent, Comm. 459. It is true that the privileges so granted by the government do not pertain to the citizens of the state by common right. But what is the "common right" here referred to? Is it not a right which pertains to the citizens by the common law, the investiture of which is not to be looked for in any special law, whether established by a Constitution or an act of the Legislature? Coke says: "De commun droit—of common right—that is, by the common law, because the common law is the best and most common birth-right that the subject hath for the safeguard and defense not only of his goods, lands, and revenues, but of his wife and children. \* \* \* This common law of England is sometimes called 'right,' sometimes 'common right,' and sometimes 'communis justitia.'" *Spring Valley Waterworks v. Schottler*, 62 Cal. 69, 106 (quoting *Co. Inst.* 142a).

### COMMON ROAD.

See "Common Highway."

The word "highway" may include a county bridge, and shall be equivalent to the

words "county way," "county road," and "common road." Rev. Laws Mass. 1902, p. 88, c. 8, § 5, subd. 4.

#### COMMON RULE.

A "common rule" was one in which it was agreed that a majority should decide in case of necessity, and in particular meant that the referee should proceed if one of the parties, upon being duly notified, should not appear. *Billington v. Sprague*, 22 Me. (9 Shep.) 34, 44.

#### COMMON SCHOOL.

"Common schools," as used in Const. Amend. art. 18, providing that all moneys raised by taxation in the towns and cities for the support of public schools, and all moneys which may be appropriated by the state for the support of common schools, shall be applied to, and expended in no other schools than those which are conducted according to law, etc., is used in its broadest sense, and is synonymous with "public schools" as there used. *Jenkins v. Inhabitants of Andover*, 103 Mass. 94, 98.

"Common schools" are such as are organized by law, and are not confined to any class of pupils, but are open to all. They are such that the trustees have no power to admit or reject pupils arbitrarily, nor to make rules or regulations fixing a standard of admission for members. They are bound to instruct all the children who present themselves, without regard to their social relations, their station in life, or their religious faith. The word "common," as applied to our schools, bears the broadest and most comprehensive signification, it being equivalent to public, universal, open to all, and they are common to all children in the sense that public highways are common to all persons who may choose to ride or drive thereon. Common schools are distinct from such schools as savor of sectarian opinion or control. *People v. Brooklyn Board of Education*, 13 Barb. 400, 410.

"Common schools," as used in a statute giving a common council of a city power to take and hold property transferred to them for the use of the common schools of the city, means schools that are common or open to all in a certain locality. In this sense common schools of the state have always been free schools; but it must be conceded that the general understanding of the provisions of law confirm this: that the common schools, in one sense, are not free; that is, that scholars attending them could not do so free of all charge and expense. *Le Couteulx v. City of Buffalo*, 33 N. Y. 333, 337.

A judgment stating that the recovery was for services as a "teacher of common

schools" meant a teacher of the common schools of the state provided for by law. *Town of Milford v. Simpson*, 11 Ind. 520, 521.

The word "common," used in connection with the word "schools," means that the schools are to be open to all without regard to denomination; that they belong to the public. The word "common" has no reference to the kind of studies to be taught in such school, nor as to any method or rule of conduct or government. While a university education cannot be given in the public schools, yet within the limits of a common school education, as distinguished from that given in universities, the State Legislature has full discretion as to what shall be taught. *Roach v. Board of Directors of St. Louis Public Schools*, 7 Mo. App. 567.

#### College distinguished.

"Common schools" are distinct from academies, colleges, and private seminaries of learning. *People v. Brooklyn Board of Education*, 13 Barb. 400, 410.

"Common schools," as used in Const. Amend. art. 18, providing that all moneys which may be appropriated by the state for the support of common schools shall be applied to and expended on no other schools than those which are conducted, according to law, under the order and superintendence of the authorities of the town or city in which the money is to be expended, cannot be construed as applying to the higher seminaries of learning, such as incorporated academies and colleges. "These, in a certain broad and comprehensive sense, are public institutions, because they are controlled by corporations, and are usually open to all persons who are willing to comply with the terms of admission and tuition. But the broad line of distinction between these and the common schools is that the latter are supported by general taxation, that they are open to all free of expense, and that they are under the immediate control and superintendence of agents appointed by the voters of each town and city." *Merrick v. Inhabitants of Amherst*, 94 Mass. (12 Allen) 500, 508.

Without being able to give any accurate definition of a "common school," it is safe to say the common understanding is that it is a school that begins with the rudimentary elements of education, whatever changes it may embrace, as contradistinguished from academies or universities, devoted exclusively to teaching advanced pupils in the classics and in all the higher branches of study usually included in the curriculum of the colleges. *Powell v. Board of Education*, 97 Ill. 375, 378, 37 Am. Rep. 123.

"The term 'school,' *ex vi termini*, does not imply a restriction to the rudiments of an education. When contrasted with the term 'college' or 'university,' it may and ordinarily does imply a lower grade, but just where the one ends and the other begins may not be easy to detect." *Roach v. Board of Trustees of St. Louis Public Schools*, 77 Mo. 484, 487.

#### High school.

Const. art. 6, § 2, authorizing a uniform system of "common schools," includes high schools, as well as schools teaching mere elementary branches. *Board of Education of City of Topeka v. Welch*, 83 Pac. 654, 658, 51 Kan. 792.

Common schools shall include all district grades and high schools that are maintained at public expense in each school district, and under the control of boards of directors. *Ballinger's Ann. Codes & St. Wash.* 1897, § 2334.

#### Normal school.

"In construing a constitutional provision providing that the common school fund, etc., shall be held inviolate for the purpose of constraining a system of common schools, the court say that the words 'common schools' have in themselves no ascertained and definite signification. It is only by looking into the history of the common-school system of Kentucky that we are enabled to understand what was meant by those words. If we look to the legislation on this subject prior to the adoption of the present Constitution, we find that a 'common school' was a school taught in a district laid out by authorities of school laws, under the control of trustees elected under those laws, by a teacher, qualified according to law to teach. *Rev. St. c. 88, art. 8, § 1*, prepared by three of the ablest lawyers of the state, two of whom have been members of the convention by which the Constitution was framed, after declaring that the object of that chapter was to carry into effect the intention of the people, as expressed in their Constitution, in promoting the establishment throughout the state of a system of common schools, proceeded to declare that every school which was put under the control of trustees and commissioners pursuant to that chapter, and which should be actually kept by a qualified teacher, and at which every free white child in the district between the ages of 6 and 18 years should have the privilege of attending, whether contributing anything toward defraying the expenses thereof or not, and none other, should be deemed a common school, or entitled to any contribution out of the school fund." The term does not include normal schools. *Collins v. Henderson*, 74 Ky. (11 Bush) 74, 82.

"Common schools," within the meaning of Const. 1846, art. 9, § 1, declaring that the

capital of the common school fund shall be kept inviolate, and that its revenues shall be applied to the support of the common schools, does not include normal schools, which are not intended for the education of the children of the inhabitants of the districts where they are located, but for the training of teachers for all the common schools, and therefore the income of the common school fund cannot be devoted to the support of such normal schools. *Gordon v. Cornes*, 47 N. Y. 608, 616; *People v. Crissey*, 45 Hun, 19, 21.

#### Orphan asylum.

Orphan asylums are not "common schools" within the constitutional meaning of such term as used in article 9, § 1, providing that the revenue of the common school fund shall be applied to the support of common schools, so that moneys devoted by the Constitution for such support cannot be lawfully appropriated to the support of such asylums. *St. Patrick's Orphan Asylum v. Board of Education of City of Rochester*, 84 How. Prac. 227.

#### COMMON SCHOOL EDUCATION.

The phrase "a common school education" is one not easily defined. One might say that a student instructed in reading, writing, geography, English grammar, and arithmetic had received a common school education, while another who had more enlarged notions on the subject might insist that history, philosophy, and algebra be included. It would thus be impossible to find two persons who would in all respects agree in regard to what constituted a common school education. Const. art. 8, § 1, providing that the General Assembly shall provide a thorough and efficient system of free schools, whereby all the children of the state may receive a good "common school education," is intended as a limitation upon the power of the Legislature to provide for the maintenance of free schools by lawful taxation of a different character from that named in the section; and *School Law, § 35*, providing for the creation and maintenance of high schools for the township, on a vote of the people, is not in violation of the Constitution, but is a valid and binding law. *Richards v. Raymond*, 92 Ill. 612, 617, 34 Am. Rep. 151.

#### COMMON SCHOOL FUND.

In Const. art. 8, § 4, providing that the common school fund, the interest of which shall be exclusively applied to the support and maintenance of common schools and purchase of suitable libraries and apparatus therefor, should be derived from certain sources, the term "common school fund" means a sum which was to operate as a foundation of the common school system, the

income of which is devoted to a specific object, to wit, the support and maintenance of the common schools. *State v. Barnes*, 22 Fla. 8, 11.

### COMMON SCHOOL SYSTEM.

See "System."

### COMMON SCOLD.

A "common scold," in the ancient common law, was a woman whose habit and the exercise of the capacity of scolding was sufficient to make her a public nuisance to her neighborhood. It was an indictable offense, punishable by being submerged in water by means of the ducking stool. *United States v. Royall* (U. S.) 27 Fed. Cas. 907, 909.

A "common scold" is a woman who makes a too free use of her tongue. It was held to be an offense in Pennsylvania, the court saying that, "as to the unreasonableness of holding women liable to punishment for a too free use of their tongue, it is enough to say that the common law, which is the expressed wisdom of ages, adjudges that it is not unreasonable. The argument drawn from the indelicacy and unreasonableness of such a prosecution of a female should be addressed, therefore, to the Legislature rather than to the court, for courts of justice, who declare rather than make the law, are invincible to all considerations of gallantry." *Commonwealth v. Mohn*, 52 Pa. (2 P. F. Smith) 243, 246, 91 Am. Dec. 153.

A woman does not become a common scold by scolding several persons on several occasions. It is the habit of scolding resulting in a public nuisance which is criminal. *Baker v. State*, 20 Atl. 858, 53 N. J. Law (24 Vroom) 45.

### COMMON SELLER.

The offense of "common seller" of intoxicating liquors is a frequent repetition of the act of selling without authority, and upon common principles there must be such a continuation, or rather repetition, of unlawful sales as would prove the allegation in the complaint of being a common seller. The eighteenth section of the act of 1852, however, provides that any number of sales exceeding five may subject a person to be adjudged a "common seller." The offense of being a common seller is but one, and is an entire offense, and it may be necessary to prove all of the several and distinct acts of sale which the party has been guilty of to make out the offense, or a less number may suffice; but we think if a respondent is charged with being a "common seller," and is convicted and sentenced for that offense, it must be a conclusive bar, up to the time the complaint is made, to any prosecution

grounded upon any one act of sale prior to that time, whether it was proved or attempted to be proved on the trial or not. *State v. Nutt*, 28 Vt. 598, 602.

The statutory criminal known as a "common seller of liquors" is one who sells commonly spirituous or forbidden liquors without license, and it has been decided that to establish this crime the state must prove at least three different sales by the accused, and in some states this alone would not suffice to prove the offense in all cases. *Moundsville v. Fountain*, 27 W. Va. 182, 194.

"Common seller," as used in Laws 1858, c. 33, § 8, providing that no person shall be a "common seller" of intoxicating liquors, means one who sells frequently, usually, customarily, or habitually, "common" being defined by Worcester, as "frequent, usual, customary, habitual." No certain definite number of acts are necessary to constitute one a "common seller," but it is to be determined by whether one sells frequently, usually, customarily, or habitually. *State v. O'Conner*, 49 Me. 594, 596.

A common seller of liquor is established by proof of three sales either to one or several persons. *Commonwealth v. Tubbs*, 55 Mass. (1 Cush.) 2, 4.

### COMMON SERVICE.

"Common service," within the statutory requirement that to constitute co-employees fellow servants they must be engaged in the common service, means the thing or work being performed for the employer at the time of the accident, and out of which it grew. *Gulf, O. & S. F. Ry. Co. v. Warner*, 35 S. W. 364, 365, 89 Tex. 475 (cited in *Masterson v. Galveston, H. & S. A. Ry. Co.* [Tex.] 42 S. W. 1001, 1002); *Masterson v. Galveston, H. & S. A. Ry. Co.* (Tex.) 42 S. W. 1001, 1002. Under such definition, the crews of separate engines, one engaged in switching and the other having additional work, were not engaged in "common service" so as to be fellow servants. *Masterson v. Galveston, H. & S. A. Ry. Co.* (Tex.) 42 S. W. 1001, 1002.

"Common service" is a service which admits of a common participation, no one of the parties in such relation being placed in control over the other. *Howard v. Denver & R. G. R. Co.* (U. S.) 26 Fed. 837, 841 (citing *Cleveland, C. & C. R. Co. v. Keary*, 3 Ohio St. 201).

"Common service," as used in a statement that in order to constitute two or more employees fellow servants they must be engaged in a common service, means the thing or work performed for the employer at a specified time at which the relationship is sought to be determined. *Patterson v. Houston & T. C. R. Co.* (Tex.) 40 S. W. 442, 445.

**COMMON SEWER.**

In Gen. St. c. 48, § 4, requiring every person who empties his particular drain into the "common sewer," not only to pay the city or town a proportionate part of the charge of making and repairing the same, but also of the charge of making and repairing "other main drains and common sewers" through which the same discharges, the term "common sewer" does not mean that connecting sewers forming a continuous line shall be deemed to be a single common sewer, but such line may be divided by the municipal authorities and designated as "separate sewers." *Ayer v. City of Somerville*, 10 N. E. 457, 458, 143 Mass. 585.

A structure underground constructed by a city, not only to carry off the sewerage from the streets and houses, but also to divert the waters of a brook, is a "common sewer" within the meaning of a provision in the city charter authorizing the city to lay out common sewers. An appropriate use of a common sewer may be to relieve from the natural, as well as the surface, flow of water. *Bennett v. City of New Bedford*, 110 Mass. 433, 438.

**COMMON SOLDIERS.**

The term "common soldiers," as used in reference to the United States army, does not include cadets at West Point, who are inferior officers, and for purposes of instruction may be required to serve as officers, noncommissioned officers, or privates. *Babbitt v. United States (U. S.)* 16 Ct. Cl. 202, 222.

The term "common soldier" includes a gunner in a train of artillery, though he is appointed by warrant, receives a high compensation, and takes an oath; as his extraordinary pay is only in consideration of the skill which is requisite in his place. *Johnson v. Louth*, 1 Strange, 7.

**COMMON STOCK.**

Where a person agreed that of the capital invested in a business he should keep a certain sum invested in the business, to be of the capital of said business, such sum was contributed to the "common stock" of the business. *Richardson v. Carlton*, 80 N. W. 532, 534, 109 Iowa, 515.

**Preferred stock distinguished.**

"Common stock" differs in many ways from what is termed "preferred stock." The owner of the former is entitled to an equal pro rata division of the profits, if there be any, but has no advantage of any other shareholder or class of shareholders in common stock. "Preferred stock," on the other hand, generally entitles its owner to dividends out of the net profits before and in

preference to the holders of the common stock. *Storrow v. Texas Consol. Compress & Mfg. Ass'n (U. S.)* 87 Fed. 612, 616, 31 C. C. A. 139.

**COMMON SURETY.**

A surety company permitted by law to act as sole surety for trustees, guardians, administrators, and other fiduciaries may be called a "common surety," not exactly in the nature of a common carrier, like railroads and telegraph companies, but still one of those public agencies to which are given unusual powers, and who have assumed the most sacred responsibilities. *Bank of Tarboro v. Fidelity & Deposit Co.*, 38 S. E. 908, 910, 128 N. C. 366, 83 Am. St. Rep. 682.

**COMMON THIEF.**

A "common thief" is one who by practice and habit is a thief. *World v. State*, 50 Md. 49, 54.

Under a statute providing that every person who shall be convicted at the same term of the court, either as principal or accessory, in three distinct larcenies, shall be deemed a common and notorious thief, and be punished by imprisonment for not more than 20 years, one who was convicted at the same term of court of two distinct larcenies and also of housebreaking, the indictment in a later case also charging larceny, cannot be sentenced as a common thief. *Commonwealth v. Hope*, 39 Mass. (22 Pick.) 1, 3.

Rev. St. c. 126, § 19, provides that a person convicted of three distinct larcenies at the same term of court shall be deemed a common, notorious thief, and shall be punished. *Haggett v. Commonwealth*, 44 Mass. (3 Metc.) 457, 459.

An indictment with three counts for stealing property on the same day, alleged to be the property of three persons, each count being for one person's property, does not show that the theft was one act, done at one time, taking by that one act the property of different persons. In such case the court are of the opinion that it would not be three distinct larcenies within the provisions of the statute requiring the person convicted of three distinct larcenies at the same term of court to be punished as a common and notorious thief. *Stevens v. Commonwealth*, 45 Mass. (4 Metc.) 360, 364.

**COMMON THING.**

Things which are "common" are those the ownership of which belongs to nobody in particular, and which all men may freely use conformably with the use for which nature has intended them; such as air, running water, the sea, and its shores. *Civ. Code La.* 1900, art. 450.

**COMMON TIPPLING HOUSE.**

"Common tipping house," as used in a statute prohibiting the keeping of a disorderly common tipping house, meant a house that was commonly resorted to for drinking purposes, and which commonly became disorderly. Thus it was not sufficient to satisfy such offense that the house was once used for tipping and there was one act of disorder therein. *Dunnaway v. State*, 17 Tenn. (9 Yerg.) 350, 352.

**COMMON TOOLS OF TRADE.**

A set of harness does not fall within the words "common tools of trade," as used in the Georgia statute exempting such tools of trade from execution. *Kirksey v. Rowe*, 40 S. E. 990, 114 Ga. 893, 88 Am. St. Rep. 65.

Act 1822, exempting "common tools" of the debtor's trade from levy or sale under execution, means some simple instrument used by the hand by which a manual occupation is performed, and therefore cannot be held to exempt lawbooks contained in a lawyer's library, though they are necessary for the proper prosecution of the lawyer's profession. *Lenoir v. Weeks*, 20 Ga. 596, 597.

**COMMON USAGE.**

The phrase "according to common usage," in a statute authorizing the court to grant a "dedimus potestatem to take depositions according to common usage," means according to the existing practice, whether at law or in equity; that is, by a commission upon interrogatories, as was the common usage at the time when the statute was passed. There is nothing in the phrase "according to common usage" which imports that the federal courts in any of the states must adopt all subsequent new regulations that may be from time to time enacted by state legislatures or adopted by state practice. *United States v. Fifty Boxes and Packages of Lace* (U. S.) 92 Fed. 601, 602.

A "common usage," within the meaning of Rev. St. § 866 [U. S. Comp. St. 1901, p. 663], cannot be established by a state statute. Counsel cited to us an opinion by Judge McCreary in which he interprets the words "common usage" to mean the usage prevalent in the state, but Judge Miller, in writing his opinion, very emphatically says: "It is not according to common usage to call a party in advance of the trial at law, and subject him to all the skill of the opposing counsel, to extract something which he may then use or not, as suits his purpose. This is a very special usage, dependent wholly upon the New York statutes." *Turner v. Shackman* (U. S.) 27 Fed. 183, 184.

"Common usage," as used in Rev. St. § 866 [U. S. Comp. St. 1901, p. 663], authoriz-

ing the taking of depositions in equity cases according to common usage, means common usage in the practice in courts of equity. *Bischoffsheim v. Baltzer* (U. S.) 10 Fed. 1, 3; *United States v. Parrott* (U. S.) 27 Fed. Cas. 444, 447.

"Common usage," as used in Rev. St. § 866 [U. S. Comp. St. 1901, p. 663], authorizing the granting of a dedimus to take depositions according to common usage, means in accordance with the mode provided for by the statutes of the state. *Giles v. Paxson* (U. S.) 86 Fed. 882, 883.

As used in Rev. St. § 866 [U. S. Comp. St. 1901, p. 663], providing that any of the courts of the United States may grant a dedimus to take depositions according to common usage, the words "common usage" mean the common usage of the courts of the state in which the federal court is sitting, and are not synonymous with "common law." *United States v. Cameron* (U. S.) 15 Fed. 794, 796.

**COMMON USE.**

"Common use" and "the care of a prudent man" are not necessarily equivalent terms. That a machine is in common use is at the most a circumstance bearing upon the question of negligence. A machine might be one of a kind in common use, or even the best in use, and yet its safety, in respect to its position or setting in a mill, be questionable. It would hardly be a defense for an employer to say that a certain machine upon which an employé had been injured was one of a kind in common use, if the employer was compelled as a prudent man to admit its use was, in his own judgment, dangerous. *Geno v. Fall Mountain Paper Co.*, 35 Atl. 475, 478, 68 Vt. 568.

**COMMON UTTERER OF COUNTERFEIT COIN.**

Under a statute providing that if any person shall at the same term of court be convicted of either of the offenses defined in the preceding section, and relating to his having in possession any number of pieces of counterfeit coins less than 10, or uttering and passing out such coins as true, knowing the same to be false, he shall be deemed a common utterer of counterfeit coin, and punished by imprisonment of not more than 20 years, one who is convicted under two indictments charging offenses under that section, and also under another indictment at the same term of court charging him with the more aggravated offense, described in another section, of having in his possession at the same time 10 or more pieces of counterfeit coin, knowing the same to be false and counterfeit, and with intent to utter or pass the same as true, is not a common utterer of counterfeit coin, and cannot be sentenced as

such. *Murray v. Commonwealth*, 54 Mass. (18 Metc.) 514, 516.

### COMMON WALL.

A "common or party wall" is one which has been built at a common expense, or one which has been built by one party, but in which another has acquired a common right. Every wall or separation between two buildings is presumed to be a common or party wall. *Campbell v. Mesier*, 4 Johns. Ch. 334, 342, 8 Am. Dec. 570.

### COMMONERS.

See "Free Commoners."

### COMMONLY SAID.

The phrase, in the preface to the announcement of a legal principle, that "it is commonly said," means it is commonly the legal opinion; that is, it is the common opinion, and communis opinio is of good authority in law. *O'Donnell v. Glenn*, 23 Pac. 1018, 1019, 9 Mont. 452, 8 L. R. A. 629.

### COMMONS.

See "Town Commons."

The recognized part of the Spanish town or commons of St. Louis consisted of town lots, outlots, common field lots, and commons. To constitute an outlot, it must be shown to have had an existence as such under the former government prior to the 20th day of December, 1803, with a definite location and boundaries, and land included in such an outlot could not have been commons. *Vasquez v. Ewing*, 42 Mo. 247, 256. In the absence of any official survey of commons in lands ceded to the United States and included in the Louisiana Purchase, the only way in which a title to commons under the act of Congress of June 13, 1812, can be shown, is by proof of some grant, concession, survey, or actual possession, claim, or user, of some definite tract of land as commons prior to the 20th day of December, 1823. Without such evidence there can be no title to commons under that act where no official survey is shown. *Robbins v. Eckler*, 36 Mo. 494, 504.

The title to the "commons" of St. Louis at the time Louisiana was ceded to the United States is as follows: A claim for 4,293 arpents, situated adjoining the town of St. Louis, known by the name of "St. Louis Commons," and said to have been granted by a decree of Lieut. Gov. Cruzat in 1782, filed in the office of the recorder. At the same time was filed a document containing the proceedings of certain inhabitants of St. Louis for the appointment of syndics on the 22d day of September, 1782, with the approbation of the Lieutenant Governor, proceed-

ing to establish certain regulations concerning the inclosure of the commons, and these regulations were signed by said syndics and the Lieutenant Governor. A survey of the commons was made by James McKay in 1806 at the request of the principal inhabitants, and on the 13th of June, 1812, by act of Congress, the title of the inhabitants of St. Louis to its commons was confirmed. *Mackay's Widow v. Dillon*, 7 Mo. 7, 11.

It is said that the Cahokia "commons" were granted by the French government to the inhabitants first settling Cahokia, and that their title thereto was recognized and secured to them by the treaty of cession from that government to the government of Great Britain, and by the latter by a like treaty with the government of the United States, and if not, then the act of Congress of 1812 granted these commons to the inhabitants of that village. *Lavelle v. Strobel*, 89 Ill. 370, 378 (cited in *Haps v. Hewitt*, 97 Ill. 498, 502).

The city of St. Louis, in disposing of her commons under an act of the Legislature, does not occupy the position of a mere trustee, but the position similar to that which the United States does as a great landed proprietor, and in an action of ejectment by the owner, claiming by a deed from the city, one who does not claim the title from the same source cannot question the validity of such deed. *Swartz v. Page*, 13 Mo. 603, 604.

Under the statute giving power to county courts to incorporate towns and villages and their commons, by the term "their commons" is meant lands included in or belonging to the town, set apart for public uses. The natural import of the word, when used in connection with or with reference to towns or villages, is public ground belonging or pertaining to the town or village. The word "commons," as used in the statute, was certainly never meant to include the farms and farming lands of individuals who happen to reside and own lands in the vicinity of the town or village. *State ex rel. Patterson v. McReynolds*, 61 Mo. 203, 210.

### COMMONWEALTH.

"Commonwealth," as used in recognizances payable to the commonwealth of West Virginia, is synonymous with the word "state," and such recognizances are sufficient. *State v. Lambert*, 28 S. E. 930, 931, 44 W. Va. 308.

Act 1889, giving a corporation the power and right to become security on any writ of error or appeal, or in any proceeding instituted in any court of this commonwealth in which security may be required, may be understood to restrict the power to cases in the courts of the state, and not as extending to cases in the United States Circuit Courts. *Black v. Black* (U. S.) 53 Fed. 985, 986.

**COMMONWEALTH PAPER.**

In an agreement binding the defendant to pay \$210 in a good wagon at its value in commonwealth paper, the balance, if any, to be discharged in the same currency, "commonwealth paper" is not synonymous with "commonwealth bank notes," and hence, in an action on the agreement, the value of commonwealth paper at the time when the contract was to have been performed must be ascertained by proof, and the recovery be limited to such sum as the value of such paper represented at that time in lawful money of the United States. *Brashear v. Kendall*, 22 Ky. (6 T. B. Mon.) 545, 548.

**COMMORANCY—COMMORANT.**

"Commorancy" is defined in Webster's Dictionary as meaning, in law, "residence, temporarily or for a short time." The term, from its derivation from the Latin, implies something less than a regular residence, such as a staying, a sojourning, and, more literally, a tarrying. It was as used to express these minor degrees of residence that the word got in vogue in our jurisprudence, though not often so used. A commorancy may be all the residence a man has, but usually not. The distinction is between a permanent and a temporary home. *Pullen v. Monk*, 82 Me. 412, 19 Atl. 909. See, also, *Gilman v. Inman*, 85 Me. 105, 26 Atl. 1049, where the court said, "The etymological signification implies an abiding or tarrying for some appreciable, though temporary, duration, less than a permanent residence." It is not such a residence as will justify service of process at the last and usual place of abode of a person. *Thomas v. Thomas*, 52 Atl. 642, 643, 96 Me. 223, 90 Am. St. Rep. 342.

"Commorant," as used in Rev. St. p. 11, § 6, which provides that no assignment of wages is valid against any other person than the parties thereto unless such assignment is recorded by the clerk of the city, town, or plantation organized for any purpose, in which the assignor is commorant while earning such wages, implies an abiding or tarrying for some appreciable, though temporary, duration, less than a permanent residence, and would apply to laborers in logging camps, who live there during the logging season (*Wright v. Smith*, 74 Me. 495), and also laborers working under contractors constructing a railroad, who live for some time in camps near their work (*Pullen v. Monk*, 82 Me. 412, 19 Atl. 909). But it does not apply to one who is employed as river driver, and who changes his place of encampment from day to day. *Gilman v. Inman*, 26 Atl. 1049, 1050, 85 Me. 105.

Where a person is described as in one place within the commonwealth and commorant at another, it clearly indicates that the former is his domicile, dwelling house,

or place of abode, and the latter a place of temporary residence. *Ames v. Winsor*, 33 Mass. (19 Pick.) 247, 248.

**COMMOTION.**

See "Civil Commotion."

**COMMUNE.**

Sir Edward Coke's comment on the charter in the twenty-eighth year of Edward the First, providing that the Great Charter of the liberties of Englishmen granted to all the communality of the realm shall be observed, kept, and maintained in every point, is that here "commune" is taken for "people." Inhabitants of Township of Bernards v. Allen, 39 Atl. 716, 718, 61 N. J. Law, 228 (citing 2 Co. Inst. 540).

**COMMUNICATE.**

Under an insurance policy covering a mill and additions, adjoining and communicating buildings, certain buildings "were adjoining and communicating buildings because they were within a few feet of, and next to, the mill building, and because their common use in the business made it necessary that some communication or connection should exist between them and the mill building. If they had not been in common use with the mill building—if, for instance, they had been used for stores or dwelling houses—the evidence of the meaning of these terms in the policy would be less convincing. The parties, knowing the relative locations of the buildings and their interdependent uses, would be guilty of no great perversion of language in designating the smaller buildings as 'adjoining and communicating' with the larger building. The word 'communicating' alone does not convey a definite meaning. There are many senses in which communication may be said to exist, as by telegraph, telephone, or conversation between individuals, or by physical contact or apparent uses between inanimate objects. The context, purposes, and circumstances in view of which it is used must be resorted to, to determine its significance in a particular case. *Kendall v. Green*, 67 N. H. 557, 562, 563, 42 Atl. 178. Nor does the literal meaning of the word 'adjoining' when used in a contract or statute, exclude all other evidence of intention and of the subject-matter involved. If it is apparent it was used in its literal and restricted sense, or if there is no evidence indicating its use in a different sense, the court would not be justified in giving it some other or more comprehensive meaning. In a criminal statute, the meaning of 'adjoining' may properly be determined by the legislative purpose requiring a strict construction, such as was applied in *State v. Downs*,



39 N. H. 320." *Marsh v. Concord Mut. Fire Ins. Co.*, 51 Atl. 898, 899, 71 N. H. 253.

"Communicating" as used in a fire insurance policy on a frame mill building and all additions thereto adjoining and communicating, appropriately describes a dry house and engine house not built onto the main building, but which communicates with the main building by means of a movable bridge. *Marsh v. New Hampshire Fire Ins. Co.*, 49 Atl. 88, 70 N. H. 590.

A fire is none the less "communicated" from an engine because intermediate land, which was burned over, belonged to other persons, or because the distance was half a mile. *Perley v. Eastern R. Co.*, 98 Mass. 414, 418, 98 Am. Dec. 645.

### COMMUNICATIONS.

See "Confidential Communication"; "Privileged Communication."

The fact of a witness having a conversation with a deceased person is not a "communication," within the meaning of Code, § 399, prohibiting the giving of testimony as to a transaction or communication with a deceased person. *Hier v. Grant*, 47 N. Y. 278, 281.

"Communicate" means substantially the same as "converse"; so that an oath administered to an officer not to allow a jury to converse, etc., is substantially the same as not to allow them to communicate. *Scott v. State*, 75 Tenn. (7 Lea) 232, 233.

The word "communication," in the statute making it a criminal offense to send or convey an insulting, etc., letter or communication, was construed to include a writing inclosed in an envelope and transmitted by mail, and it was said that such writing could properly be called either a "letter" or a "communication." *Larison v. State*, 9 Atl. 700, 701, 49 N. J. Law (20 Vroom) 256, 60 Am. Rep. 606.

The delivery of a deed by a husband to a wife is not a "communication," within Code Civ. Proc. § 1881, subd. 1, disqualifying as witnesses a husband or wife as to any communication made by one to the other during marriage. *Poulson v. Stanley*, 55 Pac. 605, 606, 122 Cal. 655, 68 Am. St. Rep. 73.

#### As confidential communications.

As used in 3 How. Ann. St. § 7546, providing that neither husband nor wife, during marriage or afterwards, without the consent of the other, shall be examined as to any communication made by or to the other during marriage, the word "communication" must be understood as having been used in the sense which had attached to it by its common use in the same connection, as such provision is only declaratory to the

common law, and hence applies to such communications as were confidential. *Hagerman v. Wigent*, 65 N. W. 756, 757, 108 Mich. 192.

The word "communication," as used in Civ. Code Prac. § 606, providing, "Neither husband nor wife shall be competent for or against each other, or concerning any communication made by one to the other during marriage, whether called while that relation subsisted or afterwards," etc., should be given a liberal construction. It should not be confined to a mere statement by the husband to the wife, or vice versa; it should be construed to embrace all knowledge upon the part of the one or the other obtained by reason of the marriage relation, and which, but for the confidence growing out of it, would not have been known to the party. *Commonwealth v. Sapp*, 14 S. W. 834, 835, 12 Ky. Law Rep. 484, 486, 90 Ky. 580, 29 Am. St. Rep. 405.

"Communications," as used in Gen. St. 1870, c. 73, § 10, making communications between husband and wife inadmissible in evidence, is employed without qualification or limitation, and includes all conversations, though not on subjects of a confidential nature. *Leppia v. Minnesota Tribune*, 35 Minn. 310, 29 N. W. 127, 128.

### COMMUNION OF PROFITS.

By the term "communion of profits," as used in defining the elements of a partnership, is meant a joint and mutual interest in the profits, not simply a joint interest in the property; for persons may be jointly concerned in the purchase of goods, yet, if they are not jointly concerned in the profits arising from the goods after they are purchased, they are not partners as between themselves. *Setzer v. Beale*, 19 W. Va. 274, 287.

"A communion of profits, within the meaning of the rule that to constitute a partnership between the parties themselves there must be a communion of profits between them, implies a communion of loss, for every man who has a share of the profits of a trade ought also to bear his share of the loss. *Collier, Partn.* § 18. Neither reason nor authority seems to favor the rule that there may be a legal and valid partnership, though one or more of the partners are guarantied by the others against loss." *Whitehill v. Schickle*, 43 Mo. 537, 544.

### COMMUNITY.

The term "community" is sometimes used to designate a body of people residing in a given territory whose property is acquired and used in common. Such a community, whether incorporated or not, is an artificial

person. In re Huss, 27 N. E. 784, 785, 126 N. Y. 537, 12 L. R. A. 620.

"Community," as used in an agreement transferring the practice and good will of one physician to another, and an agreement on the part of the vendor not to re-establish himself as a competitor of the vendee unless the latter should commit some act which should forfeit the confidence of the community, means a population residing in the village and its vicinity, among which the vendor was practicing his profession at the time of the contract. *Gilman v. Dwight*, 79 Mass. (13 Gray) 356, 359, 74 Am. Dec. 634.

The word "community," as used in a statement that the general reputation of a person is the estimate in which he is held in the community, is composed of those called by some jurists his neighbors, by others his associates or acquaintances, and by still others those who are conversant with him. In a city of 100,000 people it is not necessary that the majority of the persons should know anything about the particular person concerned, or even a small portion of the whole number. If a witness has heard enough to enable him to say that he knows the prevailing opinion entertained of him by his acquaintances, he is competent to speak. *Cunningham v. Underwood* (U. S.) 116 Fed. 803, 811, 53 C. C. A. 99.

In common parlance the meaning of the word "community" has a broader significance than the word "neighborhood" or "locality." Thus, instructing the jury to disregard general benefits accrued to plaintiff's property in common with other property in the same community, instead of neighborhood or vicinity, could not mislead the jury unfavorably to defendant in an action against a street railroad for changing a grade of a street. *Berkson v. Kansas City Cable Ry. Co.*, 45 S. W. 1119, 1122, 144 Mo. 211.

Community in general, as used in connection with the right of the property owner to sue for damages not shared by the community in general, does not mean those who use a street, and yet reside at such a distance from it that the railroad thereon, if such be the obstruction of which complaint is made, is not an annoyance, but it means those who reside in the immediate vicinity of the railroad and are subject to the inconveniences incident to such a structure. *Decker v. Evansville S. & N. Ry. Co.*, 133 Ind. 493, 495, 33 N. E. 349.

#### Partnership distinguished.

"Partnership and community," says Pothier, "are not the same thing. The first is founded on the contract of the parties, which creates the community, while the last may exist independent of any contract whatever." *Pickerell v. Fisk*, 11 La. Ann. 277, 278.

#### COMMUNITY DEBT.

Every debt created by the husband during the existence of the marriage is *prima facie* a community debt. *Calhoun v. Leary*, 32 Pac. 1070, 1071, 6 Wash. 17.

#### COMMUNITY OF PROFITS.

The term "community of profits," as used in the definition of partnership, that if there is a community of profits a partnership follows, means a proprietorship in them, as distinguished from a personal claim upon the other associate; in other words, a property right in them from the start in one associate as much as in the other. *Bradley v. Ely*, 56 N. E. 44, 45, 24 Ind. App. 2, 79 Am. St. Rep. 251; *Moore v. Williams*, 62 S. W. 977, 980, 26 Tex. Civ. App. 142.

#### COMMUNITY PROPERTY.

As estate of decedent, see "Estate."

The fundamental idea of the community system is that marriage makes the man and woman partners. *Mable v. Whittaker*, 39 Pac. 172, 174, 10 Wash. 656.

"Community property is that which is acquired by the husband and wife during marriage." *Mitchell v. Mitchell*, 15 S. W. 705, 707, 80 Tex. 101; *Mable v. Whittaker*, 39 Pac. 172, 174, 10 Wash. 656.

Property owned by a husband and wife jointly is called "community property" in California. In re *Lux's Estate*, 45 Pac. 1023, 1025, 114 Cal. 73.

Property acquired after marriage by the efforts of the husband alone, but not by gift, devise, or descent, or by exchange of his individual property, or from the rents, issues, or profits of his separate estate, belongs to the community. *Lake v. Bender*, 4 Pac. 711, 725, 18 Nev. 361.

Community property is that acquired by husband or wife by onerous title, while that which is acquired by either of the spouses by gift, devise, or descent is the separate property of the heir, donee, or devisee. Under this principle the San Jacinto donations, granting lands to those who were in the battle of San Jacinto and other battles, did not create community property. The grants were gifts as manifestation of public gratitude. But even had the grants been made to remunerate those to whom they had been issued, they would still be the separate property of the donees. For "remunerators or compensatory donations form no part of the community estate," "and that which the husband acquires by military services and the rewards bestowed upon him by the government for such services are his separate property." *Ames v. Hubby*, 49 Tex. 705, 710 (citing *Eschriche*, 367).

The statute provides that "all property acquired after marriage by either husband or wife, except such as may be acquired by gift, bequest, devise, or descent, shall be common property." All property is common property, except that owned previous to marriage, or subsequently acquired in a particular way. The presumption, therefore, attending the possession of property by either, is that it belongs to the community. Exceptions to the rule must be proved. *Meyer v. Kinzer*, 12 Cal. 247, 251, 73 Am. Dec. 538.

Where a wife claims property as her separate estate, it must have been conveyed to her before marriage, or, if afterwards, it must have been by gift, devise, or descent; otherwise, it will be considered community property. *Bessie v. Earle*, 4 Cal. 200, 201.

Community property is property acquired by husband and wife, or either, during marriage, when not acquired as the separate property of either. Civ. Code Cal. 1903, § 687; Civ. Code Idaho 1901, § 2351.

If a husband and wife acquire personal property in one state, and then remove to another state with the same, the law of the state where they lived when the property was acquired governs as to whether it is separate or community. *Kraemer v. Kraemer*, 52 Cal. 302, 306.

Under Civ. Code, § 164, providing that all property or assets acquired after marriage by either husband or wife, except that acquired by bequest, devise, or descent, is community property, it includes moneys earned by a wife while living with her husband, by her services as a nurse to another. *Spith v. Furnish*, 12 Pac. 392, 393, 70 Cal. 424.

The word "community," as used in Act 1879 relating to the sale of community property, means a compound creature of the statute constituted by the husband and wife together. "This creature is sometimes, though inaccurately, denominated a species of partnership. It probably approaches more nearly to that kind of partnership called universal than to any other business relationship known to the civil or common law. A conventional community might be contrived which would be substantially a partnership; but an ordinary legal community is, in many important particulars, quite distinct. It is like a partnership in that some property coming from or through one or other or both of the individuals forms for both a common stock which bears the losses and receives the profits of its management, and which is liable for individual debts; but it is unlike in that there is no regard paid to proportionate contribution, service, or business fidelity; that each individual, once in it, is incapable of disposing of his or her interest; and that both are powerless to escape from

the relationship, to vary its terms, or to distribute its assets or its profits. In fixity of constitution a community resembles a corporation. It is similar to a corporation in this, also: that the state originates it, and that its powers and liabilities are ordained by statute. In it the proprietary interests of husband and wife are equal, and those interests do not seem to be united merely, but unified; not mixed or blent, but identified. It is *sui generis*—a creature of the statute." *Holyoke v. Jackson*, 3 Pac. 841, 3 Wash. T. 235.

### COMMUNITY REAL PROPERTY.

The terms "community real property" and "community real estate," as used in the statutes relating to the acquisition and disposition of real property by a husband and wife, have the same meaning. *Ross v. Howard*, 72 Pac. 74, 75, 81 Wash. 393.

### COMMUTE—COMMUTATION.

#### Of punishment.

"To commute" is defined, "To exchange for one penalty or punishment another, less severe." *Webst. Dict.* The change of a punishment to which a person has been condemned to a less severe one. *Bouv. Law Dict.* The substitution of a lesser for a greater penalty. *Rich v. Chamberlain*, 65 N. W. 235, 107 Mich. 381 (citing *Anderson's Law Dict.*); *Ex parte Parker*, 17 S. W. 658, 660, 106 Mo. 551; *Ex parte Collins*, 6 S. W. 345, 346, 94 Mo. 22; *State v. State Board of Corrections*, 52 Pac. 1090, 1092, 16 Utah, 478; *Young v. Young*, 61 Tex. 191, 193; *State v. Peters*, 43 Ohio St. 629, 651, 4 N. E. 81.

"A commutation is a change of one punishment known to the law for another and different punishment also known to the law." *Ex parte Janes*, 1 Nev. 319, 321.

Commutation is the substitution of a less for a greater punishment by authority of law, and may be imposed upon the convicted without his acceptance and against his consent. *Lee v. Murphy (Va.)* 22 Gratt. 789, 798, 12 Am. Rep. 563.

The power of commutation, acting on the original sentence of the court, cuts down and modifies that sentence, and the force of that sentence, thus modified, sends the prisoner to the penitentiary. The commutation does not annul the sentence of the court, but is pro tanto an affirmation of it with a modification. *Ex parte Collins*, 6 S. W. 345, 346, 94 Mo. 22.

"In its legal acceptation commutation is a change of punishment from a higher to a lower degree in the scale of crimes and penalties fixed by the law, and it is presumed, therefore, to be beneficial to the convict. It is not a conditional pardon, nor is it sim-

ply the substitution of one punishment for another." In re Victor, 81 Ohio St. 206, 207; State v. Peters, 43 Ohio St. 629, 4 N. E. 81; In re Conditional Discharge of Convicts, 51 Atl. 10, 13, 73 Vt. 414, 56 L. R. A. 658.

A parole of a convict who remains in the legal custody and under the control of the board of prison managers, and subject at any time to be taken back within the inclosures of the prison, the board having full power to enforce such rules and regulations, and to retake and reimprison any convict so on parole, is not a commutation of such person's sentence; the prisoner simply being allowed to go outside of the buildings and inclosures of the penitentiary, but remaining in the legal custody and under the control of the board of prison managers. A law providing that the prison board of managers was empowered to parole convicts is not an encroachment on the pardoning power, and therefore is valid. State v. Peters, 43 Ohio St. 629, 4 N. E. 81; In re Conditional Discharge of Convicts, 51 Atl. 10, 13, 73 Vt. 414, 56 L. R. A. 658.

#### Of taxes.

As used with reference to taxation and assessment, the term "commute" means a payment of a designated sum for the privilege of exemption, or the selection in advance of a specific sum in lieu of an ad valorem tax. Louisiana Cotton Mfg. Co. v. City of New Orleans, 81 La. Ann. 440, 447.

#### COMMUTATION TICKET.

The term "commutation ticket" "applied to railroad tickets, is defined by Webster to be the purchase of a right to go upon a certain rate during a specified period for a less amount than would be paid in the aggregate for separate trips. The Century Dictionary gives the following definition: A ticket issued at a reduced rate by a carrier of passengers, entitling the holder to be carried for a given rate a limited number of times, or an unlimited number during a certain period. And as used in Interstate Commerce Act, § 22, authorizing sale of commutation passenger tickets, it includes party rate tickets." Per Sage, J., in Interstate Commerce Commission v. Baltimore & O. R. Co. (U. S.) 43 Fed. 37, 56; Id., 12 Sup. Ct. 844, 848, 145 U. S. 263, 36 L. Ed. 699.

#### COMMUTATIVE CONTRACTS.

Commutative contracts are those in which what is done, given, or promised by one party is considered as equivalent to, or a consideration for, what is done, given, or promised by the other. Civ. Code La. 1900, art. 1768.

The Code declares that a resolutive condition is implied in all commutative con-

tracts in case either of the parties does not comply with his engagements, which is a condition effecting a dissolution or release of an obligation already vested as soon as the condition is fulfilled. Ridings v. Johnson, 9 Sup. Ct. 72, 73, 128 U. S. 212, 32 L. Ed. 401 (citing Black's Law Dict.).

#### COMPACT.

The word "compact" has different meanings, according to the subject in connection with which it is used. It is defined as meaning closely and firmly united, as the parts or particles of solid bodies having the parts or particles pressed or packed together; close, solid, dense, as a compact mass of property. But as used in connection with territorial surface in the constitutional provision that senatorial districts shall be formed of contiguous and compact territory, the word "compact" means closely united, and the provision that the districts shall be formed of contiguous and compact territory means that the counties or subdivisions of counties, when combined to form a district, must not only touch each other, but must be closely united territorially. People v. Thompson, 40 N. E. 307, 315, 155 Ill. 451.

The Constitution, providing that the subdivisions of the judicial districts shall be of compact territory bounded by county lines, etc., requires that the county composing a judicial subdivision shall be adjacent, and denies to the General Assembly the authority to create a subdivision consisting of separate bodies of territory. The word cannot be construed to mean that the territory should be divided so that the districts should be as nearly square as possible. State v. Jacobi, 39 N. E. 317, 318, 52 Ohio St. 66.

#### As an agreement or contract.

"Compact" is synonymous with 'contract.' A compact is a mutual consent of the minds of the parties concerned, respecting some property or right that is the object of the stipulation, or something that is to be done or foreborne; a transaction between two or more persons in which each party comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised or stipulated by the other; and any words manifesting that congregatio mentium are sufficient to constitute a compact or contract, no technical words being necessary for such purpose." Chesapeake & O. Canal Co. v. Baltimore & O. R. Co. (Md.) 4 Gill & J. 1, 129.

"Compact," as used in the constitutional prohibition of compacts or agreements between the states, means a compact tending to the increase of political power in the state, which may encroach upon or interfere with the just supremacy of the United States.

*Stearns v. Minnesota*, 21 Sup. Ct. 73, 82, 179 U. S. 223, 45 L. Ed. 162.

The compact of 1785 between Maryland and Virginia, in relation to the use for fishing purposes of waters of Chesapeake Bay and the Potomac river, was not a treaty, confederation, or alliance, within the meaning of the prohibition of the Articles of Confederation (article 6, cl. 2). *Wharton v. Wise*, 14 Sup. Ct. 783, 786, 153 U. S. 155, 38 L. Ed. 669.

The terms "compact" and "contract" are synonymous; and in *Fletcher v. Peck*, 10 U. S. (6 Cranch) 87, 3 L. Ed. 162, the Chief Justice defines a contract to be a compact between two or more parties. *Green v. Biddle*, 21 U. S. (8 Wheat.) 1, 92, 5 L. Ed. 547.

The terms "agreement" and "compact," as used in the Constitution in relation to the several states, taken by themselves are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects—to those to which the United States can have no possible objection to or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting states, so as to encroach upon or impair the supremacy of the United States, or interfere with their rightful management of particular subjects placed under their entire control. There are many matters upon which different states may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York, which the latter state might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter state to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for the state to obtain the consent of Congress before it could contract with New York for the transportation of the exhibits through that state in that way. If the bordering line of two states should cross some malarious and disease producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of Congress for the bordering states to agree to unite in draining the district, and thus removing the cause of disease. So, in case of the threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened states could not unite in providing means to pre-

vent and repel the invasion of the pestilence without obtaining the consent of Congress, which might not be at the time in session. If, then, the terms "compact," and "agreement" in the Constitution do not apply to every possible compact or agreement between one state and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply? We can only reply by looking at the object of the constitutional provision, and construing the terms "agreement" and "compact" by reference to it. It is a familiar rule in the construction of terms to apply to them the meaning naturally attaching to them from their context. "*Noscitur a sociis*" is a rule of construction applicable to all written instruments. Where any particular word is obscure or of doubtful meaning taken by itself, its obscurity or doubt may be removed by reference to associated words, and the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used. Looking at the clause in which the terms "compact" and "agreement" appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States. Story, in his Commentaries (section 1403), referring to a previous part of the same section of the Constitution in which the clause in question appears, observes that its language may be more plausibly interpreted from the terms used, "treaty, alliance, or confederation," and, upon the ground that the sense of each is best known by its association ("*noscitur a sociis*"), to apply to treaties of a political character, such as treaties of alliance for purpose of peace and war, and treaties of confederation, in which the parties are leagued for mutual government, political co-operation, and the exercise of political sovereignty, and treaties of session of sovereignty, or conferring internal political jurisdiction on external political dependence, or general commercial privileges, and that the latter clause, "compacts and agreements," might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty, such as questions of boundary, interests in land situate in the territory of each other, and other internal regulations for the mutual comfort and convenience of states bordering on each other. And he adds: "In such cases the consent of Congress may be properly required in order to check any infringement of the rights of the national government, and at the same time a total prohibition to enter into any compact or agreement might be attended with permanent inconvenience or public mischief." *Virginia v. Tennessee*, 148 U. S. 503, 517, 519, 13 Sup. Ct. 728, 37 L. Ed. 537.

**COMPANY.**

See "Assessment Company"; "Co."; "Com."; "Gas Company"; "Guaranty Company"; "Home Company"; "Incorporated Company"; "Insurance Company"; "Investment Company"; "Joint-Stock Company"; "Loan Company"; "Mortgage Security Company"; "Opera Company"; "Railroad Company"; "Ship's Company"; "Street Railway Company"; "Trust Company"; "Turnpike Company"; "Very Good Company."

The words "company or association," as used in the act relating to insurance companies other than life, fire, and marine, shall be construed to mean any company, association, corporation, partnership, individual, or association of individuals doing or attempting to do business herein, under any charter, compact, or agreement, or statute of this state, or any other state, involving a guaranty, contract, or pledge of insurance other than life, fire, or marine underwriting. Gen. St. Minn. 1894, § 3334.

The term "company," as used in the insurance act of 1895, includes all corporations, associations, partnerships, or individuals engaged as principals in the business of insurance, when consistent with the context and not obviously used in a different sense. Shannon's Code Tenn. 1896, § 3274.

When consistent with the context, and not obviously used in a different sense, the term "company," as used in a chapter relating to home, life, and accident insurance companies, includes all corporations engaged as principals in the business of life, accident, or life and accident insurance. Rev. St. Tex. 1895, art. 3096a.

The term "company" embraces and applies to every person, firm, association of persons, and company, whether incorporated or not, who or which shall own or operate a telegraph or telephone line, or do an express or sleeping car business. Code Miss. 1892, § 4336.

The word "company," when used in reference to a corporation, shall be deemed to embrace the words "successors and assigns of such company or association," in like manner as if these last named words, or words of similar import, were expressed. U. S. Comp. St. 1901, p. 4.

The word "companies," as used in the chapter relating to special taxes in cities, shall be taken to mean and include any persons, companies, corporations, or associations owning or operating any street or other railway in any such city. Rev. St. Utah 1898, § 268.

When consistent with the context and not obviously used in a different sense, the

term "company" or "insurance company," includes all corporations, associations, partnerships, or individuals engaged, directly or indirectly, as principals in the business of insurance. Civ. Code Ala. 1896, § 2575.

The term "company" or "insurance company," as used in the chapter relating to insurance, includes all corporations, associations, partnerships, or individuals engaged as principals in the business of insurance. Rev. Laws Mass. 1902, p. 1120, c. 118, § 1.

The term "company," as used in the act relating to street railway companies, shall include any corporation, partnership, or person owning or operating a street railway. Pub. St. N. H. 1901, p. 532, c. 27, § 69.

The word "company" or "association," as used in the act relating to plate glass, etc., insurance, shall be construed to mean any company, association, corporation, partnership, individual, or association of individuals, doing or attempting to do business in the state, under any charter, compact, agreement, or statute of this or any other state or foreign government, or whether incorporated or not, involving a guaranty, contract, or pledge of insurance upon plate glass or steam boilers, or upon the life of domestic animals lost by disease, accident, or theft of such animals, owned or located in the state, or upon individuals, residents of the state, against personal injury, disablement, or death resulting from accident, or guarantying the fidelity of any person holding public or private trust. Comp. Laws Mich. 1897, § 5113.

In the construction of statutes the words "corporation" and "company" may be construed as including any corporation, company, person, persons, partnership, joint-stock company, or association. Ky. St. 1903, § 457.

**Club.**

A club is not a company, within the joint-stock companies' winding-up acts. In re St. James' Club, 13 Eng. Law & Eq. 589.

**Association.**

In St. March 20, 1848, to suppress illegal banking, the terms "corporation, company or association of individuals" are applied to many persons acting together through officers or agents, and do not include a commercial firm of three parties. Mr. McCulloch, in his Commercial Dictionary, says, "When there are only a few individuals associated, it is most commonly called a 'copartnership'; the term 'company' being usually applied to large associations, like the East India Company, the Bank of England, etc., who conduct their operations by means of agents, acting under the orders of a board of directors." The word "association" is used as

synonymous with the word "company." Speaking of joint-stock companies, Mr. McCulloch says, "The business of a great association must be conducted by factors or agents." Treating of open or regulated companies, the same author says, "The affairs of such companies or associations are managed by directors appointed by the members." *Mills v. State*, 23 Tex. 295, 303.

"Company," as used in an indictment of a fire insurance company charging that it exercised the privilege of a fire insurance company or association without having obtained a license, is synonymous with "association," as there used. *Lee Mut. Fire Ins. Co. v. State*, 60 Miss. 395, 396.

Rev. St. § 3205, provides that in an action by or against a corporation the complaint must aver that the plaintiff or defendant, as the case may be, is a corporation. The title of chapter 40, in which the section appears, is "All actions and proceedings by or against corporations and companies." Held, that the term "companies," as there used, could only denote private associations of persons for the transaction of some enterprise, showing an intention of the Legislature to limit the meaning of the word "corporations," with which the word "companies" is associated, to corporations created for like purposes, to wit, private corporations as distinguished from public corporations. *Smith v. City of Janesville*, 9 N. W. 789, 52 Wis. 680. As holding that the term "company" includes associations as well as corporations, see *State v. Jacksonville Terminal Co.*, 27 South. 221, 237, 41 Fla. 363; *State Board of Assessors v. Central R. Co.*, 4 Atl. 578, 607, 48 N. J. Law (19 Vroom) 146.

#### Corporation.

According to its ordinary acceptation, "company" imports a body corporate rather than a mere copartnership. *Broom v. Galena, D. D. & M. Packet Co.*, 9 Minn. 239, 243 (Gil. 225, 229).

In an act prohibiting persons from acting as agents for insurance companies of any other state or government, the word "companies" is used as the equivalent of the word "corporations." *Commonwealth v. Reineohl*, 163 Pa. 287, 291, 29 Atl. 896, 25 L. R. A. 247.

The term "railroad company" is not equivalent to "railroad corporation," as it may mean either a corporation or a voluntary association. Therefore an indictment for obstructing an engine of a certain railroad company is insufficient under Comp. St. c. 26, § 65, declaring the willful obstruction of the engines of a railroad corporation a misdemeanor. *State v. Mead*, 27 Vt. (1 Williams) 722, 724.

While the word "company" is frequently used to denote an incorporated associa-

tion, it does not necessarily involve that idea either in common speech or at law. The Imperial Dictionary says the word "company" is applicable to private partnership or to incorporated bodies, but, when there are only a few individuals associated, the concern is generally called a "copartnership," the term "company" being usually reserved for large associations; while it defines a "corporation" as a body politic or corporate formed and authorized by law to act as a single person. *Bouvier's Law Dictionary* defines "company" as an association of a number of individuals for the purpose of carrying on their legitimate business, and says that this term is not synonymous with "partnership," though every such incorporated company is a partnership. When these companies are authorized by the government, they are known by the name of "corporations." *Bradley Fertilizer Co. v. South Pub. Co.*, 23 N. Y. Supp. 675, 678, 4 Misc. Rep. 172.

An indictment charged a defendant with taking and carrying away the personal goods of the Acme Brewing Company, and it was alleged that a demurrer was filed on the ground that the term "Acme Brewing Company" was not the name of an individual, and that it did not import either a partnership or a corporation. But the word "company" is more appropriate to a corporation than to a partnership, as partnerships are associations formed under names which would be appropriate to corporations. The name, then, being one more peculiarly suited to a corporation than a partnership, the presumption would be that it was the name of a corporation, and this presumption prevails until the contrary is made to appear; and, as the term imports a corporation, it is not necessary to allege the fact that it was a corporation in the indictment. *Mattox v. State*, 41 S. E. 709, 712, 115 Ga. 212.

The word "company" no longer applies exclusively to corporations. It may now be a part of the name of a partnership or of an unincorporated company, so that, as used in pleadings, it does not import that the person or thing was designated as a corporation. *Leader Printing Co. v. Lowry*, 59 Pac. 242, 246, 9 Okl. 89.

In construing a statute prohibiting any person or company from circulating change tickets as currency, the court asked the question, in a manner implying an affirmation, "If the word 'company' does not signify corporations, and was not intended, like the word 'persons,' to restrain and punish them as well as others from issuing or putting into circulation such spurious currency." *Van Horne v. State*, 5 Ark. (5 Pike) 349, 352.

The term "company," as used in the chapter of the Penal Code relating to frauds in the sale of passage tickets, includes all corporations, whether created under the

laws of this state or that of the United States, or those of any other state or nation. Pen. Code N. Y. 1903, § 627.

"Company" and "corporation" are commonly used as interchangeable terms, and are so used in Act March 7, 1899, relating to the incorporation of street railroads. *Goddard v. Chicago & N. W. Ry. Co.*, 68 N. E. 1066, 1068, 202 Ill. 362.

#### Individuals.

The word "company" sometimes includes individuals as well as corporations. So that, as used in Rev. St. Mo. 1889, § 5910, providing that no company shall transact business in the state without a certificate, the word "company" will be held as including both companies and associations of individuals. *State v. Stone*, 24 S. W. 164, 165, 118 Mo. 888, 25 L. R. A. 243, 40 Am. St. Rep. 388.

"Company" literally means only a corporation or a partnership, but the word is often used to embrace single individuals, and as used in Tax Act 1886, § 2, par. 17, imposing a tax on "every sewing machine company selling or dealing in sewing machines," refers to single individuals engaged in such business as well as a corporation or partnership. *Singer Mfg. Co. v. Wright*, 25 S. E. 249, 251, 97 Ga. 114, 35 L. R. A. 497; *Singer Mfg. Co. v. Wright* (U. S.) 83 Fed. 121, 127.

General Incorporation Law, art. 5, § 1, cl. 90, providing that the city council or board of trustees shall have no power to grant the use of or right to lay down any railroad tracks in any street of the city to any steam or horse railroad company, except upon a petition of the owners of the land representing more than one-half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes, includes both corporations and individuals. "The use of the word 'company,' we have no doubt, was simply because such tracks are always laid and operated by companies." *Chicago Dock & Canal Co. v. Garrity*, 3 N. E. 448, 451, 115 Ill. 155.

"Company," as used in a special act of incorporation speaking of "property now owned by such company," when in fact the company was not then in existence, meant the individuals composing such company. *Keyport & M. P. Steamboat Co. v. Farmers' Transp. Co.*, 18 N. J. Eq. (3 O. E. Green) 13, 18.

The statute providing that the board of assessors shall ascertain the true value of all property used for railway and canal purposes of each canal company in the state includes not only corporations, but also individuals and associations, owning or operating railroads or canals under a franchise. *State Board of Assessors v. Central R. Co.*, 4 Atl. 578, 607, 48 N. J. Law (19 Vroom) 146.

The terms "owner, lessee, or operators of passenger terminals, and the person or company operating the same," in Laws 1899, c. 4700, § 6, relating to the power of railroad commissioners to compel admission into certain passenger terminals of railroad companies desiring or required by the commissioners to enter, and to fixing reasonable rates, etc., for the use and privilege, cannot be limited to corporations only, but also includes associations and individuals. *State v. Jacksonville Terminal Co.*, 27 South. 221, 237, 41 Fla. 383.

#### Municipal corporation.

Webster gives one definition of the word "company": "A number of persons united for the same purpose or in a joint concern; as a company of merchants. The word is applicable to private partnerships or incorporated bodies of men; hence it may signify a firm, house, or partnership; or a corporation, as the East India Company." In this case a municipal corporation was held not to come within the term "incorporated company." *Kansas City v. Vineyard*, 30 S. W. 326, 827, 128 Mo. 75.

The word "company," in Code 1873, § 25, as amended by Act Feb. 2, 1875, providing that if any railroad, turnpike, or canal company shall cross any other railroad, turnpike, or canal, or any state or county road, its work should be so constructed as not to impair the safety or impede or endanger the operations of the work to be crossed, and such crossing should be otherwise effected by such permanent and proper structures and fixtures as would best make life and property passing upon the same safe, and should be satisfactory to the company whose work is to be crossed, does not embrace a county or city. *City of Charlottesville v. Southern Ry. Co.*, 34 S. E. 98, 97 Va. 428.

#### Partnership.

While the word "company" is frequently used to denote an incorporated association, it does not necessarily involve that idea either in speech or at law, for the word is applicable to private partnerships as well. *Bradley Fertilizer Co. v. South Pub. Co.*, 23 N. Y. Supp. 675, 678, 4 Misc. Rep. 172.

"The proper signification of the word 'company,' when applied to persons engaged in trade, denotes those united for the same purpose or in a joint concern. It is so commonly used in this sense, or as meaning a partnership, that few persons accustomed to purchase goods at shops where they are sold at retail would misapprehend that such was its meaning." *Palmer v. Pinkham*, 33 Me. 32, 36.

"Company," as used in a note signed "M. & Co.," cannot be treated as a mere adjunct or surplusage, but imports that a



note was made by a partnership, and not by M. individually. *Price v. McClave*, 13 N. Y. Super. Ct. (6 Duer) 544, 547, 548.

In an agreement between two persons that one should go into a certain business under a specified firm name, and that the other should be the general manager of the company and receive a fixed salary and one-half the profits of the company, each party to receive interest on his investment and credits, the company so formed was a partnership composed of the persons who executed such agreement. *Ryder v. Wilcox*, 103 Mass. 24; 28.

A firm which was the agent of a farm machinery company, and was known to be such, entered into an agreement with a sub-agent whereby all paper taken by the sub-agent in payment for machines sold by him was to be subject to acceptance by the company. Held, that the words "the company" referred to the farm machinery company, and not to the partnership. *Brown v. McCaul*, 60 N. W. 151, 152, 8 S. D. 16.

#### **Stockholders.**

Const. § 211, declares that no railroad corporation, organized under the laws of another state, doing business in Kentucky, shall have the right of eminent domain or the power to acquire real estate until it shall have become a body corporate in accordance with the laws of Kentucky. Ky. St. 1899, § 841, provides that no company or corporation organized under the laws of any other state shall maintain any railway in Kentucky until it shall have become a citizen, resident, and corporation of the state. Held, in a suit against a foreign railroad corporation which attempted to remove the case to the federal court, that the word "corporation" in Const. § 211, and the word "company," etc., in Ky. St. 1899, § 841, referred to the corporation as a legal entity, and not to its stockholders, and the court would presume, for purposes of jurisdiction, that the stockholders were citizens of the foreign state. *Lewis v. Maysville & B. S. R. Co.*, 76 S. W. 526, 527, 25 Ky. Law Rep. 948.

#### **Unincorporated association.**

A law of 1862 in regard to the manner of serving companies of a certain character refers to companies whether incorporated or not. *Gillig v. Independent Gold & Silver Min. Co.*, 1 Nev. 247, 249.

#### **COMPANY (Militia).**

The word "division," as used in the section relating to the national guard, in connection with the naval militia, shall have the same meaning and effect as "company" when used in connection with the infantry. Pol. Code Cal. 1903, § 1912.

Whenever the word "company" is used in a military sense in the act relating to the militia, it shall be understood and construed to mean a company of infantry, battery of artillery, or troop of cavalry. *Cobbeys Ann.* St. Neb. 1903, § 7216.

In the chapter relating to the militia, the word "company" shall include battery, troop, signal corps, and ambulance corps. Rev. Laws Mass. 1902, p. 281, c. 16, § 1.

The word "company," as used in the act relating to militia, includes a company of infantry, battery of artillery, troop of cavalry, hospital or signal corps. Pub. St. N. H. 1901, p. 331, c. 59, § 131.

For the purpose of the chapter relating to the volunteer forces, the word "company" or "companies" shall apply to and include infantry, cavalry, artillery, machine gun and signal corps forces, except where otherwise specified. Code Ga. 1895, § 1109.

In the chapter relating to the militia, the word "company" shall include battery of artillery and troop of cavalry. Code Iowa 1897, § 2207.

Whenever the word "company" is used in a military sense in the chapter relating to the national guard, it shall be construed to mean a company of infantry, troop of cavalry, or battery of artillery. Rev. St. Wis. 1898, § 649.

#### **COMPANY'S PAPER.**

"Company's paper," as used in a contract that the parties to it, being stockholders of a certain company, would indemnify those who are or become indorsers of the company's paper, is synonymous with the term "corporate paper," and includes any and all obligations for the payment of money made by the corporation or for its use and benefit. *Taylor v. Coon*, 48 N. W. 123, 125, 79 Wis. 76.

#### **COMPARATIVE INTERPRETATION.**

"In expounding statutes we should have regard to what may properly be termed 'comparative interpretation' of the laws; that is, we should not so collate and compare the several parts of the statute in question, but compare the whole statute with other statutes enacted by the same legislative body in reference to the same subject, and thus determine the real purpose and intent of the Legislature, both by what is expressed and by what is omitted in the statute under consideration." *Glenn v. York County Com'rs*, 6 S. C. (6 Rich.) 412, 418.

#### **COMPARATIVE NEGLIGENCE.**

The doctrine of comparative negligence is that, where there are faults on both sides,

the plaintiff may, in some cases, recover, as where it appears that his negligence is slight and that of the defendant gross. There must be fault on the part of defendant, and no want of ordinary care on the part of plaintiff. *Calumet Iron & Steel Co. v. Martin*, 8 N. E. 456, 463, 115 Ill. 358.

The doctrine of comparative negligence authorizes a recovery by the plaintiff, although he was at fault, provided he was injured under circumstances where by the exercise of ordinary care on his part he could not have avoided the consequences of defendant's negligence. *Western & A. R. Co. v. Ferguson*, 39 S. E. 306, 308, 113 Ga. 708, 54 L. R. A. 802.

The doctrine of comparative negligence has never been recognized in this state. In *Straus v. Kansas City, St. J. & C. B. R. Co.*, 75 Mo. 185, the direct rule as to contributory negligence in passenger cases was thus announced: "When the concurring negligence of the plaintiff proximately contributes to produce the injury complained of, there can be no recovery, unless such injury is also a direct result of the omission or the defendant, after becoming aware of the injury to which the plaintiff was exposed, to use the proper degree of care to avoid injuring him." *Hurt v. St. Louis, I. M. & S. Ry. Co.*, 7 S. W. 1, 4, 94 Mo. 255, 4 Am. St. Rep. 874.

## COMPARISON OF WRITINGS.

"Comparison" is the "act of comparing; an examination of two or more objects with a view of discovering the resemblance or difference; relative estimate." *Webst. Int. Dict.* It is by "comparison" of the two documents that we ascertain the difference between them, while by "construction" we determine whether the differences are such as that the purported copy is or is not a substantial copy of the original. *Johnson v. Des Moines Life Ins. Co.*, 105 Iowa, 273, 276, 75 N. W. 101, 102.

What is now meant by "comparison of hands" is not exactly what was formerly meant. By comparison is now meant juxtaposition of two or more writings before the jury, that it may, from its own inspection and comparison of the paper in contest with others admitted or proved to be genuine, decide the question. *Rowt's Adm'r v. Kile's Adm'r* (Va.) 1 Leigh, 216, 222. See, also, *Travis v. Brown*, 43 Pa. (7 Wright) 9, 12, 82 Am. Dec. 540.

## COMPASS DIP.

The term "compass dip," in the mining law, is used to designate a dip "as to the direction it takes from the strike or apex by the points of the compass. If the strike were due east and west, and the vein in its course

downward departed from a perpendicular at an angle, so that a perpendicular shaft sunk at the apex would leave the vein to the north of such shaft, the dip, in this point of view, would be said to be due north, or, the conditions reversed, due south. In this respect a dip—that is, the direction of a dip—is said to be and is at right angles to the strike." *King v. Amy & Silversmith Consol. Min. Co.*, 24 Pac. 200, 202, 9 Mont. 543.

## COMPEL—COMPELLED.

"Compelling," as used in an instruction in an action for injuries to an employé from a defective scaffolding submitting the question whether or not the defendants were negligent in directing and compelling the plaintiff to go upon the scaffolding, has no other significance than ordering or directing. *Haworth v. Seevers Mfg. Co.*, 51 N. W. 68, 71, 87 Iowa, 765.

"Compelled," as used in an instruction that if the plaintiff was forced or compelled by the conductor to jump from the train while it was in motion, etc., implies force or violence, and has in it the element of irresistibility, and, as employed in the instruction, could not have conveyed any other impression to the mind of the jury than as meaning the same thing as force. *St. Clair v. Missouri Pac. Ry. Co.*, 29 Mo. App. 76, 86.

### Cause synonymous.

As cause, see "Cause" (verb)."

### Coerce distinguished.

See "Coerce—Coercion."

### Obliged by legal process.

The words "compelled to pay," in a contract whereby it was agreed that the party of the second part's balance of the purchase money should be held by the parties of the first part to be applied to one-third of whatever sums of money the parties of the first part might be compelled to pay on certain debts, cannot be construed to require the defendants to pay only such claims as final judgment had been rendered for. What the defendants were legally bound to pay is what the contract meant. *Rosenbaum v. Rosenbaum* (Miss.) 34 South. 324.

"Compelled to pay," as used in a contract agreeing to repay any sum which the obligee shall be compelled to pay on a certain bond, means "whatever by legal process he shall be obliged to pay, without reference to the laws of any particular state." *Parker v. Thompson*, 20 Mass. (3 Pick.) 429, 433.

Const. art. 1, § 6, declares that no person shall be compelled in any criminal case to be a witness against himself. Held, that the word "compulsion," as there used, means

merely compulsion exercised through the process of the courts, or through laws acting directly on the party, and has no reference whatever to an indirect or argumentative pressure, such as is claimed is exerted by Act 1869 (Laws 1869, c. 678), declaring that on a criminal trial the accused shall at his own request, but not otherwise, be deemed a competent witness against himself. *People v. Courtney*, 94 N. Y. 490, 493.

In prohibiting the state from compelling one to be a witness against himself, the Constitution means just what a fair interpretation of the language imports. No person shall be compelled to be a witness against himself—that is, to testify against himself. To use the common phrase, it “closes the mouth” of the person. A defendant in a criminal case cannot be compelled to give evidence under oath or affirmation, or make any statement for the purpose of proving or disproving any question at issue, before any tribunal, court, judge, or magistrate. It is a shield under which he is protected by the strong arm of the law, and this protection was given, not for the purpose of evading the truth, but for the reason that, in the sound sense of the men who framed the Constitution, it was thought that, owing to the weakness of human nature, and the various motives that actuate mankind, a defendant accused of a crime might be tempted to give evidence against himself that was not true. Compelling a defendant to exhibit his arm in such a manner as to show tattoo marks which a witness testified he knew were there—the identity of the defendant being the question at issue—was not in violation of the Constitution. *State v. Ah Chuey*, 14 Nev. 79, 83, 33 Am. Rep. 530.

#### Threat of legal proceedings.

“Compelled,” as used in 2 Rev. St. 1876, § 676, providing that, when any defendant surety in a judgment shall be compelled to pay any judgment or any part thereof, the judgment shall not be discharged by such payment, but shall remain in force to the use of the surety, includes a payment made by one under threat of legal proceedings to enforce the payment, since what one may be compelled to do by suit he may do without suit; and the fact that the party did not resist payment, and wait until a suit was instituted, did not render the payment voluntary. *Burbank v. Slinkard*, 53 Ind. 493, 495.

## COMPENSATION.

See “Adequate Compensation”; “Due Compensation”; “Extra Compensation”; “Fair Compensation”; “Full Compensation”; “Just Compensation”; “Legal Compensation”; “Reasonable Compensation”; “Same Compensation.”

Compensation first made, see “First.”

“The primary significance of the word ‘compensation’ is equivalence, and the second or more common meaning is something given or obtained as an equivalent.” *Winona & St. P. R. Co. v. Denman*, 10 Minn. 267, 280 (Gil. 208).

As a general rule, compensation is the relief or remedy provided by the law of this state for the violation of private rights and the means of securing their observance. Rev. Codes N. D. 1899, § 4969.

In a prosecution under Gen. St. c. 47, art. 1, § 1, as amended by Act March 25, 1866, inflicting a penalty on any one who for compensation sets up or conducts a game of cards whereby money or other thing may be won or lost, the addition of the words, “in any form whatever,” after the word “compensation,” in an instruction, is not error, the words “in any form whatever” being embraced by the word “compensation” in the sense in which it is used in the statute. *Harper v. Commonwealth*, 19 S. W. 737, 93 Ky. 290.

Good public roads or streets is a sufficient compensation for the labor required to be performed by each individual in keeping them in good order and condition, and this labor, or the money paid in lieu thereof, is imposed and taken as an assessment or tax; and such compensation is just as good as the compensation is in any case where persons are taxed. *State v. City of Topeka*, 12 Pac. 310, 315, 36 Kan. 76, 59 Am. Rep. 529.

“Compensation,” as used in the rule that a state cannot fix the rate of charge for a carrier so low that it will afford no compensation, “implies three things—payment of costs of service, interest on bonds, and then some dividend.” *Clyde v. Richmond & D. R. Co. (U. S.)* 57 Fed. 436, 440; *Chicago & N. W. Ry. Co. v. Dey (U. S.)* 35 Fed. 866, 879, 1 L. R. A. 744.

#### Cost distinguished.

The word “compensation” is a term of larger scope than “cost,” and especially than “actual cost.” *City of Newton v. Boston & A. R. Co.*, 51 N. E. 183, 185, 172 Mass. 5.

#### Fare distinguished.

When used in reference to common carriers, “compensation” relates to carriage of both passengers and freight, while “fare” relates only to passengers; so that a statute authorizing street surface railroads to carry persons and property in cars for compensation indicates an intention that freight may be carried. *Degrauw v. Long Island Electric Ry. Co.*, 60 N. Y. Supp. 163, 167, 43 App. Div. 502.

#### As fees, salary, allowances, etc.

In Const. art. 6, § 13, as amended in 1880, providing that the judges of the Supreme

Court shall retire at 70 years of age, but that the compensation of every justice whose term of office shall be abridged shall continue during the remainder of the term for which he was elected, the term "compensation" means the sum of money which the judicial officer had been in receipt of from the state, and hence included a yearly sum allowed as expenses. *People v. Wemple*, 22 N. E. 272, 274, 115 N. Y. 302.

In Const. art. 4, § 21, providing that no person holding any lucrative office under the United States shall be eligible to any civil office of profit under the state, but providing that local officers and postmasters whose compensation does not exceed \$500 per annum shall not be deemed lucrative, the word "compensation" means the allowance received by such officers from the government, "which in common understanding, and perhaps in strict grammatical accuracy, may be called his compensation." It is not limited to the clear income of the office after paying all necessary expenses. *Searcy v. Grow*, 15 Cal. 112, 117.

"Compensation," as used in Const. art. 11, § 9, providing that the compensation of any county, city, town, or municipal officer shall not be increased after his election or during his term of office, is synonymous with "salary," and does not include traveling or other incidental expenses. *Kirkwood v. Soto*, 25 Pac. 488, 489, 87 Cal. 394.

The term "compensation," in its ordinary acceptance, applies not only to salaries, but to compensation by fees for specific services, so that Ky. St. § 1722, providing for the payment to clerks of circuit courts of a fee of \$5 for services in each following case, etc., was unconstitutional in so far as it affected clerks in office at the date of its passage, the Constitution forbidding a change in compensation of any officer during his term. *Commonwealth v. Carter* (Ky.) 55 S. W. 701, 702.

As used in Const. art. 4, § 26, forbidding the compensation of any officer to be increased or diminished during his term of office, the word "compensation" signified a return for the services of such officers as receive a fixed salary payable out of the public treasury of the state, and does not and was not intended to apply to the remuneration of that large class of officers, such as sheriffs, constables, clerks of courts, and others, who receive specific fees for services, as they are from time to time required to render them. The limitation applied only to those salaried officers paid by the state. *State v. Kalb*, 6 N. W. 557, 558, 50 Wis. 178; *Milwaukee County Sup'rs v. Hackett*, 21 Wis. 618.

In Const. 1875, art. 5, § 21, providing that the officers of the executive department shall receive for their services a salary to

be established by law, and shall not receive to their own use any fees, costs, perquisites of office, or other compensation, the words "other compensation" mean more than is embraced in the terms "fees," "costs," and "perquisites of office," and do they apply to an increase of salary. *State ex rel. McGrath v. Holladay*, 67 Mo. 64, 65.

The words "compensation or salary," in Greater New York Charter, § 283, providing that the salary or compensation of officers who become members of the police force through consolidation shall not thereby be decreased as the same is lawfully fixed at the time the charter takes effect and immediately prior thereto, are not synonymous with the phrase "prospective scale of salary," and therefore do not assure to a police officer his prospective scale of compensation according to the grading of a force to which he belonged at the time he became a member of the municipal force, but only preserve his right to the pay which he is actually receiving when transferred to the municipal force. *People v. York*, 60 N. Y. Supp. 795, 796, 29 Misc. Rep. 158.

Where the words "compensation" or "salary" are used in a statute in reference to the remuneration of the sheriff, they are synonymous terms, and refer to the recompense or consideration that is stipulated to be paid to the sheriff for his personal services. *Crawford County v. Lindsay*, 11 Ill. App. (11 Bradw.) 261, 263.

"Compensation," as used in the Constitution, requiring the board of supervisors to fix the compensation of a county treasurer, etc., should not be construed as synonymous with "salary," but that a sum fixed as compensation should include not only the sum intended for the treasurer's personal services, but also the allowance intended for fuel, clerk hire, etc. *Kilgore v. People*, 76 Ill. 548, 552.

#### Indemnity distinguished.

Though "compensation" may be broad enough in a popular sense to include "indemnity," still, if the terms are used by the parties in a contract in a special or technical sense, they will be so understood; so that in an application for an insurance policy, failing to state that the applicant had received compensation for previous injuries will not be held to mean indemnity. *Bayley v. Employers' Liability Assur. Corp. of London, England*, 58 Pac. 7, 8, 125 Cal. 345.

#### As payment in full.

Act Cong. March 3, 1877 (19 Stat. 294), relating to the payment of the salaries of certain officers, and declaring that "the following sums be and the same are hereby appropriated out of any money in the treasury not otherwise appropriated in full compensation for the service of the fiscal year ending

June 30, 1878," so limits the salaries of the officers therein provided for that they cannot obtain larger salaries under any other provisions of the statutes than is provided for by this act. *United States v. Fisher*, 3 Sup. Ct. 154, 155, 109 U. S. 143, 27 L. Ed. 885.

"Compensation," within the meaning of a statute providing that a public officer should receive a certain salary as compensation, except, etc., is to be construed as meaning full, complete, and entire compensation for all services, except those specifically excepted. *Erie County Sup'rs v. Jones*, 23 N. E. 742, 119 N. Y. 339.

#### **As payment in money.**

The term "compensation" "imports that a wrong or injury has been inflicted which must be redressed in money." *Symonds v. City of Cincinnati*, 14 Ohio, 147, 148, 175, 45 Am. Dec. 529.

In the exercise of the right of eminent domain, no just compensation can be made for the property taken except in money. Money is a common standard, by comparison with which the value of anything may be ascertained. Compensation is a recompense in value, a quid pro quo, and must be in money. Land or anything else may be a compensation, but then it must be at the election of the party; it cannot be forced upon him; and an act of the Legislature which provides that land may be taken and paid for with other lands belonging to the state does not provide a constitutional compensation. *Vanhorne's Lessee v. Dorrance*, 2 U. S. (2 Dall.) 304, 315, 28 Fed. Cas. 1012, 1 L. Ed. 391; *Alabama & F. R. Co. v. Burkett*, 43 Ala. 83, 89.

"Compensation," as used in the Constitution, providing that private property shall not be taken for public use without just compensation, means the payment of the valuation of the property taken, in money. *Loweree v. City of Newark*, 38 N. J. Law (9 Vroom) 151, 155.

The word "compensation" imports that a wrong or injury has been inflicted, and which must be redressed in money. Money must be paid to the extent of injury, whether more or less than the value of the property. Thus, if property is benefited by an improvement or the taking of part of it, the payment in full of the value of the part taken would be more than giving compensation. *Bauman v. Ross*, 17 Sup. Ct. 966, 979, 167 U. S. 548, 42 L. Ed. 270.

#### **As price or value.**

"Compensation," though usually called "damages," is in fact the consideration or price of a privilege purchased. *Gilmore v. Pittsburgh, V. & C. R. Co.*, 104 Pa. 275, 281.

As used in a statute providing that commissioners shall be appointed to determine the compensation and damages which an owner of real estate may sustain by reason of his property being taken for a right of way, "compensation" means an equivalent for the value of the land, and anything beyond that is more than compensation, and anything short of it is less. This equivalent is for the present value of the land, and not its future value, since no human tribunal is able to determine judicially what the value of land will be at some future time. *New Jersey R. & Transp. Co. v. Suydam*, 17 N. J. Law (2 Har.) 25, 47.

"Compensation," as the term is used in reference to compensation for land taken for a railroad, consists in giving back an equivalent, either in money, which is but the measure of value, or in actual value otherwise conferred. *Long v. Harrisburgh & P. R. Co.*, 19 Atl. 39, 40, 126 Pa. 143.

The term "compensation," in regard to compensation for land taken for public use, means much more than "value." In *re First Street*, 26 N. W. 159, 162, 58 Mich. 641; *Virginia & T. R. Co. v. Henry*, 8 Nev. 165, 167, 171.

#### **Profits distinguished.**

Within the meaning of Rev. St. 1874, p. 291, § 31, providing that "associations and societies which are intended to benefit the widows and orphans as agencies of deceased members thereof, where no annual dues or premiums are required, and where the members shall receive no money as profits or otherwise, shall not be deemed insurance companies," the payment to officers of compensation for their services would not be a receipt of money as profits or otherwise. The word "profits," as ordinarily used, means the gain made upon any business or investment—a different thing altogether from mere compensation for labor. *Commercial League Ass'n of America v. People*, 90 Ill. 166, 173.

#### **As remuneration for injury.**

The term "compensation," when applied to damages, has a fixed legal signification, much more restricted than its common or general acceptation. In actions for personal injuries it is limited to the expense of cure, the value of time lost, a fair compensation for the physical and mental suffering caused by the injury, and for any permanent reduction of the power to earn money. *Louisville & N. R. Co. v. Logsdon (Ky.)* 71 S. W. 905, 906 (citing *Louisville, C. & L. R. Co. v. Case's Adm'r*, 72 Ky. [9 Bush] 736; *Standard Oil Co. v. Tierney*, 92 Ky. 367, 17 S. W. 1025, 14 L. R. A. 677, 36 Am. St. Rep. 595).

Literally and strictly speaking, compensation for personal injuries received may be said to include compensation for diminish-

ed ability to labor. *St. Louis, S. W. Ry. Co. v. Byers* (Tex.) 70 S. W. 558, 560.

In an action for libel, compensation includes remuneration for all the injury which the plaintiffs have sustained, whether a pecuniary loss or an injury to the feelings or reputation. *Austin v. Wilson*, 58 Mass. (4 Gush.) 273, 274, 50 Am. Dec. 766.

"Compensation," as used in the phrase "compensation for pain and suffering," is not to be understood as meaning the price or value. It is, however, compensation, not as a precise equivalent or valuation, nor compensation from a sentimental or benevolent standpoint, but such amount as will be the most reasonable approximation the circumstances admit, to a pecuniary compensation not in the nature of things capable of exact measurement. *Schenkel v. Pittsburg & B. Traction Co.*, 44 Atl. 1072, 1073, 194 Pa. 182.

The word "compensation" in the phrase "compensation for pain and suffering" for which a person may recover in an action for personal injuries, is not to be understood as meaning price or value, but as describing an allowance looking toward recompense for or made because of the suffering consequent upon the injury. *Goodhart v. Pennsylvania R. Co.*, 35 Atl. 191, 193, 177 Pa. 1, 55 Am. St. Rep. 706.

Compensation for a tort means recompense for the whole injury suffered, and, in the case of the ejection of a passenger from a train who had bought a ticket in good faith, in addition to the actual outlay incident to the repudiation of the ticket and the delay in the journey, includes necessary and reasonable expense in and about the prosecution of a suit in vindication of his legal right as a passenger. *Cowen v. Winters* (U. S.) 96 Fed. 929, 932, 37 L. R. A. 627.

"Compensation," as used in the statement of the rule that the object of damages other than exemplary is to give compensation to the party injured, consists in remuneration for loss of time, necessary expenditures, and for permanent disability, if such occur. *Paraker v. Jenkins*, 66 Ky. (3 Bush) 587, 591.

The word "compensation," as used in connection with assessment of damages in an action for illegal arrest, is usually employed for want of a better phrase to express the thought which underlies the right of recovery for such injuries. It is not a matter of price or market value, but is a substantial award for injuries for which there is no other legal redress, and its amount is left to the sound discretion of the jury. *Young v. Gormley*, 94 N. W. 922, 924 120 Iowa, 372 (citing *Morgan v. Southern Pac. Co.*, 95 Cal. 501, 30 Pac. 601; *Head v. Georgia Pac. Ry. Co.*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434).

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#### In civil law.

"Compensation is of three kinds, legal or by operation of law, compensation by way of exception and by reconvention." *Stewart v. Harper*, 16 La. Ann. 181.

Compensation is a reciprocal acquittal of debts between two persons who are indebted one to the other. It is not enough to make compensation that there be a debt on the one side and the other, but it is, moreover, necessary that both the debts be clear and liquid; that is, certain and not liable to dispute. Thus, one cannot compensate with a clear and liquid debt a debt that is litigious, nor a pretension that is not settled. *Campbell v. Park*, 33 S. W. 754, 755, 11 Tex. Civ. App. 455; *Howard v. Randolph*, 11 S. W. 495, 497, 73 Tex. 454.

"Compensation is a mode of payment. It takes place by the mere operation of law, without the knowledge of the debtor, and two debts are reciprocally extinguished as soon as they exist simultaneously to the amount of their respective sums." Therefore, after a judgment is rendered and execution issued, the defendant in the suit can purchase a promissory note of the plaintiff, oppose it in compensation of the amount due, and suspend the enforcement of the execution until the verity of the claim thus set up is examined. *Caldwell v. Davis* (La.) 2 Mart. (N. S.) 185, 186.

#### For taking property by eminent domain.

"Compensation" is an equivalent for property taken, or for an injury done to another. *Louisiana & F. Plank Road Co. v. Pickett*, 25 Mo. 535, 539.

"Compensation" is the rendering of an equivalent in value and amount, according to all standard lexicographers. To compensate a person in money for an article of property obtained of him, is to pay him its value in money. The language of the Constitution as to compensation for private property condemned is plain, clear, and positive, and it is on a provision for compensation in money that private property can be taken for public use. *Kramer v. Cleveland & P. R. Co.*, 5 Ohio St. 140, 155.

"Compensation," in condemnation proceedings, is the equivalent for property taken or for an injury, which must be ascertained by estimating the actual damage the party has sustained. That damage is the sum of the actual value of the property taken, and of the injury done to the residue of the property by the use of that part which is taken, less the benefit, which accrues to the residue of the said property by the use of that which is taken. *Greenville & C. R. Co. v. Partlow* (S. C.) 5 Rich. Law, 428, 437.

The right of eminent domain is an incident to sovereignty, and exists in every government. Private mischief, rather than public, must of necessity be endured. The obligation to make compensation, however, follows this right, as the shadow does the substance, and is concomitant with it. It is not in all countries a legal obligation, but it is an obligation of natural equity and justice everywhere. It is, however, incorporated in our organic law that compensation in money shall be made to the owner whenever his property is appropriated for the public welfare. That just, full, and adequate compensation must be made, and in money, is certain; more cannot be required. But if, in appropriating property of the value of \$4,000, when by the same appropriation the value of what remains is increased \$2,000, and the value of the property taken is the rule of damages, the owner actually takes \$2,000 without the least consideration, and receives more than the Constitution enjoins to be paid, because it is more than a compensation. Hence, in estimating the amount of compensation to be paid, the increased value, if any, to the property remaining, resulting directly to it from the appropriation, should be taken into consideration. *Symonds v. City of Cincinnati*, 14 Ohio, 147, 174, 45 Am. Dec. 526.

The word "compensation," as used in Lateral Railroad Act Feb. 18, 1871 (P. L. 56), is absolute in definition and suggestion, and implies, *ex vi termini*, that the owner must be paid—that is, must be compensated; must have an award made to him in dollars and cents, in order to make him wholly, fully, and entirely whole for the taking from him of his private property. The term "compensation" in itself is well defined here as "that which is given or received as an equivalent for services, debt, want, loss, or suffering; awards, remuneration, recompense; that which supplies the place of something, or makes good a deficiency." *Hays v. Briggs* (Pa.) 3 Pittsb. R. 504, 517.

The word "compensation," as used in Const. Cal. art. 1, § 14, providing that private property should not be taken for public use without just compensation having first been made to the owner by paying into court a sum of money, does not include payment into court before the damages have been judicially determined, and when the owner cannot take the money, for such owner is not compensated until he may take the money. It is not paid into court until he can take it. *Steinhart v. Superior Court of Mendocino County*, 70 Pac. 629, 630, 137 Cal. 575, 59 L. R. A. 404, 92 Am. St. Rep. 183.

The object of an appraisal to the owner of land taken by a railroad company for right of way is to make such owner "good" by rendering an equivalent in money for the loss he sustains in the value of his property by

being deprived of a portion of it. This, it is obvious, must be the main ingredient in the compensation which the commissioners are to determine. "Compensation" includes not only the value of the portion taken, but the diminution of the value of that from which it is severed also. *Rochester & S. R. Co. v. Budlong* (N. Y.) 6 How. Prac. 467, 469.

In *Bigelow v. West Wisconsin Ry. Co.*, 27 Wis. 478, it was held that "just compensation," within the meaning of the term as used in the constitutional provision relative to paying just compensation for land taken for public purposes, consists in making the owner good by an equivalent in money for the loss he sustains in the value of his property by being deprived of a portion of it, and that it includes not only the portion taken, but also the diminution in value from which it is severed." In establishing this rule, we followed the reasoning of this court in *Robbins v. Milwaukee & H. R. Co.*, 6 Wis. 636, *Snyder v. Western Union Ry. Co.*, 25 Wis. 60, and *Welch v. Milwaukee & St. P. Ry. Co.*, 27 Wis. 108, and adopted the doctrine of numerous adjudications by the courts of other states on the same subject. *Pick v. Rubicon Hydraulic Co.*, 27 Wis. 433, 445; *Parks v. Wisconsin Cent. R. Co.*, 33 Wis. 413, 420.

"Compensation," as used in St. Mich. 1883, No. 124, providing that, after the municipality had determined on the policy of a public improvement, a jury of freeholders from the municipality shall determine the public necessity and the proper compensation for land taken, means much more than the term "value." The mere value of the land as isolated land is not the measure of compensation to be awarded a railroad company across whose tracks a street has been extended, but the damage necessarily includes all the additional expenses entailed by such crossing, which in a city would embrace the expense of making the crossing safe and providing guards against accident. In re First Street, 26 N. W. 159, 160, 58 Mich. 641.

"Compensation," as used in St. 1864, 1865, pp. 439, 440, requiring compensation for land appropriated by a railroad to be paid to the landowner, does not mean the mere market value of the land taken, but includes compensation for injuries to adjoining lands. *Virginia & T. R. Co. v. Henry*, 8 Nev. 165, 171.

"Compensation" means 'a recompense given for a thing received,' and, where private property is taken for a public use for a canal, the general advantages received by the public from such improvement cannot properly be said to be a recompense given for the land, for they are equally conferred on those who lose no land. Neither, indeed, are they gifts to anybody. They are a mere incident or accident arising out of the exist-

ence of the improvement. It is neither a gift *ex mero motu*, nor can it be tortured into a price given for what he has taken from me. It can create no debt; it can pay no debt. It can neither give a right of action for benefits conferred, nor can it give a right of set-off for damages done or property condemned. If it could give such right of set-off, it is not perceived why it should not give a right of action for the excess of benefit over and above the value of the property taken. Nor can I imagine how the company is to compensate the defendant for her \$350 worth of land by setting off a claim for benefits conferred, which they never could enforce by suit, and for which they can have no pretense of claim, legal or equitable." *James River & Kanawha Co. v. Turner* (Va.) 9 Leigh, 813, 840.

### COMPENSATORY DAMAGES.

"Compensatory damages" are such damages as will compensate the injured party for the injury sustained, and nothing more. *McKnight v. Denny*, 47 Atl. 970, 971, 198 Pa. 323; *Morgan v. Southern Pac. Co.*, 80 Pac. 601, 602, 95 Cal. 501; *Sachra v. Town of Manilla*, 95 N. W. 198, 200, 120 Iowa, 562; *Henderson's Adm'r v. Kentucky Cent. R. Co.*, 9 Ky. Law Rep. 625, 627, 5 S. W. 875, 86 Ky. 389; *Armstrong v. Rhoades* (Del.) 53 Atl. 435; *Louisville & N. R. Co. v. Gordan* (Ky.) 72 S. W. 311, 312.

"Compensatory damages," as indicated by the word employed to characterize them, simply make good or replace the loss caused by the wrong. They proceed from a sense of natural justice, and are designed to repair that of which one has been deprived by the wrong of another. *Reid v. Terwilliger*, 22 N. E. 1091, 1092, 116 N. Y. 530.

"Compensatory damages are damages given as an equivalent for the injury done." *Monongahela Nav. Co. v. United States*, 13 Sup. Ct. 622, 626, 148 U. S. 312, 37 L. Ed. 463.

"Compensatory damages" are such damages as will make the persons whole; pay for the actual loss they have sustained; for the losses that have accrued from the result of the injury. *Wade v. Columbia Electric Street Railway, Light & Power Co.*, 29 S. E. 233, 236, 51 S. C. 296, 64 Am. St. Rep. 676.

"Compensatory damages" are those given for the violation of a legal right which results in a loss or injury, for the purpose of compensating the person so injured for all the loss and injury which flows directly from the illegal act. *Atchison, T. & S. F. R. Co. v. Watson*, 15 Pac. 877, 880, 37 Kan. 778.

Compensatory damages "are such as arise from actual and indirect pecuniary loss, mental suffering, value of time, actual expenses; and to these may be added bodily

pain and suffering." *Smith v. Bagwell*, 19 Fla. 117, 121, 45 Am. Rep. 12.

#### As actual damages.

Damages, in a tort action, are not divided into actual, compensatory, and exemplary. The term "compensatory damages" covers all loss recoverable as matter of right. It includes all damages for which the law gives compensation, and that gives rise to the term "compensatory damages." "Compensatory damages" and "actual damages" are synonymous terms. Pecuniary loss is an actual damage; so is bodily pain and suffering. *Gatzow v. Buening*, 81 N. W. 1003, 1009, 106 Wis. 1, 49 L. R. A. 475, 80 Am. St. Rep. 1.

#### As affected by intent.

Compensatory damages are not dependent on nor graded by the intent with which the wrongful act is done. *Field v. Munster*, 32 S. W. 417, 418, 11 Tex. Civ. App. 341.

"Compensatory damages" are such as are awarded to compensate the injured party for injury caused by the wrong, and must be only such as make just and fair compensation, and are due when the wrong is established, whether it was committed maliciously—that is, with evil intention—or not. *Wiemer v. Allbaugh*, 42 N. W. 587, 588, 78 Iowa, 79, 16 Am. St. Rep. 422.

"Compensatory damages are damages given as a compensation to the injured party for the injury he has received." Under the rule limiting them to "compensatory damages," the juries will, with proper instruction, recognize a broad distinction between a tort unaccompanied by malice or circumstances of aggravation or disgrace, and one producing equal, direct, pecuniary damage, where either of these conditions exist. In the former case they consider only the actual injury to the person or property, including expenses, loss of time, bodily pain, etc., occasioned by the wrongful act; in the latter they allow such additional sum as in their judgment is warranted by the circumstances of contumely, anguish, or oppression; but in both instances the damages are awarded as compensation. The additional sum is given to the individual as a recompense for the mental suffering or wounded sensibilities, as the case may be. *Murphy v. Hobbs*, 5 Pac. 119, 123, 7 Colo. 541, 49 Am. Rep. 366.

#### Exemplary damages distinguished.

Compensatory damages and exemplary or punitive damages are of entirely different nature, and rest upon different principles. The former is intended to provide a recompense for injuries sustained, while the latter is intended only as a punishment to the wrongdoer, and to furnish an example to him and other wrongdoers of the dangers attending such wrongdoing. Thus where the Legislature, in the title of an act, declared their



intention to provide for such damages against railway companies as may be proportionate to the injury resulting from death to the parties for whom and for whose benefit such action is brought, it implies that the damages are to be compensatory damages. *Garrick v. Florida Cent. & P. R. Co.*, 31 S. E. 334, 337, 53 S. C. 448, 69 Am. St. Rep. 874.

As defined in an instruction that, in case the jury found for the plaintiff, they might assess exemplary as well as compensatory damages, the compensatory damages were such as would compensate the plaintiff for injuries actually sustained, including his pain and anguish of mind and body, while exemplary damages were such "as are given as an example by way of punishment to prevent a repetition of the wrongful act complained of," and described as something in the character of the punishment by the people, with the difference that the person injured is the one that recovers the damages instead of the people by fine or imprisonment. *Hamilton v. Third Ave. R. Co.*, 35 N. Y. Super. Ct. (3 Jones & S.) 118, 129.

#### In particular torts.

If there has been any actual loss by reason of defendant's fault, then the damages must be compensatory, and for false imprisonment, as for trespass in improperly ejecting plaintiff from defendant's cars, such damages include, in addition to actual expenses incurred, compensation for the loss of time, interruption of business, bodily or mental suffering, humiliation, and injury to feelings. *Duggan v. Baltimore & O. R. R.*, 28 Atl. 182, 184, 159 Pa. 248, 39 Am. St. Rep. 672.

In an action for false imprisonment, "compensatory damages" are such damages as will compensate plaintiff for the injury to her feelings and anxiety of mind. *Limbeck v. Gerry*, 39 N. Y. Supp. 95, 104, 15 Misc. Rep. 663.

In an action for libel "compensatory damages" are those damages which furnish reparation for the actual injury the plaintiff has suffered because of defamation. *Miller v. Donovan*, 39 N. Y. Supp. 820, 824, 16 Misc. Rep. 453.

Compensatory damages for breach of a covenant of warranty of the quality of goods sold are not limited to the difference between their value, had they been as warranted, and their actual value; but when the seller knew that such goods were to be used by the buyer in the course of trade and commerce, and that their inferior quality would injure his reputation as an honest, careful, and judicious merchant, compensatory damages may be awarded to cover profits lost, patronage destroyed, and expenses incurred. *Swain v. Schieffelin*, 31 N. E. 1025, 1026, 134 N. Y. 471, 18 L. R. A. 385.

## COMPETENCY.

The word "competent" means answering to all requirements; adequate; sufficient; suitable; capable; legally qualified; fit. *King's Lake Drainage & Levee Dist. v. Jamison*, 75 S. W. 679, 683, 176 Mo. 557 (citing Webster).

"Credibility" and "competency" are sometimes applied to a witness as if they were synonymous in meaning. "Credibility" relates to whether the witness is such as entitled to credit or belief. It may not attach by reason of extreme youth, idiocy, insanity, or, under our statutes, conviction of perjury. "Competency" relates more to the relation of witnesses to the matter under investigation. The person, though incompetent in a particular matter, may be a credible witness in other relations to such matters. Formerly incompetency arose from being directly interested in the matter under investigation, or because charged with the commission of the crime under investigation or because of his relation to the party interested, as husband or wife. *Smith Jones*, 34 Atl. 424, 68 Vt. 132.

"The distinction between the 'competency' and the 'credit' of a witness has been long settled. If a question be made respecting his competency, the decision of the question is an exclusive province of the judge; but if the ground of the objection is to the credit only, his testimony must be received and left with the jury, under such directions and observations of the court as the circumstances of the case may require to say whether they think it sufficiently credible to guide their decision in the case." *Commonwealth v. Holmes*, 127 Mass. 424, 430, 34 Am. Rep. 391.

By the "competency" of a person to make a will is meant intelligence sufficient to understand the act he is performing, the property he possesses, the disposition he makes of it, and the persons or objects he makes the beneficiaries of his bounty. In perfect memory, caused by sickness or old age, forgetfulness of the names of the persons he has known, idle questions, or requiring a repetition of information, will not be sufficient to establish incompetency, if he has sufficient intelligence remaining to fulfill the above definition. *Sehr v. Lindmann*, 54 S. W. 537, 540, 153 Mo. 276; *Lorvick v. Wash*, 75 S. W. 95, 100, 175 Mo. 48; *Southworth v. Southworth*, 73 S. W. 123, 173 Mo. 59 (citing *Farmer v. Farmer*, 129 Mo. 530, 31 S. W. 926; *Fulbright v. Perry County*, 145 Mo. 432, 46 S. W. 955).

## COMPETENT.

"Competent," as used in Code Civ. Proc. Kan. § 112b, providing that in all bills of

exception it shall be competent for the party preparing the same to set out the pleadings, motions, and decisions of the justice of the peace thereon, etc., means "sufficient." *Winter v. Shutter*, 22 Pac. 564, 565, 42 Kan. 544.

Comp. Laws, § 562, providing that the township board should be composed of the supervisor and the two justices of the peace whose terms of office soonest expire, and the township clerk, any three of whom should constitute a quorum; and further providing that, when from any cause there should not be three of the officers constituting such board "competent and able to act," one of the remaining justices should meet with any members of the board and have the same authority as such members—cannot be construed as meaning that any necessity whatever would make a regular member "competent and able to act" as a member of the board who would otherwise be incompetent; and hence, where the town moderator had refused to sign an order in favor of the township clerk for money due under a contract for the erection of a building for a town, such township clerk is not made "competent and able to act" in proceedings by the board for the removal of such moderator for refusal to perform his duties because there was no other member of the board or person present capable of acting as such member in his place. *Stockwell v. Township Board of White Lake*, 22 Mich. 341, 351.

"Competent," as used in Probate Law, § 69, providing that if the right of the applicant for letters of administration be established, and he or she be competent, etc., means "not addicted to drunkenness, not imprudent, or wanting in integrity or understanding." In *re Pacheco's Estate*, 23 Cal. 476, 480.

Code, c. 77, § 18, provides that if a will be attested by a person to whom any beneficial interest in any estate is thereby devised, if a will may not otherwise be proved, such person shall be deemed a competent person to witness, but such devise shall be void to him. It was contended that the word "competent," so used, related to the matter of attestation, so that, in order to render the will valid, it was necessary that the person beneficially interested should testify as to its execution, and therefore such person would lose his interest under the will; but it was held that the word "competent" related rather to the matter of the proof of the will, and that the word "competent" in such section 3 of said chapter, describing who should be competent to witness a will, had reference to age, sanity, and moral integrity, so that a person beneficially interested might be competent to witness a will under such section, and a will will not be invalidated if other evidence of its execution can be furnished. *Davis v. Davis*, 27 S. E. 323, 324, 43 W. Va. 300.

The word "credible," as used in the statute of frauds in relation to devises of real property, and the word "competent," as used in Ga. Code, § 2414, relating to the qualification of the witnesses required to attest a will, are synonymous terms, and in this connection mean witnesses who are competent at the time of attestation to testify in a court of justice. *Gillis v. Gillis*, 23 S. E. 107, 96 Ga. 1, 30 L. R. A. 143, 51 Am. St. Rep. 121.

#### COMPETENT ARBITRATORS.

"Competent arbitrators," as used in an insurance policy providing for the appointment of competent arbitrators, means persons who are disinterested, and have the requisite ability to act in the matter. It is not fulfilled by one who is proven to be a drinking man of no account, and who has been arrested for vagrancy. *Ætna Ins. Co. v. Stevens*, 48 Ill. 81, 33.

#### COMPETENT AUTHORITY.

The meaning of the words "competent authorities," in the ratification by the King of Spain of the treaty of cession of Florida, in referring to lands which had been granted by competent authority, must be taken to be those persons who exercised the granting power by the authority of the crown. *Mitchell v. United States*, 34 U. S. (9 Pet.) 711, 735, 9 L. Ed. 283.

A "court of competent authority," as used in Gen. St. 1878, c. 62, § 1, providing that all marriages which are prohibited by law on account of consanguinity between the parties, or on account of either of them having a husband or wife then living, shall, if solemnized within this state, be absolutely void, without any decree of divorce or any other legal proceeding; provided that if any person whose husband or wife has been absent for five successive years, without being known to such person to be living within that time, marries during the lifetime of such husband or wife, the marriage shall be void from the time that its nullity is pronounced by a court of competent authority—means a court with the proper parties before it in an action instituted for the purpose of annulling a marriage, and having jurisdiction of such matters. The decree of such a court would determine the matter conclusively so as to be binding as to the status of the parties, whenever and wherever the question might arise. The marriage is valid until such a court has annulled it, and the validity of such a marriage until annulled cannot be questioned collaterally. *Charles v. Charles*, 42 N. W. 935, 41 Minn. 201.

#### COMPETENT CLERK.

"Competent clerk," as used in a Wisconsin resolution instructing a standing commit-

tee to reduce into two acts the general laws of the state relating to taxes, and empowering them to employ some competent clerk to assist them in other duties, means simply a "clerk" as the term is generally employed with respect to clerks of committees, and does not authorize the employment of legal counsel; and an attorney employed by the committee under such authority was only entitled to the compensation allowed by law to a clerk employed by the Legislature, and not to compensation for skilled labor as a lawyer. *Tenney v. State*, 27 Wis. 387, 393.

#### COMPETENT COMMISSIONER.

A person who had an inchoate right to land owned by his wife, which land was subject to overflow, and was excluded from a district laid out by the drainage commissioners, though included in the original petition, was not a "competent commissioner" under the statute providing for the appointment by the county court of three competent commissioners to lay out and construct a proposed drainage system. *King's Lake Drainage & Levee Dist. v. Jamison*, 75 S. W. 679, 684, 176 Mo. 557.

#### COMPETENT COURT.

A "competent court" for the prosecution of an action or proceeding, either civilly or criminally, is one having lawful jurisdiction. *Landers v. Staten Island R. R. Co.* (N. Y.) 14 Abb. Prac. (N. S.) 346, 353.

To constitute a "competent court" for the trial of a person indicted, a panel of jurors constituted according to law is as necessary an ingredient as the president judge. *Clark v. Commonwealth*, 29 Pa. (5 Casey) 129, 136.

#### COMPETENT EVIDENCE.

By "competent evidence" is meant that which the very nature of the thing to be proven requires, as "the production of a writing the contents of which are the subject of the inquiry." *Chapman v. McAdams*, 69 Tenn. (1 Lea) 500, 504; *Porter v. Valentine*, 41 N. Y. Supp. 507, 508, 18 Misc. Rep. 213.

"Competent evidence" is that which is admissible. Pen. Code Ga. 1895, § 983; Civ. Code Ga. 1895, § 5143.

By "competent evidence" is meant that which the very nature of the thing to be proved requires as the fit and appropriate proof in the particular case. *Horbach v. State*, 43 Tex. 242, 249.

In an instruction that plaintiffs, in order to show their inheritance of certain property, must prove by competent evidence that certain parties were lawfully married, the word "competent" means sufficient or adequate, and not that the jury were to determine

whether the testimony was legally fit or sufficient, or otherwise, to prove the necessary fact or facts. *Niles v. Sprague*, 13 Iowa, 198, 204.

An assignment of error that there was no "competent evidence" before the jury on a certain issue will be construed to mean relevant evidence. *Ryan v. Town of Bristol*, 2 Atl. 309, 312, 63 Conn. 261.

Gen. St. p. 531, § 89, providing that, where the fact of marriage is required or offered to be proved before any court, evidence of the admission of such fact by the party against whom the proceeding is instituted, or of general repute or of cohabitation as married persons, or any other circumstantial or presumptive evidence from which the fact may be inferred, shall be "competent," means admissible for the purpose of establishing the fact of marriage; in other words, such evidence as, if believed, would authorize a jury to find the fact of marriage. *State v. Johnson*, 12 Minn. 476 (Gil. 378, 387).

Articles of agreement which constitute part of the title under which all the parties to the action claim the premises in controversy are competent evidence, whether the executors who signed the agreement were authorized by the will to do so or not. *Ripple v. Ripple* (Pa.) 1 Rawle, 386, 389.

#### COMPETENT INSPECTOR.

Act Pa. June 6, 1893 (P. L. 330), providing for the appointment of a "competent inspector" to investigate the neglect of school directors to furnish suitable school building should be construed to authorize the appointment of a lawyer. If he have reasonable good eyesight and acute perception, a knowledge of the law will not disqualify him as reporter of facts. *Appeal of School Director* 36 Atl. 151, 179 Pa. 60.

#### COMPETENT JURISDICTION.

"Competent jurisdiction," in its ordinary signification, refers to the person as well as the cause. *Babbitt v. Brush*, 4 Ind. 355, 358.

The words "competent jurisdiction," as used in Comp. St. c. 23, § 64, relating to sales by guardians under a license from the district court of competent jurisdiction, mean the court which has power or authority conferred upon it by the law to hear and determine the particular application, and whose jurisdiction it was proper to invoke in the instance. *Hubermann v. Evans*, 65 N. W. 1045, 1049, 46 Neb. 784.

A "court of competent jurisdiction," as used in Rev. St. 427, providing that it shall be the duty of the adverse claimant, within 30 days after filing his claim, to commence proceedings in a court of competent jurisdiction to determine the question of the right

of possession, means "a court of general jurisdiction, whether federal, state, or territorial." *Burke v. McDonald*, 13 Pac. 351, 360, 2 Idaho (Hasb.) 339.

The statute provides that a guardian's sale shall not be void on account of any irregularity in the proceedings, providing it shall appear, among other things, that he was licensed to make the sale by a probate court of competent jurisdiction. Where it appears that license was granted by a probate court, the question is, was such license granted by a probate court of competent jurisdiction? This will depend upon the sense in which the phrase "competent jurisdiction" is used in the statute. The term is susceptible of two meanings: It may signify that the court must acquire and exercise jurisdiction competent to grant the license through and by reason of a strict conformity to the requirements of the statute; or it may signify jurisdiction over the subject-matter, a sort of authority in the abstract to hear and determine the case. In other words, by a probate of "competent jurisdiction" may be meant the court whose jurisdiction it is proper to invoke in the given instance. The phrase "competent jurisdiction" is not to be taken in the first sense above spoken of, for the section in which it occurs is professedly a healing statute, plainly designed to cure certain irregularities, and therefore excusing to some extent a noncompliance with the provisions of law. The term as there used means the probate court whose jurisdiction it is proper to invoke in the particular case in hand. *Montour v. Purdy*, 11 Minn. 384 (Gil. 278, 296), 83 Am. Dec. 88.

A "court of competent jurisdiction" is one provided for in the Constitution or created by the Legislature, and having jurisdiction of the subject-matter and of the person. *In re Norton*, 68 Pac. 639, 641, 64 Kan. 842, 91 Am. St. Rep. 255.

#### COMPETENT OFFICER.

Rev. St. § 5292, making it perjury to make a false oath before any competent tribunal, "officer," or person, etc., means an officer competent under the laws of the United States to administer the oath alleged to be false. *United States v. Madison* (U. S.) 21 Fed. 628, 629; *United States v. Curtis*, 2 Sup. Ct. 507, 509, 107 U. S. 671, 27 L. Ed. 534. The terms may include a state officer authorized by act of Congress to administer oaths in proceedings relative to timber claims. *United States v. Madison* (U. S.) 21 Fed. 628, 629.

#### COMPETENT PARTY.

In Laws 1857, p. 348, § 11, providing that, if either of the railroad companies to which lands were granted by such act fail to perform the conditions therein specified,

the board of control should have power to declare the lands forfeited to the state, and requiring said board to confer the lands upon some other competent party, the term "competent party" means a railroad company proposing to construct the very line of railroad for which the lands were originally granted. *Bowes v. Haywood*, 85 Mich. 241, 246.

#### COMPETENT PERSON.

A "competent person, officer, or tribunal," within the meaning of Rev. St. § 5292, making it perjury to take a false oath before any competent tribunal, officer, or person, means a person, officer, or tribunal competent under the laws of the United States to administer the oath alleged to be false. *United States v. Madison* (U. S.) 21 Fed. 628, 629; *United States v. Curtis*, 2 Sup. Ct. 507, 509, 107 U. S. 671, 27 L. Ed. 534. The term may include a state officer authorized by act of Congress to administer oaths in proceedings relative to timber claims. *United States v. Madison* (U. S.) 21 Fed. 628, 629.

Within Code 1892, c. 123, providing for the employment of a competent person by the board of supervisors to investigate the title to school lands and to conduct suits leading thereto, the term "competent person" will not necessarily exclude a lawyer who was otherwise competent, for, if he were competent in other respects, his eminence as a lawyer would not render him less competent to institute and prosecute the suits to effect. *Warren County v. Dabney* (Miss.) 32 South. 908, 909.

One person named by mutual consent of the parties to determine the value of property and certain premises could not be considered "competent persons," within the meaning of an agreement for submission. *Harvey v. Grabham*, 5 Adol. & El. 61, 67.

#### COMPETENT PROOF.

Rev. St. 464, § 4142, providing that whenever a receiver of an insolvent corporation shall show by his oath or "other competent proof" that a person is indebted to the corporation, etc., "does not mean proof competent to establish the fact in a legal sense before a jury, but merely proof sufficient to create a rational belief which may fall far short of that necessary to authorize a verdict." It is sufficient if a receiver who applies for a warrant swore to the facts on information and belief. *Noble v. Halliday*, 1 N. Y. (1 Comst.) 330, 335.

#### COMPETENT SUPPORT.

A will providing that testator's daughter and grandson should have a "reasonable and competent support" out of the proceeds of his estate did not mean merely "food and clothing necessary to sustain life, nor any



other fixed quantity or allowance, but depends on circumstances and exigencies." *Ellerbe v. Ellerbe's Heirs* (S. C.) Speers, Eq. 828, 340.

### COMPETENT TRIBUNAL.

It is usual to say, even of foreign judgments, that if pronounced by a competent tribunal, and carried into effect without our assistance, they are conclusive of the question decided. And here "competent tribunal" means one of the regularly established courts of the country, and in it. In *re Williamson*, 26 Pa. 9, 30, 67 Am. Dec. 374.

Rev. St. § 5392, providing that every person who, having taken an oath before a "competent tribunal, officer or person" in any case in which a law of the United States authorizes an oath to be administered, that he will testify truly, etc., and, contrary to such oath, testifies falsely to that which he does not believe to be true, shall be guilty of perjury, etc., means that the oath must be permitted or required by some law of the United States, and be administered by some tribunal, officer, or person authorized by such laws to administer oaths in respect to the particular matters to which it relates. It does not necessarily mean that the tribunal by which the oath is administered shall have been created by the government, which requires it to be taken, in order that the officer who administers it shall be an officer of that government. *United States v. Curtis*, 2 Sup. Ct. 507, 509, 107 U. S. 671, 27 L. Ed. 534.

A "competent person, officer, or tribunal," within the meaning of Rev. St. U. S. § 5292, making it perjury to take a false oath before any competent tribunal, officer, or person, means a person, officer, or tribunal competent under the laws of the United States to administer the oath alleged to be false. The terms may include a state officer authorized by act of Congress to administer oaths in proceedings relative to timber claims. *United States v. Madison* (U. S.) 21 Fed. 623, 629.

"Competent tribunal," as used in 2 Rev. St. 563, § 22, providing that persons who are committed or detained by virtue of the final judgment or decree of any competent tribunal, of civil or criminal jurisdiction, shall not be entitled to prosecute the writ of habeas corpus, means a tribunal having jurisdiction of the matter and of the person. *People v. Liscomb* (N. Y.) 3 Hun, 760, 775; *People v. Liscomb*, 60 N. Y. 559, 568, 569, 19 Am. Rep. 211.

### COMPETENT WITNESS.

A "competent" witness is one competent to testify generally, and laboring under no legal disqualifications. The office of an affi-

davit made by one party to a suit, for the purpose of taking the testimony of the other, is to point out the fact to be proved, and not to produce the evidence of that fact. Within the range of the affidavit, the party is to be examined like any other witness, and it is as competent for him to prove a fact by admissible declarations of others as it is for any other witness. *Hogan v. Sherman*, 5 Mich. 60, 61.

The word "competent," when relating to a witness, implies a legal capacity to testify, and, when applied to evidence in law, means having the legal capacity or fitness to be heard in court, as distinguished from credibility or sufficiency. Thus a witness may be competent, although unworthy of belief. Evidence may be competent, although not altogether sufficient, even if believed. *People v. Compton*, 56 Pac. 44, 46, 123 Cal. 403.

"Competent witness," as used in St. 1894, c. 260, providing that a defendant in a criminal case, at his own request and not otherwise, may testify in his own behalf, and shall be deemed a competent witness, means "competent not for a special purpose, or to give evidence only which shall operate to his favor, but competent to testify to all facts relevant and material to the issue." Like all other witnesses, he is to tell the truth, and the whole truth, concerning a matter proper to be inquired about. If he offers himself as a witness, he waives his constitutional privilege of refusing to furnish evidence against himself, and may be interrogated as a general witness in the case. *Commonwealth v. Mullen*, 97 Mass. 545, 546.

### COMPETING.

The word "competing," in Const. art. I, § 4, prohibiting the consolidation of any railroad, canal, or other transportation companies owning or having under their control parallel or competing lines, does not apply to street railways, even though their lines are parallel. "The travel over parallel streets is not necessarily a competing travel. Every street has a travel of its own, which is conducted upon its own railway. The travel may be almost entirely conducted without competition with the travel upon any other, though parallel, street. Nor do railways upon parallel streets have the same termini. Many of them, though running upon parallel streets for a considerable distance, diverge altogether from such a course toward their extremities. Two roads would be 'competing' if laid upon the same street and running in the same direction." *Appeal of Montgomery*, 20 Atl. 399, 400, 136 Pa. 96, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

"Competing railroads," within the meaning of Rev. St. Mo. § 2569, which prohibits any railroad within the state from owning, operating, or managing any parallel or competing railroad within the state, applies on-

where both the railroads are situated within the state, and the competition between the two must be of some practical importance, such as is liable to have an appreciable effect on the rates. Two railroads which do not touch at any two common points, and between which for a distance of 40 miles another railroad is interposed, and whose traffic, except an unimportant amount, will in no event pass over the other, are not "competing" lines within the meaning of the statute. *Kimball v. Atchison, T. & S. F. R. Co.* (U. S.) 46 Fed. 888, 890.

Whether a railroad is a "competing railroad" in its relation to another road, within the meaning of a statute prohibiting competing railroads from consolidating, cannot be determined by the application of the doctrine of judicial notice, but it is a question of fact only, to be established by evidence. *East Line & R. R. Ry. Co. v. Rushing*, 6 S. W. 334, 837, 69 Tex. 306.

"Competing line," within the meaning of a clause of the Pennsylvania Constitution, forbidding a railroad corporation from controlling any other railroad corporation having under its control a parallel or competing line, only applies to a line already constructed; but the word "parallel" is not so limited, but may include a projected road surveyed, laid out, and in the process of construction. *Pennsylvania R. Co. v. Commonwealth* (Pa.) 7 Atl. 368, 378.

The term "competing road," within the meaning of Const. Ky. 1891, § 201, prohibiting consolidation of a railroad with a parallel or competing road, characterizes two railroads which connect two important cities, and are natural competitors for the traffic between such cities. *Louisville & N. R. Co. v. Commonwealth of Kentucky*, 16 Sup. Ct. 714, 719, 161 U. S. 677, 40 L. Ed. 849.

## COMPETITION.

See "Unfair Competition."

"Competition" is the struggle between rivals for the same trade at the same time. It is self-evident that there cannot be competition unless there is trade, and so, though the popular saying is that competition is the life of trade, yet it is quite certain that trade is the mother of competition, for the latter springs from the former, so that whatever restrains trade restrains competition in exact degree. *Ferd Helm Brewing Co. v. Belinder*, 71 S. W. 691, 695, 97 Mo. App. 64.

The essential quality of that series of acts or course of conduct which we call "competition" is that which shall be the result of the free choice of the individual, and not of any legal or moral obligation or duty. *Meredith v. New Jersey Zinc & Iron Co.*, 37 Atl. 539, 543, 55 N. J. Eq. 211.

## COMPILE—COMPILATION.

Abridgment distinguished, see "Abridgment."

Code distinguished, see "Code."

To "compile" is to copy from various authorities into one work. *Story v. Holcombe* (U. S.) 23 Fed. Cas. 171, 174.

## COMPLAIN.

The generally understood meaning of the verb "complain" is to express regret or pain. *Southern Indiana Ry. Co. v. Davis* (Ind.) 68 N. E. 191, 194.

## COMPLAINT.

See "Cross-Complaint"; "Supplemental Complaint"; "Supplementary Complaint"; "Sworn Complaint."

Within the meaning of Sess. Laws 1890, p. 52, providing that the county court shall have power to determine all complaints made in regard to the assessed value of any property, and that upon hearing of complaints the board may subpoena and administer orders to witnesses, etc., the word "complaints" is not used in the technical sense in which the word "complaint" is used in the Civil Code. And it is not necessary that a formal allegation or charge in writing should be filed in order to confer jurisdiction upon the board. *Central Pac. R. Co. v. Standing*, 45 Pac. 344, 345, 13 Utah, 488.

The term "complaint" is not always limited to charges of crime or wrong, and it may be that as used in some statute it comprehends oral as well as written allegations; but whenever used it means the making of a statement of fact as a basis for the taking of legal action. Hence a notice to a sheriff directing him to place in temporary quarantine certain cattle is not a "complaint" within the statute authorizing the sheriff to seize and quarantine cattle on a complaint made to him that such cattle were capable of communicating or liable to impart fever. *Asbell v. Edwards*, 66 Pac. 641, 642, 63 Kan. 610.

### In civil proceedings.

The term "complaint" is that given to designate the first pleading on the part of the plaintiff in a civil action. *Sharon v. Sharon*, 7 Pac. 456, 457, 67 Cal. 185.

The "complaint" is a statement of the plaintiff's cause or causes of action. *Talbot v. Garretson*, 49 Pac. 978, 979, 31 Or. 256.

A "complaint" is the exhibiting any action, real or personal, in writing, and the party making it is called the "plaintiff." *State v. McCann*, 67 Me. 372, 374.

Code Civ. Proc. § 481, describes the following rule for a complaint: "A plain and concise statement of the facts, constituting each cause of action, without unnecessary repetition." *Becker v. Fischer*, 43 N. Y. Supp. 685, 13 App. Div. 555.

The office of the "complaint" is to state in a plain and concise manner the cause of action upon which the plaintiff relies. Code Civ. Proc. § 481, subd. 2; *Hughes v. Wilcox*, 39 N. Y. Supp. 210, 211, 17 Misc. Rep. 32.

A "complaint" is defined by the Code to be a statement of the facts constituting a cause of action, in plain and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended. *Travelers' Ins. Co. v. Prairie School Tp.*, 51 N. E. 100, 101, 151 Ind. 36; *Wabash R. Co. v. Young*, 55 N. E. 853, 854, 154 Ind. 24.

The complaint in an action "is the pleading in an action, containing a statement of a cause of action, with a demand for the proper relief to which the party may be entitled. A verification forms no part of a complaint." *McMath v. Parsons*, 2 N. W. 703, 704, 26 Minn. 246.

The word "bill" or "complaint," when found in the Code of Civil Procedure, shall mean "petition." *Cobbey's Ann. St. Neb.* 1903, § 1851.

#### **Same—As affidavit.**

See "Affidavit"

#### **Same—As cause of action.**

"Complaint," as used in a demurrer which recited that defendant demurred because the complainant did not state facts sufficient to constitute a complaint, was not equivalent to the words "cause of action." *Pine Civil Tp. v. Huber Mfg. Co.*, 83 Ind. 121, 124.

"Complaint," as used in a demurrer to defendant's answer on the ground that it does not state facts to constitute a good defense of plaintiff's complaint, is equivalent to the words "cause of action." *Foster v. Dailey*, 30 N. E. 4, 3 Ind. App. 530.

#### **Same—Counterclaim.**

Gen. St. 1878, c. 65, § 113, allowing an appeal from justice court if "the amount claimed in the complaint" exceeds \$30, will not be construed to include amount claimed in pleadings other than the complaint, and hence does not authorize an appeal because more than \$30 is demanded in a counterclaim, but will be limited to the amount claimed in the complaint. The term "complaint" has a fixed and well-known meaning, and the language "amount claimed in the complaint" can hardly be construed to be equivalent to the words "amount for which judgment is demanded by either party in his

pleadings." *Ross v. Evans*, 14 N. W. 89, 898, 30 Minn. 206.

#### **Same—Cross-complaint distinguished.**

The only real difference between a "complaint" and a "cross-complaint" is that the first is filed by the plaintiff and the second by the defendant. Both contain a statement of the facts, and each demands a firmative relief on the facts stated. *White Reagan*, 32 Ark. 281, 290.

#### **Same—Election contest.**

There is a broad distinction between a suit for an office and a mere contest of the result of the election as declared by the officer to whom the duty of certifying the result is intrusted. The power of the officer to conduct an election contest before whom an election contest is limited to the mere award of the election, or of ordering another election. Neither the officer nor the tribunal before whom the contest is had gives the contestant a judgment for his right to the office, or for the fees and emoluments of it, but merely gives him a certificate, and leaves him, if the office is not voluntarily surrendered by the contestee, to assert his title thereon. Furthermore, the character of the proceedings is the same, whether the contest is prosecuted before the judge in chambers or before the court. Though heard before the court, it is to be determined without a jury. On the other hand, if it was a suit, a trial by jury should not be denied if demanded. Const. art. 5, § 10. It therefore follows that an election contest is not a "suit, complaint or plea," within the meaning of the phrase as used in defining a constitutional jurisdiction of the district court. *Williamson Lane*, 52 Tex. 335, 345.

"Complaint or plea," as used in a constitution confining the jurisdiction of the district court to a suit, complaint or plea wherein the matter in controversy is valued at or amounts to \$500, exclusive of interest, does not include a proceeding to contest an election, there being a difference between a contest of an election and a suit for an office, the latter being a suit within the latter meaning of the Constitution, the former involving a political or rather extrajudicial question, to be regulated under the Constitution by the political authority of the state. *Gibson v. Templeton*, 62 Tex. 555, 556.

#### **Same—Summons or writ distinguished.**

The term "complaint," as used in the removal statute, providing that any party who desires to remove a cause may file a petition at any time before the defendant is required by the law of the state in which the suit is brought to answer or plead to the declaration or complaint of the plaintiff, is not used as synonymous with the words "writ" or "summons," which is at common law the process of commencing the suit, and

is the first step taken to bring the parties into court, while the declaration or complaint is necessarily the second step which manifests the case; so that such petition need not be filed within the time when pleas for abatement must be filed under the state practice. *Wilson v. Winchester & P. R. Co.* (U. S.) 82 Fed. 15, 17.

#### In criminal proceedings.

A "complaint" is a form of legal process, which consists of a formal allegation or charge against a party, made or presented to the proper court or officer, as for a wrong done or a crime committed. *State v. Dodge County*, 31 N. W. 117, 120, 20 Neb. 595; *Asbell v. Edwards*, 66 Pac. 641, 63 Kan. 610; *State v. Goetz*, 69 Pac. 187, 188, 65 Kan. 25. It imports a charge in clear and distinct form of a writing. *State v. Goetz*, 69 Pac. 187, 188, 65 Kan. 125.

The complaint is the allegation in writing, made to a court or magistrate, that a person has been guilty of some designated offense. *Pen. Code Cal.* 1903, § 806; *Pen. Code Idaho* 1901, § 5219; *Rev. St. Utah* 1898, § 4604. Under such section the word "complaint" includes the accusation made before the committing magistrate, and also the information filed by the district attorney in the trial court. *United States v. Collins* (U. S.) 79 Fed. 65, 66.

A complaint is an allegation made to a magistrate that a person has been guilty of some public offense. *Comp. Laws Nev.* 1900, § 4070.

A "complaint," within the meaning of an article in the Code of Criminal Procedure entitled "Security to Keep the Peace," is a statement in writing, made to a magistrate, that a person has threatened to commit an offense against the person or property of another, and subscribed and sworn to by the complainant. *Rev. Codes N. D.* 1899, § 7765.

A "complaint," within the meaning of the chapter relating to security to keep the peace, is a statement in writing of the jurisdictional facts, clearly specifying the threatened offense, and subscribed and sworn to by the complainant. *Rev. St. Utah* 1898, § 4524.

Complaints are preliminary charges before committing magistrates. *Gardner v. People*, 62 N. Y. 299, 306.

"The word 'complaint,' as used in the statutes of this commonwealth in reference to criminal offenses, sometimes means the formal written charge of crime to which the accused person is to answer, and sometimes it means the oral charge which may be made to a proper magistrate or court, and which is to be reduced to writing by the magistrate or court. It is used in the latter sense in *Pub. St. c.* 207, § 25" providing that an of-

ficer may arrest a person for drunkenness without a warrant, and when the person is sufficiently recovered from his intoxication, the officer shall make a "complaint" against him for the crime. *Hobbs v. Hill*, 32 N. E. 862, 157 Mass. 556.

The term "complaint" is a technical one, descriptive of proceedings before magistrates, and a complaint may be made before one magistrate and the warrant thereon returned to another for a hearing. *Commonwealth v. Davis*, 28 Mass. (11 Pick.) 432, 436.

Where criminal prosecutions originate upon complaint, one made under oath or affirmation is implied. *Campbell v. Thompson*, 16 Me. (4 Shep.) 117, 120.

A warrant on which a person was arrested, in setting forth that he was to be held to answer to a "complaint" charging him with the crime of perjury, did not import that the instrument charging the perjury was a "technical complaint," as the term is used in the statutes, and the warrant, therefore, was not defective in not using "indictment" instead of "complaint." *In re Durant*, 12 Atl. 650, 654, 60 Vt. 176.

*St.* 1868, c. 263, § 2, providing that the penalty for selling adulterated milk "may be recovered on complaint" before any court of jurisdictions, is permissive and not mandatory, and does not exclude an indictment. *Commonwealth v. Haynes*, 107 Mass. 194, 197.

The term "complaint," when it is a charge for a crime committed, is generally under oath. *State v. Dodge County*, 31 N. W. 117, 120, 20 Neb. 595.

#### Same—As affidavit or indictment.

See "Affidavit"; "Indictment."

The affidavit before the magistrate which charges the commission of an offense is called a "complaint." *Code Cr. Proc. Tex.* 1895, art. 256.

#### Same—Information distinguished.

Webster defines "complaint" as an accusation or charge against an offender, made by a private person or an informer to the justice of the peace or other proper officer, alleging that the offender has violated the law, and claiming the penalty due to the prosecutor. It differs from "information," which is a prosecution of the offender by an attorney or solicitor; from a "presentment" or "indictment," which are the accusations of the grand jury. Consequently, on a complaint exhibited by a tithing man to a justice of the peace, the accused is not entitled to a jury trial, under the constitutional provision giving one accused by an indictment or information right to a trial by jury. *Godard v. State*, 12 Conn. 443, 453.



**In equity.**

The word "complaint" is the technical name of a bill in chancery. *United States v. Ambrose*, 2 Sup. Ct. 682, 684, 108 U. S. 336, 27 L. Ed. 746.

**In justice court.**

The "complaint" in justices' courts is a concise statement, in writing, of the facts constituting the plaintiff's cause of action; or a copy of the account, note, bill, bond, or instrument upon which the action is based. *Code Civ. Proc. Cal. 1903, § 853.*

As used in the Justices' Code, the "complaint" is a concise statement of the facts constituting the plaintiff's cause of action, with a demand for judgment, specifying the sum of money or the relief claimed. *Rev. Codes N. D. 1899, § 6660.*

The "complaint" in justices' courts is a concise statement in writing of the facts constituting the plaintiff's cause of action, or the original account, note, bill, bond, or instrument, or a copy thereof, upon which the action is based, which shall be deemed a complaint. *Rev. St. Utah 1893, § 3687.*

**COMPLAINANT.**

The term "complainant" is applicable to the actor in suits in chancery. *Railway Passenger & Freight Conductors' Mut. Aid & Benefit Ass'n v. Robinson*, 35 N. E. 168, 173, 147 Ill. 138.

The word "complainant," when found in the Code of Civil Procedure, shall be construed and held to mean "plaintiff." *Cobbe's Ann. St. Neb. 1903, § 1851.*

The party prosecuting a special proceeding of a criminal nature is designated in this Code as the "complainant," and the adverse party as the "defendant." *Cr. Code N. Y. 1903, § 950.*

**COMPLAINANT'S COSTS.**

Where an action is dismissed "at complainant's costs," it means costs to the defendant, to be recovered of the complainant in the usual course. *Kellogg Switchboard & Supply Co. v. Glen Telephone Co.* (U. S.) 121 Fed. 174, 177.

**COMPLETE—COMPLETION.****See "Furnished Complete."**

The verb "to complete," like many others, is used with some indefiniteness or indistinctness, and the idea conveyed by it frequently depends upon the connection in which it is found, or the object to which it is referred, and, when used in the statute relating to the application of revenue to the time when certain canals shall be completed, means that the revenue shall be applied so

long as the application shall be necessary to such completion, or until the application is complete. *Newell v. People*, 7 N. Y. (3 Seld.) 9, 131.

"Completion," as used in a contract for the sale of a steam engine, providing that the last installment was to be paid "two months after its completion," did not apply to improvements and alterations made in the engine after it was originally set up and deemed completed. *Parsons v. Saxter*, 2 Car. & K. 265.

"Completion" ordinarily means the finishing or accomplishing in full of something which has already been commenced; as, for instance, it is most frequent to hear the word "completion" used in connection with the finishing years and months of the education of the young. It is said of the young man or the young woman that he or she has gone for this year or this session to a certain university for the "completion" of his or her education, the training or educational process having been going on for years; the words "to complete" being understood to mean "to finish," "to fulfill"; and, as used in Code, § 1996, authorizing county commissioners to subscribe stock to a railroad company when necessary to aid in the "completion" of a railroad, it does not include a railroad not begun to be built before the Constitution was adopted. *Stanley County Com'rs v. Snuggs*, 28 S. E. 539, 542, 121 N. C. 394; *Same v. Coler* (U. S.) 96 Fed. 284, 287, 37 C. C. A. 484; *Wilkes County Com'rs v. Call*, 123 N. C. 308, 31 S. E. 481, 486.

"Complete," as used in a contract providing that the expenses of completing a certain work, and the labor account incurred in so completing it, should be paid out of a certain sum, signifies the finishing of unfinished work, bringing it from the condition in which it then was to a state in which there was no deficiency. The instruction is not broad enough to include laborers' claims preceding its date. *McElwaine v. Hosey*, 35 N. E. 272, 276, 135 Ind. 481.

A contract providing that defendant should cause certain houses which had been erected, but were not papered and painted, to be fully "completed," did not constitute a guaranty of the work which had been done on the houses before defendant contracted to finish them, and did not render defendant liable for a loss occasioned by a defective foundation. *Hyannis Sav. Bank v. Moors*, 120 Mass. 459, 463.

"Completion," as used in the chapter relating to the appropriation and use of waters, means conducting the waters to the place of intended use. *Civ. Code Idaho 1901, § 2585.*

**As commencement.**

In the case of *Cushwa v. Improvement Loan & Building Ass'n*, 32 S. E. 259, 45 W.

Va. 490, it was held that a statute giving a mechanic's lien for work performed, which should be prior to liens of other kinds, gave the mechanic a prior lien dating from the commencement of the work. This case is referred to as being a holding that "completion" means "commencement," and such construction is disapproved in a holding as to a provision in an oil lease in reference to the completion of the well. *Yoke v. Shay*, 34 S. E. 748, 750, 47 W. Va. 40.

#### As completion of substantial part.

In the absence of any statutory qualification or definition of the term "completion," there would be no room for its construction by the court, but it would be considered to mean actual completion, and would be a question of fact to be determined in each case. The mechanic's lien statute has, however, provided that a substantial completion is all that is required in any case, whether the work be done at the direct instance of the owner or under the provisions of a contract between him and an original contractor, by declaring that a trivial imperfection shall not be deemed such a lack of completion as to prevent the filing of the lien. What constitutes a "trivial imperfection" is still a question of fact in each instance. *Willamette Steam Mills Lumbering & Mfg. Co. v. Los Angeles College Co.*, 94 Cal. 229, 238, 29 Pac. 629, 632.

In an action to establish and enforce a mechanic's lien, a finding that the plaintiffs substantially complied with all the terms of their contract and "completed" the work is entirely consistent with a finding that some places in the houses were not properly grained and finished. The performance of a contract need not in all cases be literal and exact, in order to entitle the party to compensation therefor. Especially is this the rule in contracts for labor by mechanics or artisans, where the quality of the work done or the manner of its performance is the sole matter in dispute, and is to be decided upon conflicting testimony. *Harlan v. Stufflebeem*, 25 Pac. 686, 687, 87 Cal. 508.

A contract providing for the construction of waterworks for a village, providing that an estimate shall be made for the value of labor, materials, and all work "completed" up to the first day of the month, did not mean entirely completed, but the contractor was entitled to an estimate of and payment for any work of which a material and substantial part had been performed. *Delafield v. Village of Westfield*, 28 N. Y. Supp. 440, 445, 77 Hun, 124.

A contract for lumber to be paid "when the house is completed" is to be construed as meaning when the house is substantially finished by any one. *Russell v. Barry*, 115 Mass. 300.

#### Of building.

"Completion," as used in Kan. Code, § 632, regulating the time within which a contractor may file a statement for a lien on a building, and declaring that it shall not be filed until after completion, means a final cessation by the contractor of work on the building; and hence the abandonment of work by such contractor is to be deemed a "completion" of the building for the purpose of filing his liens. *Catlin v. Douglas* (U. S.) 33 Fed. 569, 570.

Code, § 1187, declares that material men shall file their notice of lien within a certain time after the completion of the building. Held, that while in general the word "completed" or "completion" means the finishing of the building, if a dwelling house, according to the plans and specifications, yet when it was made to appear that it was the original purpose of the owner to erect and build it in part only, or that, having proceeded to erect the house in part, he abandoned his design of finishing it, the building should be held to be "completed" within the terms of the statute on such abandonment. *Schwartz v. Knight*, 16 Pac. 235, 74 Cal. 432.

"Completed," as used in Act March 24, 1876, § 17, establishing a new city hall commission to act until the hall should be erected or "completed as in this act provided," means when the moneys raised under the provisions of the act are employed in the manner directed by the statute. *People v. Bartlett*, 7 Pac. 417, 87 Cal. 156.

#### Of irrigation works.

"Completion," within Civ. Code, tit. 8, pt. 4, div. 2, § 1416, regulating irrigation and water rights, and declaring that within 60 days after the posting of notice the claimant must commence the excavation or construction of works by which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion unless temporarily interrupted by snow or rain, means a conducting of the waters to the place of their intended use. *Lux v. Hagglin*, 10 Pac. 674, 74, 69 Cal. 255.

#### Of purchase.

In a contract for the sale of land, where in the purchaser covenanted to pay a certain sum on or before a certain time as the consideration for such sale, with interest to the time of the completion of the purchase, the words "completion of the purchase" only meant payment of the rest of the purchase money, and did not necessarily mean completion of the purchase by acquisition of the land. *Mattock v. Kinglake*, 10 Adol. & E. 50.

#### Of railroad.

"Completed for use," as used in a vote of a municipal corporation granting aid in the construction of a railroad, which provides

that it shall be payable when the road is completed for use, means "such a degree of completion as would make a railroad reasonably safe, fit, and convenient for the public use and accommodation, as new roads are ordinarily used in similar localities." *Manchester & K. R. R. v. City of Keene*, 62 N. H. 81, 120.

Bonds were voted by a county in aid of a railroad in payment of its subscription to the stock, on condition that the railroad be built and be completed and in operation by a certain date. Held, that the term "completed" would not be construed to require the road to be perfect in every respect at the prescribed date for completion, but the road would be held to be "completed" if it was in operation on that day in such a manner that it might be properly and regularly used for the purpose of transporting freight and passengers. *Southern Kansas & P. R. Co. v. Towner*, 21 Pac. 221, 224, 41 Kan. 72.

"Completed," as used in a contract in which subscribers to a fund for the building of a railroad promised to pay a specified amount when the road was completed, has a different meaning from that which it has in a contract for the construction of a road, since in a contract for the construction it would mean a completion in accordance with the specifications, while in a subscriber's contract a less perfect construction would satisfy the term; and if the road was in a condition to be open for regular passenger and freight traffic, and was actually in use, it was "completed" within the meaning of the subscriber's contract. *Tower v. Detroit, L. & L. M. R. Co.*, 34 Mich. 328, 338.

In its narrowest signification, "completion" means to carry out something already begun; to fill out something already outlined. The term "completion of a railroad," as used in Code N. C. § 1996, providing that the boards and commissions of the several counties shall have power to subscribe the stock to any railroad company when necessary to aid in the completion of any railroad, etc., involves the selection of the termini, the survey and location of the route, the securing of the right of way, the construction of the roadbed, and the laying and ironing the track. Any aid given in any of these stages is aid in the "completion of a railroad." *Coler v. Stanly County Com'rs* (U. S.) 89 Fed. 257, 266.

"Completed," within the conditions on which railroad aid bonds were to be issued, means when the road is made, to the suburb of the village to which it is to run, in such a manner as to bear daily trains on it, carrying all freight and travelers that offer, though some portion of the work is intended to be replaced with other and better material. *O'Neal v. King*, 48 N. C. 517, 519.

The word "completing" has substantially the same signification as "constructing."

A railroad is "completed" or "constructed" when that is done which is necessary to make it a railroad; when it is fitted for use as a railroad; that is to say, when it is made ready and put in a proper condition for the placing and running of regular trains upon it for its "operation," as it is usually termed. In its natural and ordinary sense, the word "completing" does not include the equipment of the road with rolling stock or putting it into operation. *De Graff v. St. Paul & P. R. Co.*, 23 Minn. 144, 146.

#### Of street.

"Complete," as used in the special statute authorizing the municipality of Boston to complete certain streets, means determine the time at which they should be graded, finished, fitted for travel, and opened for use. *Bowman v. City of Boston*, 59 Mass. (5 Cush.) 1, 8.

"Completed," as used in a city ordinance with reference to the completion of a street, does not mean "that condition in which they are made smooth and finished, but some work by which they are made streets de facto." *Fernald v. City of Boston*, 66 Mass. (12 Cush.) 574, 579.

#### Of sale.

A "completed agreement" for the sale of a piece of property is something more than an unaccepted offer to sell. *Milwaukee Mechanics' Ins. Co. v. B. S. Shea & Son* (U. S.) 123 Fed. 9, 12, 60 C. C. A. 103.

When a real estate broker is required to "complete a sale" before he is entitled to his commission, it requires the broker to find a purchaser in a situation, and ready and willing, to complete the purchase on the terms agreed on. *McGavock v. Woodlief*, 61 U. S. (20 How.) 221, 227, 15 L. Ed. 884 (cited and approved in *Carstens v. McReavy*, 25 Pac. 471, 472, 1 Wash. St. 359).

#### COMPLETE ANSWER.

In the statute providing that no decree pro confesso shall be set aside but on filing a full and complete answer to the plea, it is evident that the word "complete" gives no strength to the sentence, nor does it enlarge the meaning. A "full" answer is as extensive a term in describing one which is ample and sufficient as if the term had been "complete"; the latter is mere tautology. *Bently v. Cleaveland*, 22 Ala. 814, 817.

#### COMPLETE CARGO.

See "Full and Complete Cargo."

#### COMPLETE COPY OR STATEMENT.

The statement that a transcript contains a "correct" statement of certain proceedings is the practical equivalent of a certificate

that the transcript is "a true and complete copy of such proceedings" required by statute. *Yeager v. Wright*, 13 N. E. 707, 709, 112 Ind. 230.

In an agreement submitting mutual accounts between the parties to arbitration, with a stipulation that the party shall accept the annexed statement of disbursements and collections as correct to date, the word "correct" could not have meant "complete," so as to exclude all omitted items of disbursements or collections, but the meaning and intent of the phrase was that the schedule should be taken to be "correct" as far as they went, and as to the items therein specified. *Adams v. MacFarlane*, 65 Me. 143, 151.

Civ. Code Ind. 1852, § 283 (Rev. St. 1881, § 462), provides that copies of records shall be proved and admitted as legal evidence by the attestation of the keeper of such records that the same are true and complete copies thereof. Held, that the words "true and complete" as used in such statute were not technical words, and that a certificate using words of substantially the same import or words of equivalent meaning was a sufficient attestation to authorize the admission of a copy of a record in evidence. Thus the words "full, true, and complete" were held to be certainly equivalent in meaning to the words used in the statute, and a certificate containing them was a substantial compliance with the statute. *Anderson v. Ackerman*, 88 Ind. 481, 490.

The clerk in his certificate stated that the transcript of the judgment is a true and "correct" copy. A point was made that the certificate was insufficient, for the reason that the word "correct" is used instead of the word "complete"; that the certificate should have stated that the transcript of the judgment is a true and "complete" copy. There is nothing in this objection. *Bailey v. Martin*, 119 Ind. 103, 108, 21 N. E. 346.

#### COMPLETE PURCHASER.

A "complete purchaser" is a purchaser who has paid the purchase price on real estate, and who is entitled in a court of equity to demand a conveyance of the legal title. *Preston's Adm'rs v. Nash*, 76 Va. 1, 9.

#### COMPLETE SCHEDULE.

Code, § 2733, requiring a full and complete schedule to be filed with every assignment by a debtor, does not require a minute and detailed inventory of every article, and where a stock of goods, wares, and merchandise conveyed are scheduled as consisting of "dry goods, boots, shoes, hats, caps, gentlemen's furnishing goods, clothing, notions, trunks, and valises," it is a sufficient schedule within the meaning of the statute. *Rosenbaum v. Moller*, 4 S. W. 10, 12, 85 Tenn. (1 Pickle) 653.

#### COMPLETE SEARCH OF TITLE.

The expression "complete search of title," as used in an authority to an agent to negotiate a mortgage loaned upon his principal's property, and bind them to pay for making complete searches of title to the premises proposed to be mortgaged, is not an equivalent term to "title insurance," so as to authorize the agent to arrange for giving clear title insurance. "Title insurance" has a much broader scope than "complete search of title." *Giltinan v. Lehman*, 48 Atl. 540, 65 N. J. Law, 668.

#### COMPLETE STATEMENT.

See "Complete Copy or Statement."

#### COMPLETE TITLE.

Undoubtedly possession is necessary to a complete title to land, for such title has several stages or degrees, namely, first, mere possession or actual occupation, without pretense of right; second, the right of possession, which one man may have while another has the possession in fact; and, third, the mere right of property, which may exist without possession or the right of possession. These being united constitute what Blackstone calls a "completely legal title," but it is held that the question of actual possession of lands is not one of title within the meaning of the statute providing that a justice of the peace shall have no jurisdiction of cases involving the title of land. *Ehle v. Quackenboss* (N. Y.) 6 Hill, 537.

A "complete title to land," according to Blackstone, consists of *juris et seisinæ conjunctio*; possession; the right of possession, and the right of property. *Dingey v. Paxton*, 60 Miss. 1038, 1054.

A complete title, in the sense that complete Spanish or French titles required no confirmation by the government of the United States, was one where the terms of the granting act or concession not only sufficed to convey the land, but which so described it as to identify and locate it, or following the inchoate grant or concession, and before the cession from France, that was done in the way of a survey or act of location which identified and segregated it from the mass of other lands, and thus perfected the title. *Teddle v. McNeely*, 29 South. 247, 249, 104 La. 603.

Where the Governor of a province, on approving a cession of land by Indian tribes, granted the lands to the purchasers, directing them to apply to him for "a complete title," such words should be construed to refer only to the instruments which constitute the title, and not to the estate or interest conveyed. *Slidell v. Grandjean Jean*, 4 Sup. Ct. 475, 476, 111 U. S. 412, 28 L. Ed. 321.

**COMPLETE TRANSCRIPT.**

A transcript of a justice of the peace exhibiting a complete proceeding and judgment against the defendant therein named, and certified as a true and correct copy, is admissible as evidence in support of a deed on a sale of real estate in execution thereunder, under Rev. St. 1894, § 624, Rev. St. 1881, § 612, which requires such justice to make out and certify a true and complete transcript of the proceedings and judgment, the phrases "true and correct copy" and "true and complete transcript" being equivalent terms. *Collier v. Collier*, 49 N. E. 1063, 1064, 150 Ind. 276.

**COMPLY—COMPLIANCE.**

Under a will requiring distribution of an estate when all the terms of the will shall have been "complied with," the phrase means to perfect or carry into effect; to complete; to perform and execute. *Cleland v. Walters*, 16 Ga. 496, 502.

The word "compliance" in a certificate of membership in a life association, in which it is stated that the promise of the insurer is made in consideration of the full compliance by insured with all the by-laws now existing or hereafter adopted, means doing what the by-laws may require the member to do, not submission to seeing his only inducement to do it destroyed; and therefore he is not bound by an attempt of the company to reduce the face of the certificate by subsequent by-laws providing that certificates shall not exceed a certain sum, or providing for the deduction of a percentage from the certificate as an emergency fund. *Newhall v. Supreme Council American Legion of Honor*, 63 N. E. 1, 181 Mass. 111.

**COMPOSE.**

"Composing the company," as used in Act May 6, 1851, § 7, providing that the persons composing a manufacturing corporation at the time of its dissolution shall be held individually responsible to the extent of their respective shares of stock in the company for all debts which the company shall be owing at the time of its dissolution, means those who are entitled to the management of the affairs of the corporation at the time of its dissolution. Other persons may have an interest in the property of the corporation, but they do not compose the company, but the company is composed of the owners of stock, and a person to whom stock is transferred on the books of the company, and who appears by such books to be the legal owner, is liable under the statute, though such stock had been transferred and held by him as collateral security for a debt. *Rosevelt v. Brown*, 11 N. Y. (1 Kern.) 148, 154.

**COMPOSITION.**

See "Agreement for Common-Law Composition"; "Literary Composition." Composition real or otherwise, see "Otherwise."

A composition is an agreement between an insolvent or embarrassed debtor and his creditors, whereby the latter, for the sake of immediate payment, agrees to accept a dividend less than the whole amount of their claims, to be distributed pro rata in discharge and satisfaction of the whole, and must be made on a sufficient consideration. *Continental Nat. Bank v. McGeoch*, 66 N. W. 606, 613, 92 Wis. 286; *Wilson v. Samuels*, 35 Pac. 148, 149, 100 Cal. 514.

A composition agreement is an agreement as well between the creditors themselves, as between the creditors and their debtors. Each creditor agrees to receive the sum fixed by the agreement in full of his debt; the signing of the agreement by one of the creditors is offering an inducement to the others to unite with him in it. *Bank of Commerce v. Hoeber*, 11 Mo. App. 475, 480 (citing *Solinger v. Earle*, 82 N. Y. 393, 396).

In determining whether a party is a necessary party to an action for the complete determination of the controversy, in *McMahon v. Allen* (N. Y.) 12 How. Prac. 39, the phrase "complete determination of the controversy" was held to mean when there are persons not parties whose rights must be ascertained and settled before the rights of the parties to a suit can be determined. *Bauer v. Platt*, 25 N. Y. Supp. 426, 430, 72 Hun, 326. This definition was cited with approval in *Chapman v. Forbes*, 123 N. Y. 532, 538, 26 N. E. 3, and in *Walsh v. National Broadway Bank*, 32 N. Y. Supp. 734, 735, 11 Misc. Rep. 249.

A contract of composition by a debtor with his creditors has characteristics peculiar to that class of agreements, which distinguish it from an ordinary contract inter partes. In one sense it is regarded as a contract of the debtor with his creditors that on payment of a stipulated proportion of his debts he shall be discharged; in another sense it is a contract of each of the creditors with the others that they shall be placed on a basis of entire equality and reciprocity among themselves, that each shall receive his stipulated amount and nothing more. Indeed, it is the mutual agreement of the creditors among themselves that each will surrender a part of his debts that gives a consideration to the contract, and binds the creditors individually to abide by the agreement and take a part of the debt in satisfaction of the whole. In transactions of this kind the utmost good faith is required, and one creditor cannot become a party to the arrangement and sign the composition deed,

by a secret bargain with the debtor obtaining an advantage over the other creditors. *Massley v. Moore*, 40 N. J. Law (11 Vroom) 34.

The essential elements of a composition agreement are concession to an insolvent or embarrassed debtor, and mutuality of contracts between the creditors. The form of agreement is immaterial. Such an agreement is not with the debtor only, but with creditors as well, each acting on the faith of the promise of the others to relinquish a part of his claim, and the benefit which each may derive from the mutual concession is the consideration which sustains the agreement and makes it an exception to the rule that a creditor is not bound by an agreement to accept less than the amount of ascertained debt. *Crawford v. Krueger*, Atl. 931, 932, 201 Pa. 348.

A composition agreement "is an agreement between a debtor and creditor, where the debtor agrees to give and the creditor takes a less sum at a time fixed instead of the original debt, according to these terms: Where the debtor gives or furnishes new liability as security for the performance of the composition agreement, it becomes a binding contract." *Bailey v. Boyd*, Ind. 125, 127.

The distinction between a composition inter partes and in bankruptcy is sustained in *Merriman's Estate* (U. S.) 17 Fed. Cas. where the court says the differences are radical between the nature of a composition inter partes and of a bankruptcy composition. The reason of the difference is the fact that the entire proceedings in a bankruptcy composition are proceedings in bankruptcy and a part of a system for the compulsory liquidation of assets which is administered by court, while a composition inter partes derives its validity merely from the will of the parties. The Supreme Court of Massachusetts held, in *Guild v. Butler*, 127 Mass. that proceedings for composition under statute differ wholly in nature and effect from a voluntary composition which binds only those executing it. *First Nat. Bank v. Wood*, 53 Vt. 491, 493.

A composition agreement is an act of forbearance and indulgence on the part of creditors, but when it is signed and delivered for acceptance, and the debtor, in the absence of a waiver by the creditors, is remanded to the law, which requires of him a strict compliance if he would avail himself of its advantages. *Chapman v. Dennison Paper Mfg. Co.*, 77 Me. 205, 210.

The purport of the composition or trust deed, in case of insolvency, usually is that the property of the debtor shall be assigned to trustees, and shall be collected and distributed by them among the creditors according to the order and terms prescribed in

the deed itself; and in consideration of the assignment the creditors who become parties generally agree to release all their debts beyond what the funds will satisfy. *John T. Hardie's Sons & Co. v. Scheen*, 34 South. 707, 708, 110 La. 612.

In the case of a composition or compromise between debtors in failing circumstances and their creditors, the law requires the utmost good faith. The parties are held to a strict and literal compliance with their agreement, and arrangements securing advantages to particular creditors are absolutely void. If the creditors of a failing debtor agree between themselves, with the consent of the debtor, to a composition of their respective debts, and to receive in lieu thereof securities of a certain character, and one of the creditors subsequently obtains from the debtor new notes of a character more favorable to the creditor than those provided for in the composition agreement, such new notes are void for fraud, not only as to other creditors, but as to the assenting debtor. *Smith v. Owens*, 21 Cal. 11, 24.

If a creditor agrees with his debtor that, on being indemnified against his suretyship on a bond signed by him for the debtor, he will accept 30 cents on the dollar in satisfaction of his demand, provided the other creditors will do so, he nevertheless has a right, on signing the composition agreement, to make it a condition that all the other creditors shall accede to the same terms within a specified time, which condition, when annexed, becomes a part of the contract of such creditor, and on delivery of the agreement becomes obligatory as such. *Magee v. Kast*, 49 Cal. 141, 146.

"An assignment for the benefit of creditors who shall file releases of their debts and claims is not a 'composition agreement' after such creditors shall have accepted the provisions of the assignment." *In re Walker*, 33 N. W. 852, 854, 37 Minn. 243.

A "composition" is a compact or agreement, the settlement or adjusting of a matter of controversy. As used in *Bankr. Act* 1898, Act July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418], authorizing a "composition" by the debtor with a creditor, the term is used separate from the bankruptcy by the act itself, except as a mere foundation for it. *In re Adler* (U. S.) 103 Fed. 444, 445.

#### COMPOSITION METAL.

Old cannon, composed of 91.09 per cent. copper and 7.05 per cent. tin, though practically worthless for use against modern implements of war, are not free from duty as composition metal of which copper is the component material of chief value, but are dutiable as manufactures of metal. *Downing v. United States* (U. S.) 116 Fed. 779.



**COMPOSITION OF MATTER.**

Under a patent to the discoverer of a new manufacture or "composition of matter" not known or used by others before his discovery or invention, the franchise or sole right to use, and vend to others to be used, covers the new composition or substance itself, and not merely the process of manufacture. *Goodyear v. Central R. Co. of New Jersey* (U. S.) 10 Fed. Cas. 664.

Inventors of a new and useful "composition of matter" duly secured by letters patent are entitled to the same protection as the owners of a patent for a new and useful art, machine, or manufacture, and the rules and regulations in suits for infringement are the same in all material respects. A claim in a patent for a bronze dressing for leather as a new article of manufacture, composed of spirit varnish and aniline fuchsine, with or without the addition of aniline blue or bronze powder, covers a patentable invention. *Cahill v. Brown* (U. S.) 4 Fed. Cas. 1005.

"Compositions of glass or paste, when not set," as used in Tariff Act March 3, 1883, includes merchandise, consisting of glass disks of various colors and sizes, colored and cut in imitation of precious stones. *United States v. Popper* (U. S.) 66 Fed. 51, 52, 13 C. C. A. 325.

The expression "composition of matter," as used in the patent act of 1836, authorizing the granting of patents for any new and useful art, machine, manufacture, or a composition of matter, does not include a jail. *Jacobs v. Baker*, 74 U. S. (7 Wall.) 295, 297, 19 L. Ed. 200.

**COMPOSITION PROCEEDING.**

A "composition proceeding" in bankruptcy is a stage in the proceedings resulting in a decree for a discharge. It intercepts the progress of such proceedings, and supersedes the judicial scrutiny which any creditor may promote touching any of the matters specified as grounds of objections to a discharge. *Smith v. Morganstern* (U. S.) 2 Fed. 674, 676.

**COMPOSITION PUMICE STONE.**

"Composition pumice stone" consists of ground pumice stone mixed with clay, in the form of bricks or cakes. *Waddell & Co. v. United States* (U. S.) 124 Fed. 301.

**COMPOUND.**

See "Explosive Compound."

The noun "compound" is defined by Webster's Dictionary as "that which is compounded or formed by the union or mixture of elements, ingredients, or parts." And the same word "compound" is defined in the

Century Dictionary as "composed of two or more elements, parts, or ingredients; simple." An article of food, which is produced by abstracting from the natural food a valuable part, such as the extracting oil of the cocoa bean for the manufacture of cocoa, is not a "compound" or "mixture" under Acts March 20, 1884, as amended April 22, 1890, prohibiting the adulteration of foods. *Rose v. State of Ohio*, 11 O. Cir. Ct. R. 87, 91, 92, 5 O. C. D. 72, 74.

The term "compound" signifies, in chemistry, a substance formed by a chemical union of its constituent elements, and not a simple mixture in which a chemical union of the ingredients does not occur. In pharmacy, on the other hand, a "compound" is merely a mixture of different ingredients without reference to chemical union. The verb "to compound" means to mix or prepare. To "compound" a prescription is to prepare it for use, or put together the different articles specified in a prescription so as to be fit for the patient; and this is the ordinary and common use of the word with druggists. A "compounded" drug is a drug made up of other articles, drugs, or chemicals mixed together by trituration, by rubbing together, or by dissolving, etc. Such an article is not a single definite chemical substance, but "compounded" by the mere mixture of two or more chemical substances, each of which retains its own separate properties, which is not true of a chemical compound. *United States v. Stubbs* (U. S.) 91 Fed. 630, 610.

"Compounded," as used in the war revenue act of 1898 (Act June 13, 1898, c. 441, 20, 30 Stat. 456 [U. S. Comp. St. 1901, 2297]), has its ordinary and common meaning of "mixed." It certainly has no special meaning with pharmacists which is generally understood and established. *J. Ellwood McClain v. McClain* (U. S.) 106 Fed. 164, 166.

"Compounds" are liquors produced by the union of several ingredients, with spirit as the base. *Block v. Lewis*, 5 Ohio 1370, 5 Ohio N. P. 392.

**As discharge of debt.**

The word "compound" is defined as "to compromise; to effect a composition with a creditor; to obtain discharge from a debt by the payment of a smaller sum;" and hence, under a statute providing that a county court has authority to "compound for" or release in full or in part any debt due the county, it has not authority to purchase claims against a creditor of the county to be offset against his claim. *First National Bank v. Malheur County*, 45 Pac. 781, 730 Or. 420, 35 L. R. A. 141.

"To compound a debt" is to abate a portion on receiving the residue. To abate a whole cannot, in any grammatical or common use of the word, be said to be considered

composition" with the debtor. *Haskins v. Newcomb*, 2 Johns. 405, 408.

Within 5 & 6 Vict. c. 122, relating to the giving of an admission of an indebtedness by a debtor summoned by his creditor, and requiring in section 14 that the debtor, within ten days after filing his admissions, shall pay tender to his creditor the amount of the debt, or secure or compound for the same to his satisfaction, "compounding" means an entering into stipulations with the creditors by which they are satisfied with at the time. *Connell v. Rhodes*, 9 Q. B. 114, 129.

#### COMPOUND INTEREST.

The words "compound interest" mean interest added to the principal as the former becomes due, and thereafter made to bear interest. *Rev. Codes N. D. 1899, § 5136; Civ. Code S. D. 1903, § 2470; Rev. St. Okl. 1903, § 2809; Hovey v. Edmison*, 22 N. W. 594, 599, 100 Dak. 449; *United States Mortg. Co. v. Perry* (U. S.) 28 Fed. 727, 730.

"Compound interest" signifies the adding of the growing interest of any sum to the sum itself, and then the taking of interest on this accumulation. *Camp v. Bates*, 11 Conn. 487, 501.

"Compounding interest" is the charging of interest against a debtor upon a sum which has accrued as interest upon the principal debt. *Woods v. Rankin*, 49 Tenn. (2 Leisk.) 46, 48.

#### COMPOUND LARCENY.

Larceny or theft at common law is distinguished into two sorts, the one called "simple larceny" or "plain larceny," unaccompanied with any other atrocious circumstance, and "mixed" or "compound larceny," which also includes in it the aggravation of taking from one's house or person. Simple larceny, then, is the felonious taking and carrying away of the personal goods of another. Mixed or compound larceny is such as has all the properties of the former—simple larceny—but is accompanied by either one or both of the aggravations of taking from one's house or person. "Larceny from the person" is either by privately stealing from a man's person, as by picking his pocket, or by open and violent assault. "Open and violent larceny from a person," or "robbery," is the felonious and forcible taking from the person of another of goods or money, of any value, by violence or putting him in fear. *Anderson v. Winfree*, 4 S. W. 351, 352, 85 Ky. 597.

#### COMPOUND OFFENSE.

The term "compound offense," as used in Code, § 4300, providing that in cases of compound offenses, where in the same transac-

tion more than one offense has been committed, the indictment may charge the several offenses, and that the defendant may be convicted of any offense included therein, means every particular transaction constituting in itself two or more offenses. *State v. Ridley*, 48 Iowa, 370, 372.

#### COMPOUND OF PYROXYLIN.

Umbrella sticks of wood having celluloid handles are not subject to duty under paragraph 17, Schedule A, § 1, c. 11, Tariff Act July 24, 1897, 30 Stat. 152 [U. S. Comp. St. 1901, p. 1628], imposing a duty on articles of which any "compound of pyroxylin" is the component material of chief value, notwithstanding that the handles made of celluloid constitute the chief value. *United States v. Borgfeldt* (U. S.) 124 Fed. 304.

#### COMPOUNDED WINE.

As used in an act relating to the adulteration of wine, the words "compounded wine" mean any wine which contains less than 75 per cent. of pure undried grape juice, and is otherwise pure, and all wines containing alcohol or any other distilled spirits not produced by the natural fermentation of pure undried grapes. *Bates' Ann. St. Ohio 1904, § 4200-59.*

#### COMPOUNDING A FELONY.

The crime of "compounding a felony" includes the taking of a promissory note as a consideration for not prosecuting for theft, and it is not necessary to return the goods taken or other goods, in order to constitute the crime. *Commonwealth v. Pease*, 16 Mass. 91, 93.

Compounding a felony "is the offense of taking a reward for forbearing to prosecute a felony, as where a party robbed takes his goods again, or other amends, on an agreement not to prosecute." *Watson v. State*, 29 Ark. 299, 301.

"Composition of criminal proceedings," as used in a statute forbidding any composition of certain criminal proceedings in which the prosecutor is entitled to a certain penalty, means "an adjustment of the demand by a payment of a part in satisfaction of the whole. To 'compound a debt' is to abate a part on receiving the residue. To abandon the whole cannot, in any grammatical or common use of the word, be said or considered to be a 'composition' with the debtor. It is in this sense that Mr. Blackstone understood the word (4 Comm. 136) when he spoke of the offense of compounding of information under the penal statute as being of an equivalent nature with champerty." *Haskins v. Newcomb* (N. Y.) 2 Johns. 405, 408.



## COMPREHEND.

Webster defines the word "comprehend" as synonymous with the word "include." *Farmers' Nat. Bank v. Cook*, 32 N. J. Law (3 Vroom) 347, 351.

Where a deed describes the land as all a certain tract of land, called by a certain name and situated in a certain county, and comprehending the lots laid down in a certain survey, the word "comprehending" imports a purchase by metes and bounds, and the grantee is entitled to no more than the land within the limits of such survey. *Jones' Devisees v. Carter* (Va.) 4 Hen. & M. 184, 188.

## COMPRESSOR.

A "compressor" (a nautical term) is a somewhat recent device, placed a little forward of the windlass, in the direction of each hawse pipe, designed to keep the hawser in place, and to steady and relieve in some measure the strain on the windlass. *The Alaska* (U. S.) 23 Fed. 597, 599.

## COMPRISE.

Webster defines the word "comprise" as synonymous with "include." *Farmers' Nat. Bank v. Cook*, 32 N. J. Law (3 Vroom) 347, 351.

In a statute providing that, on an appeal from an order of the judge of a court of equity denying an injunction, the clerk shall forthwith transmit the original papers, comprising the bill of petition and exhibits and the court's order of refusal to the court of appeals, and the said court shall hear and determine the appeal, the word "comprising" should be construed as determining what are the original papers, which are only to be transmitted, and on which the decision of the court may be given, although the word "comprising" does not under all circumstances imply including only the things enumerated. *Steigerwald v. Winans*, 17 Md. 62, 68.

## COMPROMISE.

"Compromise" is defined as an agreement made between two or more parties as a settlement of matters in dispute between them. *Treitschke v. Western Grain Co.*, 6 N. W. 427, 10 Neb. 358 (quoting 1 Bouvier, Law Dict. 308); *Chilton v. Willford*, 2 Wis. 1, 6, 40 Am. Dec. 399.

A transaction or compromise is an agreement between two or more persons, who, for preventing or putting an end to a lawsuit, adjust their differences by mutual consent in the manner which they agree on, and which every one of them prefers to the hope of gaining, balanced by the danger of losing. *Civ.*

*Code La. 1900, art. 3071; Sharp v. Knox*, La. 458, 460.

"To 'compromise' is to adjust a dispute by mutual concession. To 'negotiate' means substantially the same thing—to effect something, or an effort to effect something, by treaty or agreement. Negotiations and compromises exclude the idea of actual resort to hostile litigation." *Attrill v. Patterson*, Md. 226, 245.

Taking one's property from him without consideration and against his will can more be called "compromise" than robbery, so that the refusal of an instruction in regard to compromise was proper in such case. *Landa v. Obert*, 25 S. W. 342, 348, Tex. Civ. App. 620.

### Concessions must be mutual.

A "compromise" is defined to be a settlement of differences by mutual concession, a mutual surrendering of opposing claims, the surrender of some right or claimed right in consideration of a like surrender of some counterclaim. *Continental Nat. Bank v. M. Geoch*, 66 N. W. 606, 614, 92 Wis. 286; *Rankin v. Schofield*, 66 S. W. 197, 198, 70 Ark. 887; *Gregg v. Town of Weathersfield*, 55 Vt. 387.

Every compromise involves an admission or concession to some extent of the claim of the other party. *Rankin v. Schofield*, 66 S. W. 197, 198, 70 Ark. 887.

Compromise "is the yielding of something by each of two parties, and can only exist when something is yielded by each party to it." *Bellows v. Sowles*, 55 Vt. 391, 394, 45 Am. Rep. 291.

### As discharge or release.

"Compromise" is defined to mean to adjust by mutual concession; to settle without resort to law; to compound. A finding that one party had discharged another of an obligation was supported by evidence that his claim against the other had been settled by compromise. *Rivers v. Blom*, 63 S. W. 813, 163 Mo. 442.

The word "compromise," as contained in a power of attorney authorizing the attorney to "sue for, settle, compromise and adjust all matters and things," means an agreement made between two or more parties as a settlement of the matters in dispute, and, where the title to land was in dispute at the time, the agent under such power of attorney was authorized to execute releases to the property. *Smith v. Cantrel* (Tex.) 50 S. W. 1081, 1085.

### Involves a dispute.

In order to authorize a compromise, there must be a dispute as to the amount of the claim in good faith; a mere false claim—a sham one—set up without any colorable pre-

use or plausible foundation, might not come within the terms or definition of a "compromise," and might not sustain it. *Greenlee Mosnat*, 90 N. W. 338, 339, 116 Iowa, 535.

#### Purchase of peace.

"Compromise" signifies a settlement in which there is concession on both sides. Used in that sense, the word does not describe a case in which peace is bought without an admission of liability. *Colburn v. Town of Groton*, 28 Atl. 95, 99, 66 N. H. 151, L. R. A. 763.

#### COMPTROLLER.

See "State Comptroller."

Auditor synonymous, see "Auditor."

#### COMPULSION.

See, also, "Duress."

"Compulsion" is synonymous with "coercion," and means in general some actual or threatened exercise of power, possessed or supposed to be possessed by the party exercising or receiving payment of money or other thing, from which the latter has no means of immediate relief, and, when used with reference to the payment of money under compulsion, is the same as "duress," and which entitles the person imposed upon to void and recover the payment in law. *Lehigh Coal & Navigation Co. v. Brown*, 100 Pa. 8, 346.

"Compulsion" is the antithesis of "willingness," and the provision that no person shall be forced to be a witness against himself does not mean that he may not be a witness against himself; otherwise an accomplice could not testify. It does not mean that any person may not be called and sworn, hence those competent and free-willed to do so may give evidence against the whole world, themselves included; but those unwilling may not be coerced, if it appear that the unwillingness arises from incriminating evidence which they are asked to give. A person summoned before a grand jury presumptively belongs to the general body of citizens competent to testify, and, if he elect to be exempted from this class, he must speak, or his objection to the proceedings must speak for him. The Constitution provides that a person shall not give incriminating evidence under compulsion. Immunity from compulsion is the right reserved. *United States v. Kimball* (U. S.) 117 Fed. 156, 163.

#### As affecting payments.

"Compulsion" or "coercion," within the rule that a payment of money not owing was voluntary, and cannot be recovered unless its payment was procured by compulsion or coercion, is to be understood as importing some actual or threatened exercise of power pos-

sessed or supposed to be possessed by the party receiving the payment over the person or property of the party making it, through which the latter has no other means of immediate relief than by advancing the money. *Garrison v. Tillinghast*, 18 Cal. 404, 407; *Brumagim v. Tillinghast*, 18 Cal. 265, 272, 79 Am. Dec. 176.

The term "compulsion," within the rule that a payment made under compulsion may be recovered, imports that such a pressure must be brought upon the person paying as to interfere in some way with the enjoyment of his rights of person and of property. The mere fact that an execution against A. is levied on the land of B. does not constitute "compulsion" which will authorize B. to recover a payment made by him and induced by such execution. *Stover v. Mitchell*, 45 Ill. 213, 217.

The word "compulsion," in the rule that a payment of money made under compulsion is not a voluntary payment and may be recovered back, does not characterize a payment of money in order to prevent the obligee in a bottomry bond from enforcing the same by taking possession of the vessel. *Forbes v. Appleton*, 59 Mass. (5 Cush.) 115-118.

The terms "compulsion" and "duress" cannot be applied to the payment of money to procure a license to transact business in a state, required by ordinance to be taken out, even though such ordinance is void; and therefore such payment cannot be recovered. *Mays v. City of Cincinnati*, 1 Ohio St. 268, 277.

The term "duress" or "compulsion" may be properly used to characterize an act of procuring a payment from the owner of property, against his protest, to remove a mechanic's lien based upon an unfounded claim, in order to clear the title of record so that the owner may consummate a loan upon the property, which he has negotiated in order to raise money to pay a prior overdue mortgage and other pressing debts, he having no other available means of raising the money. *Joannin v. Ogilvie*, 52 N. W. 217, 49 Minn. 564, 16 L. R. A. 376, 32 Am. St. Rep. 581.

Where an assessment is void on its face because made to one who does not own the property, and the true owner, with knowledge thereof, but in ignorance of the law, pays the tax under protest and to avoid a threatened sale by a tax collector, the payment is a voluntary one, and not a payment under compulsion so as to authorize a recovery back of the money in a suit against the tax collector. *Bucknall v. Story*, 46 Cal. 589, 598, 13 Am. Rep. 220.

#### In acknowledgment.

"Compulsion," as used in the certificate of a wife's separate acknowledgment of a

mortgage, reciting that she executed it without compulsion of her husband, being used in reference to extrinsic power, force, or influence, as when exercised by one person on another, is synonymous with "constraint" as used in Code 1878, § 2822, providing that a wife shall acknowledge that she signed a conveyance of land without constraint on the part of her husband. *Gates v. Hester*, 1 South. 848, 850, 81 Ala. 357.

The certification of a deed which states that it was executed "without undue influence or compulsion" sufficiently shows a voluntary execution, and is equivalent to declaring it to be of her "own free will." *Tubbs v. Gatewood*, 26 Ark. 128, 131.

#### COMPULSORY ARBITRATION.

"Compulsory arbitration" is that which takes place when the consent of one party is enforced by statutory provision. *Wood v. City of Seattle*, 62 Pac. 135, 143, 23 Wash. 1, 52 L. R. A. 369.

#### COMPULSORY NONSUIT.

In its legal effect, a "compulsory nonsuit" is substantially the same as a demurrer to the evidence, except that the trial judge cannot give judgment for the defendant. It thus impliedly admits all the facts which the jury might have inferred from the testimony. *Maynes v. Atwater*, 88 Pa. 496; *Miller v. Bealer*, 100 Pa. 583. If there be any evidence beyond a mere scintilla, however slight, from which the jury may draw an inference favorable to the plaintiff, the case should be submitted; and, if it inadvertently happens to be withdrawn from the jury by judgment of nonsuit, the latter should be taken off by the trial court. *Bastian v. City of Philadelphia*, 36 Atl. 746, 747, 180 Pa. 227.

#### COMPULSORY PAYMENT.

In *Shaw v. Woodcock*, 7 B. & C. 73, the court says: "If a party has in his possession goods or other property belonging to another, and refuses to deliver such property to the other unless the latter pays him a sum of money which he has no right to receive, and the latter, in order to obtain possession of his property, pays that sum, the money so paid is a payment by compulsion, and may be recovered back." Judge Woodbury says, in speaking of the distinction between voluntary and compulsory payments, that "It can hardly be meant in this class of cases that, to make a payment involuntary, it should be by actual violence or physical duress. It suffices if the payment is caused on the one part by an illegal demand, and made on the other part reluctantly, and in consequence of that illegality, and without being able to regain possession of his property except by submitting to the payment." See, also, *El-*

*lott v. Swartwout*, 35 U. S. (10 Pet.) 138, L. Ed. 373, and *Harmony v. Bingham*, 12 N. Y. (2 Kern.) 99, 62 Am. Dec. 142. The same doctrine is applied to payments, under protest, of unjust charges by carriers, where the payments were necessary to regain possession of the property by the owner. Where one has the advantage of another and where delay or resort to the law is different to the one but may produce serious loss and injury to the other, it is unconscionable to press such advantage to the obtaining payment of unjust demands. *Beckwith Frisbie*, 32 Vt. 559, 565.

It has always been considered that the payment under protest of an illegal tax or demand to an officer armed with a warrant authorizing him to enforce the payment by imprisonment or by seizure and sale of the property, who is about to exercise his authority, is not voluntary; nor is this proposition applicable merely with respect to personal property, but the same is true when real property is involved. Nor is it necessary, in order to constitute "compulsory payment" distinguished from "involuntary payment," that the unlawful demand be made by an officer who is prepared to enforce it by process. There may be that kind and degree of necessity or coercion that justifies and virtually requires payment to be made of the illegal demand of a private person who has it in his power to seriously prejudice the property rights of another, and to impose on another the risk of great loss if the demand be not complied with. Thus where one by the force of the statute is unable to place on record a deed of conveyance by which he has acquired title to real estate, by reason of illegal taxes being charged upon the land, may pay such taxes, in order to secure the recording of his deed, such payment will not be deemed voluntary, but compulsory. *State v. Nelson*, 42 W. 548, 549, 41 Minn. 25, 4 L. R. A. 300.

It is well settled that the payment under stress of legal process is "compulsory," and if unlawfully exacted, may be recovered. *Desty, Tax'n*, 795, and cases cited. The payment of a tax by the owner of property after a warrant has been levied on it for the collection of the tax is compulsory payment. *Lindsey v. Allen*, 36 Atl. 840, 19 R. L. 721.

Where conflicting claims are made on money owed by a debtor to a bankrupt creditor, the payment of the money into court by the debtor, in compliance with the bill of interpleader filed by such debtor in an action brought by one of the bankrupt's creditors, is not a compulsory payment to such creditor, within the meaning of a contract between such debtor and the assignee of the bankrupt, who also claimed the money, that the assignee would hold the debtor harmless for any "compulsory payment" made to the creditor who had instigated the suit. *Massey v. Schott* (U. S.) 16 Fed. Cas. 1073, 1075.



A payment is not to be regarded compulsory unless made to emancipate the person from property from an actual duress imposed on it by the party to whom the money is paid. Thus where a party had paid a large sum of money for property, and in order to retain possession and protect the property against loss was compelled to pay an additional sum, such payment constituted compulsory payment. *Loneragan v. Buford*, 13 Op. Ct. 684, 687, 148 U. S. 581, 37 L. Ed. 569.

"A payment is compulsory, and not voluntary, when it is caused on the one part by illegal demand, and made on the other part reluctantly and in consequence of that illegality, and without being able to regain and retain the possession of the property except by submitting to the payment." *Sowles v. Soule*, 7 Atl. 715, 59 Vt. 131.

### COMPULSORY PROCESS.

A "compulsory process," authorized by the Constitution in order to produce witnesses for the defendant in criminal prosecutions, means not only the ordinary subpoena, but a warrant of arrest or attachment for such witnesses as fail to obey or avoid service of the subpoena or recognizance. *Powers v. Commonwealth*, 70 S. W. 644, 655, 24 Ky. W. Rep. 1007.

"Compulsory process for obtaining witnesses," as used in the Declaration of Rights, Const. 1874, § 10, guarantying to the accused in all criminal prosecutions the right to have "compulsory process for obtaining witnesses" in his favor, means the right to invoke the aid of the law to compel the personal attendance of witnesses at the trial, when they are within the jurisdiction of the court. It is a substantial, a real right, and not an illusory sham to be satisfied by the use of process which is to be rendered ineffectual by hastening on to immediate trial. Reasonable opportunity to make the process effective must be afforded, else what the framers of the Constitution term "a right to be enjoyed by the accused" is only a mockery to vex. The process is for obtaining witnesses, not the less availing by the concession of a prosecuting officer that the witness, if obtained, would swear to the statement made by the accused. *Graham v. State*, 6 S. W. 721, 722, 50 Ark. 161.

The right to compulsory process does not vary with it the right to have the witnesses brought in without expense to the defendant. The provision for compulsory process has been construed to mean that the accused will not be debarred of the right of issuing subpoenas for his witnesses as in civil cases, and not to entitle him, on application, to a decree of the court for an allowance to secure their attendance. *State v. Nathaniel*, 26 Mich. 1008, 1010, 52 La. Ann. 558.

### COMPULSORY PURCHASE.

The term "compulsory purchase" has been used to characterize the exercise of the right of eminent domain. In *re Barre Water Co.*, 20 Atl. 109, 110, 62 Vt. 27, 9 L. R. A. 195.

### COMPUTING.

The word "computing," as applied to the class of scales which, in addition to weighing, indicate the price of the article weighed, is aptly descriptive of such function, and cannot be appropriated by one manufacturer as a trade-mark for his own product, to the exclusion of other makers, of whose scales it is equally descriptive. *Computing Scale Co. v. Standard Computing Scale Co.* (U. S.) 118 Fed. 965, 967, 55 C. C. A. 459.

### CONCEAL—CONCEALMENT.

See "Fraudulent Concealment"; "Undue Concealment."

The word "concealed" means kept close or secret; hid; withdrawn from sight; covered. *Dale County v. Gunter*, 46 Ala. 118, 142.

"Conceal" merely means not letting come to observation. The word does not charge a criminal act. *Tygard v. Falor*, 63 S. W. 672, 674, 163 Mo. 234.

A neglect to communicate that which a party knows and ought to communicate is called a "concealment." Civ. Code Cal. 1903, § 2561; Civ. Code Mont. 1895, § 3420; Civ. Code S. D. 1903, § 1815.

"Hiding and concealing" may be construed as an act, and the statement that the defendant in attachment is hiding and concealing certain goods may be construed as a statement of the fact; but it is too general a statement thereof, in an attachment suit based upon the concealment of property by defendant, to comply with the statute requiring the plaintiff to state the material facts upon which the attachment is founded. *Sandheger v. Hosey*, 26 W. Va. 221, 224.

The use of the words "concealed and secreted" in a petition in bankruptcy is a clear and specific charge, and leaves no room for doubt on the part of the defendant as to the nature and extent of the execution, for if a defendant concealed the event, as alleged, it must be assumed that the details and circumstances of the concealment were within his knowledge, and no hardship can be involved in requiring him to answer and meet the charge of concealment as made, without further explanation of the matter. In *re Bellah* (U. S.) 116 Fed. 69-73.

"Conceal," as used in the bankruptcy act, wherein it was provided that, if any mer-

chant should conceal any of his goods to prevent their being taken in execution, such person should be deemed and adjudged a bankrupt, meant an actual, and not a constructive, concealment of them by the bankrupt himself or by his procurement. *Livermore v. Bagley*, 3 Mass. 487, 510.

The words "conceal the facts of the crime" in the statute must be held to mean the concealment of the fact that a crime has been committed, unconnected with the fact that the accused is the perpetrator; and the concealment must be the result of some positive act of the accused, calculated to prevent a discovery of the commission of the offense with which he stands charged. And where an indictment for fornication charged the concealment of the crime, by the defendant "publicly acknowledging and claiming the said Mary Watson to be his wife," the allegation did not show any such positive act of concealment as would take the case out of the statute of limitations. Opinion by Biddle, *J. Robinson v. State*, 57 Ind. 113, 114.

"Conceal," as used in the bankruptcy act, shall include "secrete," "falsify," and "mutilate." U. S. Comp. St. 1901, p. 3419.

What amounts to a concealment, under a law of Congress prohibiting any person from harboring or concealing a fugitive from justice, etc., may depend much on the circumstances. It does not necessarily require that the subject of it be secreted in a garret, cellar, barn, or covered wagon. The highway of a remote and uncultivated country like Indiana may be a better place of concealment than the highway of many other places, and the limits of the whole country as good a place to secrete a fugitive from a distant state as any that could be imagined, especially if the fugitive have a committee of sympathizers to watch over his interests and give him warning of the approach of danger. *Van Metre v. Mitchell* (U. S.) 28 Fed. Cas. 1036, 1040.

There is no concealment where a debtor makes a bona fide conversion of his property, and shows good faith in respect to the care of the money received therefrom; and a debtor will not be adjudged a bankrupt simply because, after selling his property for the purpose of engaging in a new business, he does not put the proceeds into a tangible shape to prevent the same being seized on process issued out of a court. *Fox v. Eckstein* (U. S.) 4 Nat. B. R. 373, 375.

Concealment of one's property cannot be predicated on a mere failure to pay, although the debtor has ready money which is not visible to the creditor. *Roach v. Brannon*, 57 Miss. 490, 498.

It is a "concealment to avoid the service of process," within the meaning of the

attachment statutes of New York, no matter whether for an hour, a day, or a week, no matter whether with a view to defraud creditors, or merely to have time to make disposition, lawful or otherwise, of his property before his creditors got at him. It is placing himself designedly so that his creditors cannot reach him with process. *Carman v. Tompkins* (N. Y.) 2 Edm. Sel. Cas. 227, 230.

On a motion to quash a writ of attachment, on the ground of a defective affidavit stating that defendant is about to assign, dispose of, or conceal, etc., the court said: "To dispose of" is a comprehensive term, and to conceal would be one method of disposing of the property." *Horsman v. Bruce*, 1 Mich. N. P. 255, 256.

Under a statute providing that prosecutions for larceny are barred by the lapse of two years from the time the offense is committed, and that, where the person committing the offense conceals the fact of the crime, the time of such concealment is not to be included in computing the period of limitation, the fact that the owner of the goods and his family did not know, or have good reason to believe, that the larceny had been committed, until less than two years before the prosecution, is not proof of concealment of the crime by the accused. Such crime may be openly and publicly proclaimed and known to the officers of the law and the community in general, and yet not come to the knowledge of the owner of the goods or his family. *Free v. State*, 13 Ind. 324, 325.

To "conceal" means "to hide, to cover up, to keep from sight;" and to "dispose of" property includes the foregoing, and "sell," "alienate" or "put away," as the terms are used in Code, § 3895, providing: "If any mortgagor of personal property \* \* \* willfully destroy, conceal, sell, or in any manner dispose of the property covered by such mortgage, without the consent of the then holder of such mortgage, he shall be deemed guilty of larceny." *State v. Jullen*, 48 Iowa, 445, 447.

"Concealed," as used in St. 1846, c. 16, § 1, providing that any one suspected of having fraudulently received, concealed, embezzled, or conveyed away any of the money, goods, effects, etc., of an insolvent, may be examined, etc., applies to obtaining real estate as well as personal property; and one who takes an apparently legal title to real estate, which is void in consequence of some secret defect, is said to cover up or conceal such estate. *Harlow v. Tufts*, 58 Mass. (Cush.) 448, 453.

A concealment which entirely discharges a surety is one of facts known to the other party and not known to him, and known to be of a character to materially increase the risk beyond that assumed in the usual course

of business of that kind, having a suitable opportunity to make them known to the surety. *Wright v. Crosby*, 36 Me. 562, 571, 58 Am. Dec. 767.

**Absconding distinguished.**

When used as a ground for attachment, "concealment" is not strictly synonymous with "absconding," but the one is included in the other. Absconding is not always concealment, but concealment for the purpose of defrauding creditors or avoiding service of summons is always absconding. Where both of the terms are used either conjunctively or separately, the one refers to a concealment or absconding within, and the other without, the state; so that, an affidavit that a debtor absconds or conceals himself states but one real ground for judgment, the terms being, for that purpose, equivalent. *Garson v. Brumberg*, 28 N. Y. Supp. 1003, 1005, 75 Hun. 336.

Concealment is but a phase of absconding. It is with the purpose of defeating or delaying creditors by avoiding service of process. *Stafford v. Mills*, 32 Atl. 7, 8, 57 J. Law (28 Vroom) 574.

**Design or intent imported.**

The word "concealed," as used in an instruction that if a person acting as treasurer of a railroad corporation took the money of the corporation, which had been intrusted to him, and used it for his own purpose, knowing that he had no right to do so, and did it without the consent of the company or any of its officers, and concealed the transaction from them, it amounted to a fraudulent conversion of the money of the company, though at the time of the taking he intended to restore the money appropriated, necessarily imports the execution of some plan previously arranged or of some design which had been cautiously premeditated. This is not merely that he was still and silent or omitted to publish or disclose what he had done, but involves, by necessary implication, the idea that he had deliberately resorted to the active employment of means, which he believed would be effectual for that purpose, to secrete and hide from his employers the fact of his defalcation, in order that he might escape with impunity from its consequences. *Commonwealth v. Tucker*, 76 Mass. (10 Gray) 173, 187.

Act March 2, 1799, c. 28, § 68, provides that every collector shall have full power and authority to enter any ship or vessel in which they have reason to suspect any goods subject to duties are concealed, and that all such goods on which duty shall not have been paid shall be forfeited. Held, that the word "concealed" applies only to articles intended to be secreted and withdrawn from public view on account of the duties not having been paid or secured to be paid, or from

some other fraudulent motive. *United States v. 350 Chests of Tea*, 25 U. S. (12 Wheat.) 486, 492, 6 L. Ed. 702; *United States v. Tappan*, 24 U. S. (11 Wheat.) 419, 421, 6 L. Ed. 509.

Under the statute which authorizes an attachment of the goods of a defendant who conceals himself to avoid the service of summons upon him, where a defendant absconds to avoid a criminal prosecution, and not to prevent civil suits being commenced against him, an attachment is not authorized, as in such cases the motive of the concealment is not that specified in the statute. *Evans v. Saul* (La.) 8 Mart. (N. S.) 247, 251.

"Concealment," as used in the Bankruptcy Act, means a willful and fraudulent concealment of the assets of the bankrupt, and not a mere omission through mistake or accident. *In re Scott* (U. S.) 11 Fed. 133, 134.

"Concealment," as used with reference to bankruptcy, "is the doing of an act, whether by way of conveyance or transfer, by which the true title and ownership of the debtor is kept from the view of the creditor, when done with the intent and purpose of preventing property being attached and taken on execution." *O'Neill v. Glover*, 71 Mass. (5 Gray) 144, 159.

It is not easy to conceive that a concealment of property can be fraudulent unless it is willful. Fraud cannot exist without some operation of the mind and the will; and, where an act is done which is fraudulent, that act must be the result of the will, but the omission may have been willful and not fraudulent. If the term "concealment" does not imply in the bankrupt act any more than "omission," willful concealment is the same as willful omission. *Crooker v. Trevett*, 28 Me. (15 Shep.) 271, 273.

**Disguise distinguished.**

"Conceal" means, first, to hide or withdraw from observation; second, to withhold from utterance or declaration. The synonyms of conceal are 'hide,' 'disguise,' 'dissemble,' 'secrete.' To hide is generic; conceal is simply not to make known what we wish to secrete; disguise or dissemble is to hide in some place of secrecy. A man may conceal a fact, disguise his sentiment, dissemble his feelings, or secrete stolen goods." The word is distinguished from "disguise," which means change the guise or appearance of, especially to conceal by an unusual dress, and therefore a murder by one concealed in the bushes is not a murder by one in disguise, within the meaning of Act Dec. 28, 1868, § 1, requiring the payment of damages by the county to the widow or husband of a person assassinated or murdered by any person or persons in disguise. *Dale v. Gunter*, 46 Ala. 118, 142.



**Disguise of identity and removal.**

"Conceal," as used in Hill's Code Or. § 16, providing that, when a cause of action shall accrue against any person who shall be out of the state or concealed therein, such action may be commenced within the terms herein respectively limited, the word "conceal" does not apply to one who lives openly in the community where he has fixed his residence in this state, without any effort or attempt in any way to baffle search or inquiry. Webster defines the word "conceal," "To hide or withdraw from observation; to cover or keep from sight; as a party of men concealed behind a wall." In *Frey v. Aultman, Miller & Co.*, 30 Kan. 181, 2 Pac. 168, the court gave a construction to the word "conceal," used in the statute of limitations. The court said: "We think the word 'conceal' contemplates some action here; that he passes under an assumed name; has changed his occupation or acts in a manner which tends to prevent the community in which he lives from knowing who he is or whence he came." *Rhoton v. Mendenhall*, 20 Pac. 49, 50, 17 Or. 199.

Civ. Code, § 21, providing that the statute of limitations shall not run against one absconding and concealing himself in the state for the purpose of avoiding service of process, must be construed to refer to the acts of a party within the state. The changing of a party's name and removing from place to place, so that a debtor was unable to learn where the party had gone or her place of residence, is not a "concealing," within the meaning of the statute, where it does not appear that such acts were done within the state. *Myers v. Center*, 27 Pac. 978, 979, 47 Kan. 324.

**As harbor or hide.**

"Conceal," as used in Const. art. 4, § 4, providing that, when any person shall harbor or conceal fugitives from labor, he shall forfeit a certain sum, means to hide, to keep secret, to secrete, to cover, to disguise. Worcester. And Webster defines it as to withdraw from the observation; to cover or keep from sight. *Ray v. Donnell* (U. S.) 20 Fed. Cas. 325, 328.

"Conceal," as used in the Constitution, prohibiting the sale of a slave, means to hide or harbor. *Cook v. State*, 26 Ga. 593, 603.

To conceal a fugitive from labor he must be hidden away with the intention of eluding the claim of his master. In this connection it is said that "harbor" and "conceal" are synonymous. *Driskill v. Parrish* (U. S.) 7 Fed. Cas. 1100, 1103.

**As holding.**

Under a statute authorizing an administrator, who believes that any person conceals any part of a decedent's estate, to apply summarily for an order requiring the property

to be delivered to him, the word "conceal" is not a synonym of "holding." Secrecy is an ordinary ingredient of the act of concealment; "to hide or withhold from observation, to cover or keep from sight," is the meaning technically and properly conveyed by the word "conceal." *Taylor v. Bruscu*, 27 Md. 219, 228.

**Intentional withholding of facts.**

"'Concealment,' according to the law of insurance, is the designed and intentional withholding of any fact material to the risk which the assured in honesty and good faith ought to communicate." *Clark v. Union Mutual Fire Ins. Co.*, 40 N. H. 333, 338, 77 Am. Dec. 721; *American Artistic Gold Stamping Co. v. Glens Falls Ins. Co.*, 20 N. Y. Supp. 648, 649, 1 Misc. Rep. 114.

As the term is used with reference to life insurance, "concealment" means the designed and intentional withholding of any fact material to the risk which the assured in honesty and good faith, ought to communicate to the insurer, and every such fact wrongfully suppressed must be regarded as material, the knowledge or ignorance of which would naturally influence the judgment of the insurer in making the contract at all, or in estimating the degree or character of the risk. *Goucher v. Northwestern Traveling Men's Ass'n* (U. S.) 20 Fed. 599; *Mascott v. First Nat. Fire Ins. Co.*, 3 Atl. 255, 257, 69 Vt. 116.

An answer by insured to an inquiry, at the time of the application for a policy, "Have you deed for same, or what is the nature of your title?" "Pre-emption," was not a concealment that would avoid the policy, where insured had only taken the necessary steps preliminary to obtaining a patent. *McNamara v. Dakota Fire & Marine Ins. Co.*, 1 S. D. 342, 349, 47 N. W. 288.

"Concealment," as the term is used in the law of insurance, was said by Lord Mansfield, in his celebrated judgment, in *Cartwright v. Boehm*, 3 Burr. 1909, to be "a suppression of a fact within the knowledge of the party which the other had not the means of knowing or is not presumed to know." This definition is universally adopted by the writers of the law of insurance. *Merchants' and Manufacturers' Mut. Ins. Co. v. Washington Mut. Ins. Co.* (Ohio) 1 Cin. R. 408, 415.

Within the rule that a failure of an insured to disclose the true condition of the title which amounts to a concealment will avoid the policy, neglect to communicate that which a party knows and ought to communicate is a concealment. *McNamara v. Dakota Fire & Marine Ins. Co.*, 47 N. W. 288, 290, 1 S. D. 342.

"Concealment," as used in the law of insurance, means "the designed and intentional withholding of any fact material to

risk, which the assured in honesty and faith ought to communicate to the underwriter. Mere silence on the part of the assured, especially as to some matter of fact which he does not consider important for the underwriter to know, is not to be construed such concealment." *Daniels v. Hudson River Fire Ins. Co.*, 66 Mass. (12 Cush.) 416, 59 Am. Dec. 192.

**Lying in wait.**

"Concealed," with reference to a defendant being concealed at the time of the commission of a murder, cannot be used as a synonym of "lying in wait." *People v. ...*, 55 Cal. 207, 209.

**Refusal to give information.**

The concealment intended by Rev. St. 4, § 301, providing that, if any person liable to an action shall conceal the fact from the knowledge of the person entitled to the action, the action may be commenced at any time within the period of limitation after the discovery of a cause of action, means something more than mere silence or general declarations on the part of the person liable.

It has reference to something of an affirmative character, something said or done, the trick or artifice employed to prevent inquiry or elude investigation, or calculated to mislead and hinder the party entitled to obtain knowledge by the use of ordinary diligence. *Dearborn County Com'rs v. ...*, 36 N. E. 772, 773, 9 Ind. App. 369; *Boyd v. Boyd*, 27 Ind. 429, 430. Thus a person appropriating to his own use a fund, to which an heir having no knowledge of the existence thereof is entitled, and remaining silent and refusing to give any information respecting the fund, does not conceal the fact of his being liable to an action therefor, within the meaning of the statute. *Bower v. Thomas*, 54 N. E. 142, 143, 22 Ind. App.

The word "conceal," in Code 1886, § 5, providing that any person who, for the purpose of hindering, etc., any person having a lawful claim, etc., hides, receives, or conceals any property with knowledge of the existence of such claim, must on conviction be punished, etc., is employed in its ordinary sense—to hide from sight or observation, to secrete, to cover. It implies some thing done or procured to be done which is intended to prevent or hinder the discovery of the thing searched for. A mere failure to give information is not enough. *Thomas v. State*, 9 South. 540, 541, 92 Ala.

Under a statute authorizing an attachment in case defendant has concealed his goods and effects with intent to defraud his creditors, where defendant sold his goods and concealed the fact of the sale and the money received therefor, an instruction that

the statute means secreting goods, and not concealment of circumstances or misrepresentation of facts, and that this last-mentioned conduct is no ground for issuing an attachment, was error. If defendant packed away in his cellar goods to the value of \$1,000 with the view of defrauding his creditors and prevent them from collecting their debts, this is construed to be a fraud, within the meaning of the statute, and, if he sells the same goods and puts the money in his pocket with the same intent of cheating his creditors by the operation, it is regarded by such instruction as a mere concealment of circumstances, and therefore not such a concealment as is urged by the attachment law. The statute uses the phrase "goods and effects"; but money for which the goods were sold was as capable of being concealed as the goods were, and the concealment of the money is surely not less a fraud because it was accompanied by a concealment and misrepresentation of facts and circumstances. *Powell v. Matthews*, 10 Mo. 49, 50, 53.

**Resistance of officer.**

A party who resists an officer of the customs seizing goods as wrongfully imported is not guilty of a concealment of the goods, within Collection Act March 2, 1799, c. 128. *United States v. Farnsworth* (U. S.) 25 Fed. Cas. 1048, 1049.

**As secretion.**

In a warrant of attachment based on the ground that defendant fraudulently concealed his property, the word "conceal" is equivalent to the word "secrete," and hence the warrant was not insufficient as not complying with the statute authorizing the issuance of a warrant where the defendant fraudulently secretes his property. *Jurgens v. Tum Suden*, 52 N. Y. Supp. 662, 663, 32 App. Div. 1.

Civ. Code, § 221, subsec. 5, providing that the plaintiff may have an attachment against the property of the defendant if the defendant conceals himself to avoid the service of summons, involves the intention on the part of a debtor to delay or to prevent creditors from enforcing their demands in the ordinary modes prescribed by law, which he may accomplish by secreting himself in his own house or on his own premises, or by departing secretly from the place of his abode to a more secure spot either in or out of the county of his residence. *Dunn v. Salter*, 62 Ky. (1 Duv.) 342, 345.

An attachment statute provided that an attachment might be issued if the debtor conceals himself or stands in defiance of an officer so that process cannot be served on him. Held, that the statute comprehends two classes of debtors in contradistinction—the debtor who conceals himself so that pro-



cess cannot be served on him, and the debtor who stands in defiance of an officer so that process cannot be served; and hence "concealment," as so used, was not limited to an act which follows or is attended with an attempted service of process, but it included any person leaving a place to "avoid service, and requesting false information to be given as to his movements, or placing himself in such a position that he was not accessible to his creditors." *North v. McDonald* (U. S.) 18 Fed. Cas. 332, 333.

#### Silence or inaction.

"Conceals," as used in Rev. St. c. 81, § 107, providing that, if any person liable to an action fraudulently conceals the cause of such action from the person entitled thereto, the action may be commenced at any time within six years after the person entitled thereto discovers that he has a just cause of action, should be construed to include the withholding from a plaintiff all knowledge of the falsity of representations concerning the relation of debtor and creditor, then subsisting between defendant and the plaintiff's creditor. There was no corporeal thing to be concealed, but simply a mental one, and knowledge of the fact of a perjury. "The word 'conceal,' according to the best lexicographers, signifies to withhold or keep secret mental facts from another's knowledge, as well as to hide or secrete visible objects from sight or observation. Viewed in the former sense of this word, the defendant's conduct clearly amounted to a concealment of the cause of action; he falsified the facts in the case and concealed the knowledge that he had done so." *Geery v. Dunham*, 57 Me. 334, 338.

"Conceal," as used in Pen. Code, § 32, providing that all persons who, after full knowledge that a felony has been committed, conceal it from a magistrate, means more than a simple withholding of knowledge possessed by a party that a felony has been committed, but includes the element of some affirmative act on the part of the person tending to or looking towards the concealment of the commission of the felony. Mere silence is not sufficient. *People v. Garnett*, 61 Pac. 1114, 1115, 129 Cal. 364.

"Concealment of a will," within the meaning of the law affecting the running of limitations, means something more than mere silence or inaction. There must be some act, arrangement, or contrivance of an affirmative character, where the purpose or design is to prevent its discovery. *Fox v. Fee*, 60 N. E. 281, 282, 167 N. Y. 44.

Fraud of a secret nature in a particular case, conceived and executed on such a plan as to secure continued secrecy without further acts of concealment except silence, will constitute a "concealment," within the meaning of the statute of limitation of actions.

In such case it may be said to be a continuous concealment. The making of a fraudulent deed, and the keeping of it off record by all the persons concerned, combined with their purposed silence, is a concealment within the meaning of such statute. *McAlpin v. Hedges* (U. S.) 21 Fed. 681, 690.

"Conceals," as used in Rev. St. c. 18, § 8, as amended by Laws 1843, c. 35, authorizing the arrest of a debtor who conceals his property so that no attachment or levy can be made, implies something done to prevent the attachment or seizure of the property concealed. One who did not change the condition of his watch or a sum of money, but merely carried them about on his person in the usual manner, as he had been accustomed to do before he anticipated any attachment, did not conceal them. *Clement v. Dudley*, 42 N. H. 367, 368.

"Concealment," within the meaning of the statute of limitations in reference to concealment which will suspend the running of the statute of limitations, does not include the mere nonuser of all corporate powers. *City of Ft. Scott v. Schulenberg*, 22 Kan. 641, 656.

The concealment of a fraud which is sufficient to prevent the running of the statute is not established by mere silence. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry. *Shelby County v. Bragg*, 135 Mo. 291, 36 W. 600. The concealment contemplated by the statute must be something more than mere silence. It must be of an affirmative character, and must be alleged and proved so as to bring the case clearly within the meaning of the statute. *Callan v. Callan*, 1 S. W. 965, 969, 175 Mo. 346 (citing *Ware v. Galveston City Co.*, 146 U. S. 102, 116, 1 Sup. Ct. 33, 36 L. Ed. 904).

#### CONCEALED WEAPONS.

As to what constitutes about the person, see "About the Person."

As to what constitutes a weapon, see "Weapon."

Carrying Concealed Weapons, see "Carrying."

To "conceal," as the word is defined by lexicographers, according to the common and approved usage of language, and therefore the proper meaning of the statute against carrying concealed weapons, is to hide, secrete, screen, cover. *Williams v. Commonwealth*, 18 Ky. Law Rep. 663, 664, 37 S. W. 680.

The statute which makes it an indictable offense for a person, except on his own premises, "to carry concealed about his person any pistol or other deadly weapon," is not violated by one who carried a pistol buckled around him without scabbard and naked, i

elt on the outside of his clothing. To constitute the offense there must be a concealment. When the proof shows there is no concealment, there is no violation of the statute. It would be a contradiction in terms to hold that the person conceals that which carries about him openly and to the view of everybody. *State v. Roten*, 86 N. C. 701.

A carrying of concealed weapons, within the meaning of a statute making such a crime, is not shown by evidence that defendant borrowed a revolver and carried it on the street in his hand. *Ridenour v. State*, 65 Ind. 411, 412.

A person who, in the room of another, in which there are two or three other persons, bears in his vest pocket a pistol, willfully or knowingly kept from sight without any of the excuses therefor recognized by law, is guilty of carrying a concealed weapon, within the meaning of the statute imposing a penalty on any one who carried, concealed about his person, a pistol or other description of a firearm. *Owen v. State*, 31 Ala. 387.

Code, § 4527, making it a misdemeanor to carry a concealed weapon, does not mean by a weapon concealed in the clothing of an accused, but embraces any means by which a weapon is carried about concealed; not for the purpose of transportation alone; so one carrying a pistol in a covered pocket was guilty under the statute. *Boles v. State*, 12 S. E. 361, 362, 86 Ga. 255.

Code, § 4109, prohibiting carrying deadly weapons "concealed about the person" means that the weapon is so connected with the person that the locomotion of the person will carry the weapon with him. The practice of the Legislature intended to interdict was the facility it furnishes for the prompt use of a deadly weapon so concealed as to give no notice of its presence, yet so accessible as to be ready for immediate use when wanted." So where a person, while riding on horseback, carried a pistol in his saddle bags, it was not concealed about the person, within the meaning of the statute. *Cunningham v. State*, 76 Ga. 88.

#### As not fully exposed to view.

A weapon is concealed, within the meaning of statutes prohibiting the carrying of concealed weapons, if it is so carried that it is not left in full, open view. *State v. Smith*, La. Ann. 633, 634, 66 Am. Dec. 208; *Washington v. State*, 36 Ga. 242, 245.

"'Concealed' ordinarily means 'hidden,' and therefore one might be correct in saying that, if a thing is not hidden or is visible, it is not concealed; but, as used in statutes prohibiting the carrying of concealed weapons, a partial concealment is a violation of

the statute, and any weapon not fully exposed is regarded as concealed." *State v. Bias*, 37 La. Ann. 259, 260.

The carrying of concealed weapons, within the meaning of a statute prohibiting such carrying, imports the carrying of a pistol in such a manner that it cannot be seen and easily recognized as a pistol, even though it is partially exposed. *Killet v. State*, 32 Ga. 292.

#### As hidden from ordinary observation.

To constitute concealment, within the meaning of the statutes in reference to carrying concealed weapons, it is not necessary that the weapon may be seen from without by inspection or examination more or less close. It is sufficient if it is hidden from ordinary observation. *Jones v. State*, 51 Ala. 16. The general question is, was the weapon open to the ordinary observation of persons coming in contact, in the usual associations of life, with the person carrying it? *Smith v. State*, 11 South. 71, 96 Ala. 66. The word "concealed" cannot be properly used to characterize a carrying of a pistol unless it is so carried as not to be discernible by ordinary observation. *Ramsey v. State*, 8 South. 568, 91 Ala. 29; *State v. Johnson*, 16 S. C. 187, 189. It is not necessary that it should be completely or entirely hidden. *State v. Johnson*, 16 S. C. 187, 189.

To constitute the offense of carrying a concealed weapon, it must be worn or carried so that persons near enough to see it, if it was not concealed, cannot see it. *Street v. State*, 67 Ala. 87, 88.

The statute prohibiting the carrying of concealed weapons does not mean or import that no part of the weapons should be concealed, but the offense is only committed when the weapon is so concealed that it is impossible for one approaching in view of the person carrying the weapon to see any part of it. All that the Legislature meant when it prohibited the carrying of concealed weapons was to compel persons to so wear them that others who might come in contact with them might see that they were armed and dangerous persons, who were to be avoided in consequence, for, if it should be required that no part of the weapon should be concealed, the statute would amount to an infringement of the constitutional right of citizens to have and bear arms, since it would be impossible for one to have and bear about his person a pistol or weapon of any kind without having some part of it concealed. *Stockdale v. State*, 32 Ga. 225, 227.

#### CONCEALING STOLEN PROPERTY.

"Conceal," as used in Gen. St. c. 371, § 12, making it an offense to receive and conceal stolen goods, is not used in a technical sense, but includes all acts done which render the discovery and identification of the

property more difficult. *State v. Ward*, 49 Conn. 429, 442.

Receiving or concealing stolen property on separate occasions constitute distinct offenses, and cannot be prosecuted as one crime, though all the property be thereafter found in the possession of the defendant at one time and place; and in such case a conviction for a felony based on the aggregate value of all the property cannot be sustained when the value of that received or stolen on each of such occasions is less than \$35. *Smith v. State*, 52 N. E. 826, 828, 59 Ohio St. 350.

## CONCIDER.

The French word "conceder" means to grant. *Strother v. Lucas*, 37 U. S. (12 Pet.) 410, 428, note, 9 L. Ed. 1137.

## CONCEIVE.

"Conceive" is often used to signify to think; to understand; to have a complete idea of, as it is to imagine; to fancy; and therefore an instruction as to defendant's conduct in a negligence case, "We must compare his conduct with what we may conceive careful men would have done under similar circumstances," is not erroneous as permitting the jury to imagine or fancy what reasonable men would have done. *Hays v. Paul*, 51 Pa. (1 P. F. Smith) 134, 143, 88 Am. Dec. 569.

## CONCENTRATED COMMERCIAL FEEDING STUFF.

The term "concentrated commercial feeding stuff" shall include linseed meals, cottonseed meals, pea meals, cocoanut meals, gluten meals, gluten feeds, malze feeds, starch feeds, sugar feeds, dried brewers' grains, malt sprouts, hominy feeds, cerealine feeds, rice meals, oat feeds, corn and oat chop, corn and oat feeds, ground beef or fish scraps, mixed feeds, provenders, bran, middlings, and mixed feeds made wholly or in part from wheat, rye, or buckwheat, and all materials of a similar nature, but shall not include hays and straws, the whole seeds nor the unmixed meals made directly from the seed of wheat, rye, barley, oats, Indian corn, buckwheat, or broom corn, nor feed ground from whole grain and sold directly from manufacturer to consumer. *Gen. St. Conn.* 1902, § 4591.

## CONCENTRATED MOLASSES.

"Concentrated molasses is melado or syrup boiled down to a denser consistency, and is manufactured by boiling down the melado, and thus evaporating the watery portions until the point of crystallization is

reached." *Belcher v. Linn*, 65 U. S. (24 How.) 508, 519, 16 L. Ed. 754.

## CONCENTRATING POINT.

"Concentrating point," as used in a bill for damages caused by a collision of vessels at sea, means that vessels going to and from Great Britain, Ireland, and various parts of the United States of America cross at a certain line in the ocean. It is probable that the place of meeting would be somewhere in that locality. *The Europa*, 2 U. L. W. Mag. 497, 499.

## CONCERN.

See "Private Concern."

Arising concerning vessels, see "Arising." Arising."

8 & 9 Vict. c. 87, § 46, punishing every person who shall unship or assist or be otherwise concerned in the unshipping of goods which are prohibited to be imported applies to the owner of a vessel who knowingly lets his vessel, that it may be employed in a smuggling adventure, the cargo of which was unshipped without the duty being paid. *Attorney General v. Robson*, 4 E. L. W. & Eq. 405, 406.

### As affecting.

*Rev. Code* 1855, p. 1221, art. 4, § 3, declares that suits concerning real estate, whereby the same may be affected, shall be brought in the county within which the real estate or some part of it is situate. Hence that the phrase "action concerning real estate" was not limited in its application to actions real, as distinguished from actions personal, so as to exclude from the meaning of the provision actions to enforce contracts relating to real estate, but includes all actions which in any manner affect real property. *Ensworth v. Holly*, 33 Mo. 370, 372.

*Rev. St.* § 566, providing that a case of admiralty and maritime jurisdiction relating to any matter of contract or tort arising or concerning any vessel of 20 tons' burden or upwards, shall be tried by a jury when either party requires it, includes both a vessel receiving the injury in a collision and also the vessel doing the injury, since the cause of action arises and concerns one vessel as much as the other, and it is more important to the injured that she should recover her damages than it is to the other vessel that she should not be compelled to pay them; and hence either party is entitled to demand a trial by jury. *The Erie Bell*, 20 Fed. 63.

The general principle is that if a covenantant relate to the mode of enjoying the leased lands, whether for the benefit of the tenant, or of other lands of the lessor, or

business conducted elsewhere by him, it is a covenant which, in the language of the old cases, "touches" or "concerns" the demised premises. *American Strawboard Co. v. Hallinan Paper Co.* (U. S.) 83 Fed. 619, 625, 27 C. A. 634.

#### Persons directly involved.

Const. art. 6, § 2, giving the Supreme Court of Appeals jurisdiction of controversies concerning the right of a corporation or county to levy tolls and taxes gives the right to appeal only in a direct proceeding; and in a case where the right of a corporation to levy tolls is not questioned, but it is claimed that the right does not authorize the levy under particular facts as shown by the defendant. In the case, the only matter in controversy is the amount of the tolls, and not the right to levy tolls. Though the right to levy tolls under the special facts shown in the record is drawn in question incidentally and collaterally, the direct purpose of the action is the recovery of a specific amount in money. *Miller v. Little Kanawha Nav. Co.*, 32 W. Va. 51, 9 S. E. 57.

A policy providing that a loss thereunder could not be payable until the assured produced a certificate of loss of a magistrate not concerned in the loss as a creditor" is not a magistrate who was not concerned in the loss by reason of having an interest in the property insured, or in the policy as a surety for an obligation, and does not disqualify a magistrate from acting who was merely a general creditor of the assured. *Miller v. St. Joseph Fire & Marine Ins. Co.*, 111 Mass. 39, 45.

Under the statute giving a court appellate jurisdiction in civil cases in controversies concerning the title or boundaries of land, an action of trespass is not an action concerning the title or boundaries of land, though such action the title may be disputed. *Leathouse v. Sapp*, 26 W. Va. 87, 88.

The phrase "concerning the title to land," in the clause to the statute of frauds, requiring all agreements concerning the title to land to be in writing, does not include an agreement to remove a fence so as to open a road to its original width. *Talmadge v. Rensselaer & S. R. Co.* (N. Y.) 13 Barb. 493-498.

#### Persons engaged in or take part.

In the statute making it an offense for an officer of the United States to directly or indirectly solicit or receive, or be in manner concerned in soliciting or receiving, any assignment for any political purpose (Act Jan. 1883, § 11), the expression "being concerned in" is not a general term or conclusion which needs a specification of facts for completeness of description. It is a colloquial expression equivalent to "be engaged in" or "taking part in," and sufficiently informs the jury of what the government intends to

prove. *United States v. Scott* (U. S.) 74 Fed. 213, 217.

In Dig. c. 52, § 72, providing that, where two persons are concerned in the commission of an offense, each may be sworn, and his testimony shall not be used against him in a criminal prosecution for the same offense, the word "concerned" is used in the sense of the word "participants." *State v. Bach Liquor Co.*, 55 S. W. 854, 856, 67 Ark. 103.

The term "concerned in interest," within the meaning of the statute making it criminal to be concerned in interest in the keeping of a table of a like kind as faro, keno, etc., does not apply to a person who does not take part in the game, but furnishes the room and guests in which poker is played, from which he receives a moderate compensation from the persons playing. *Nuckolls v. Commonwealth* (Va.) 32 Grat. 884, 885.

When one opens an office and makes arrangements and furnishes facilities to enable his customers to sit in his office and gamble upon the results of horse racing, he keeps a place for the purpose of carrying on gambling on the result of a trial of speed, contrary to the statute, and, if he knowingly assists in making the transmission of money in the course of that business, he is "concerned" in the business. *State v. Harbourn*, 40 Atl. 179, 182, 70 Conn. 484, 40 L. R. A. 607, 66 Am. St. Rep. 126.

#### Persons interested in.

In a statute relating to the probate of wills, and providing that, if any person interested shall appear within three years after the probate of any such will, then an issue shall be made whether the writing produced is the will of the testator, but, if no such person shall appear within the time aforesaid, the probate shall be conclusive on all parties concerned, the words "parties concerned" mean those on whom the law imposes the duty of settling the estate. *McDonald v. White*, 22 N. E. 599, 600, 130 Ill. 493.

Revision, p. 708, § 32, providing that the record of an assignment of a mortgage is notice, from the time the assignment is left for record, to all persons concerned, that the mortgage is assigned, does not mean only those concerned at the time of the placing of an assignment on record, but should be construed to include a subsequent assignee of the mortgagee. *Mott v. Newark German Hospital*, 37 Atl. 757, 762, 55 N. J. Eq. 722.

A deputy county treasurer becomes "concerned" in a tax sale, within the meaning of Code 1873, § 885, which provides that a tax sale shall be invalid if any county treasurer or officers be either directly or indirectly concerned in the purchase of land sold for taxes, if he request a third person to attend



the tax sale and bid in the property in behalf of the deputy's minor son, and, after the person so requested has bid in the land, pays the purchase price in the son's behalf, and procures an assignment of the certificate of sale to the son. *Kirk v. St. Thomas' Church*, 30 N. W. 569, 570, 70 Iowa, 287.

#### As relating or pertaining to.

An allegation of libel, that the words were used "of and concerning" different matters alleged to be libelous, should not be construed to mean that the libel is stated to be of and concerning all of such matters, so that it would be necessary to prove a libel relating specifically to every one of the matters alleged, and that there would be a failure of proof if such was not the case, but the words only require that plaintiff prove the libel relating to those matters so far as they are concerned with the libel, in respect either to the particular defamatory character ascribed to it in the declaration, or of the manner in which it is afterwards set out. *May v. Brown*, 3 B. & C. 113, 137.

"Concerning," as used in Rev. St. § 3894, making it a crime to deposit in a post office a letter concerning a lottery, signifies pertaining to; having relation to. It does not conflict with this interpretation to concede that a letter pertaining to or having relation to a lottery might under some circumstances be deposited in the mail, and yet no crime be thereby committed. Such circumstances, however, would simply constitute a case manifestly outside of the intent of Congress as shown in the section, and which, therefore, the courts would hold to be exceptional. *United States v. Fulkerson* (U. S.) 74 Fed. 631, 632.

In Rev. St. § 3849, providing that no letters or circulars concerning lotteries shall be carried in the mail, the word "concerning" was not intended to be used in its broadest sense, as meaning pertaining to or relative to, as such a construction would include every letter of which the enterprise mentioned comprised the subject of the letter, and would condemn a letter seeking legal advice or written for the purpose of suppressing the lottery business, and even correspondence carried on between officers and the general post-office department in regard to such letters. The words should be construed only as meaning such letters and circulars as are sent out for the purpose of advertising lottery schemes and those of like import. *Commerford v. Thompson* (U. S.) 1 Fed. 417, 420.

#### CONCERNS AND ACCOUNTS.

See "Fiscal Concerns."

A commission merchant accepted certain orders, and agreed in writing to "account with the said B., and to pay to him, or order, any balance which may eventually be due on settling my concerns and accounts with M.

and H." Held, that words "concerns and accounts" were mercantile terms having appropriate technical import, and, as used with the acceptance, meaning merchandise on consignment—nothing more or less than the business incident to a sale of consigned goods—and could not include any other right or interest, and such as are incidental to the sale on commission of the goods in relation to which the orders were drawn and accepted. *Bruce v. Burdet*, 24 Ky. (1 J. J. Mars) 80, 82.

#### CONCERT.

"Concert," as defined by Webster, means "agreement in a design or plan; union formed by mutual communication of opinion and views." *Dauids v. People*, 61 N. E. 5540, 192 Ill. 176.

"Concert," as used in an ordinance forbidding concerts in the place operated under a license to sell liquors, unless a fee is paid, means a public performance of music in which several singers or instrumentalists are both participating, or a public performance of music intended to secure patrons for a saloon. A song or performance not intended to draw or secure an audience does not violate the ordinance. *City of Buffalo v. Smith*, 28 N. Y. Supp. 690, 691, 8 Misc. Rep. 348.

#### CONCESSI.

The words "dedi, concessi, and demisi" when used in a conveyance of real estate at common law imported a covenant in law. *Kenney v. Watts* (N. Y.) 14 Wend. 38.

At common law, a covenant for title was implied from the word "concessi" in a lease or grant for years. *Koch v. Hustis*, 87 W. 834, 835, 113 Wis. 599.

The use of the word "concessi," in a grant for years, at common law, imported a warranty of title. *Burwell v. Jackson* (N. Y. (5 Seld.) 535, 541 (citing Coke's Littleton 384a).

The word "concessi" in a lease implied a covenant for quiet enjoyment. *Gallup v. Albany Ry.* (N. Y.) 7 Lans. 471, 479; *Langan v. Kille*, 97 Pa. 120, 125, 39 Am. R. 797.

#### CONCESSION.

The Latin word "concessio," derived from the operative word in the Latin assent, heretofore used in England, formerly was employed to designate that species of assurance; and the English word "concession," derived from the Latin word in ordinary use, is exactly or nearly the equivalent of the word "grant," though the former is not now, in Virginia or West Virginia, generally used, as the latter is, w

reference to the conveyance of land or transfer of title, right, or claim thereto. *Western Min. & Mfg. Co. v. Peytona Cannel Coal Co.*, 8 W. Va. 406, 446.

### CONCESSION MEAT.

By "concession meat" is meant meat that has remained on hand so long in the cooler that it has become discolored or moldy, or not exactly what would be termed "first-class," but not unfit for use after it has been trimmed, though unfit for sale. When any cooler had such meat, the manager of another cooler would be called in to examine it, and if he believed it to be of such a character he would "concede" to the manager of the cooler having such meat the right or privilege to sell it for a price less than the agreed price as prescribed by the combination of packers. *State v. Armour Packing Co.*, 73 S. W. 645, 650, 173 Mo. 356, 1 L. R. A. 464, 96 Am. St. Rep. 515.

### CONCLAMATION.

"Conclamation" means a running together of persons. *United States v. Hand* (U. S.), 26 Fed. Cas. 103, 104.

### CONCLUDE.

The word "concluded," in a treaty which was to take effect when the terms of peace were agreed upon between Great Britain and France, and Great Britain was ready to conclude the same, was construed to mean when the agreement had received its last form by being signed and duly executed by the English minister. "It is this which concludes all agreements, whether made by nations or individuals." *Hylton v. Brown* (U. S.) 12 Fed. Cas. 1129, 1132.

### CONCLUSION.

See "Prosecute to Conclusion."

"Conclusion," as used by a juror in his examination, wherein his opinions were designated by himself as "conclusions," was not intended to convey the meaning of "conclusiveness," but was only a loose use of the word in the sense of "opinion," having no fixedness or conclusiveness in his mind. *Ortwein v. Commonwealth*, 76 Pa. 414, 426, 18 Am. Rep. 420.

In Greater New York charter, § 86, providing that, if a riparian owner apply to the land commissioners for a grant of the soil under water, the board of docks shall determine whether it will conflict with the public interests, and report their conclusions, the phrase "report their conclusions" is to be construed as showing that such report is merely advisory, and not in any way conclusive. "The charter was framed by able

lawyers, and in legal procedure 'to report their conclusions' has an accepted significance. A referee directed 'to report his conclusions' should report his conclusions of fact, which would show not only the result reached, but the ground which lead to the results. Such a report is always advisory, and not conclusive." *People v. Woodruff*, 68 N. Y. Supp. 10, 12, 57 App. Div. 273.

#### Of indictment.

The conclusion to an indictment "is one of its formal parts or divisions. It indicates the power or authority against which the facts charged constitute an offense. For such conclusion it cannot be necessary that any particular words shall be used in the indictment. At common law the conclusion was as to some crimes 'contra formam statuti,' and as to others 'contra pacem et dignitatem regis.'" *State v. Waters*, 1 Mo. App. 7, 9.

#### Of trial.

Within the provision that the party taking a bill of exceptions has a right to write them out and send the same to the judge for his signature during the term and within 10 days after the conclusion of the trial (Rev. St. art. 1363), the expression "conclusion of the trial" is held to be after verdict, or after the overruling of motions for a new trial or in arrest of judgment, where the same are filed. *Exon v. State*, 26 S. W. 1083, 1089, 33 Tex. Cr. R. 461.

### CONCLUSION OF FACT.

"Conclusions of fact" are inferences drawn from the subordinate or evidentiary facts. *Caywood v. Farrell*, 51 N. E. 775, 776, 175 Ill. 480.

### CONCLUSION OF LAW.

It may not be possible to formulate a definition that will always describe what is a mere "conclusion of law," so as to distinguish it from a pleadable ultimate fact, or that will define how great an infusion of conclusions of law will be held to enter into the composition of a pleadable fact. Precedent and analogy are the only guides, and in holding one class of inferences as facts to be pleaded, and another as conclusions of law to be avoided, courts may have been often governed more by precedent than by a substantial difference in principle, but it has been quite generally held that the question of negligence in a particular case is one of mingled law and fact; that when we speak of the act as "negligent" or "careless," according to the common use of language, we state, not simply a conclusion of law, but likewise state an ultimate fact inferable from certain other facts not stated. *Clark v. Chicago, M. & St. P. Ry. Co.*, 9 N. W. 75, 28 Minn. 69.

Whether a finding is an ultimate fact or a conclusion of law depends upon whether it is reached by natural reasoning or by the application of the artificial rules of law; and where plaintiff's mother owned property which, by proper steps, became the homestead of plaintiff's father and mother, and thereafter the mother died, and the father married again and conveyed the homestead, his wife joining in the conveyance under the name of the first wife, a finding of the court that this conveyance passed the title as against the plaintiff is a conclusion of law. *Levins v. Rovegno*, 12 Pac. 161, 164, 71 Cal. 273.

An allegation that no valid contract was made is held to be an allegation of a legal conclusion. *Sigua Iron Co. v. Vandervort*, 80 Atl. 491, 164 Pa. 572.

#### **Fraud.**

See "Fraud."

#### **CONCLUSIVE.**

See "Final and Conclusive."

Where the court, in instructing a jury, stated that, in order to reach certain conclusions, the evidence should be clear, satisfactory, and conclusive to their minds, the word "conclusive" was not used in its legal sense as possessing weight and force that could not be contradicted, but rather in its common acceptance, in which it means "decisive; putting an end to debate; leading to a conclusion or decision." *Hoadley v. Hammond*, 19 N. W. 794, 795, 63 Iowa, 599.

"Conclusive," in law, is that of which from its nature the law allows no contradiction or explanation; an inference which the law makes so peremptory that it will not allow it to be overthrown by any contrary proof, however strong. *Joslyn v. Rockwell*, 13 N. Y. Supp. 311, 317, 59 Hun, 129.

Rev. St. Wis. § 2832, providing that the settlement of an account by an assignee for the benefit of creditors shall be "conclusive," means simply that while the settlement stands unreversed it binds all parties to the proceeding, just as a judgment is conclusive because it binds all parties to the action, but does not prevent a court from vacating a settlement on a proper showing. *Commercial Bank v. McAuliffe*, 66 N. W. 110, 111, 92 Wis. 242.

The words "final and conclusive," as used in Act 1880, making judgments of the superior courts on appeals from order forming reclamation or swamp-land districts final and conclusive, are synonymous, and mean that the judgment shall be followed by no other proceedings in the same or any other court. *Appeal of Bixler*, 59 Cal. 550, 556.

"Conclusive," as used in an agreement to argue a case before the judges of the circuit

court, and providing that their opinion should be conclusive, means that the decision, when rendered in pursuance of such agreement, terminates the litigation and deprives the parties of their right of appeal. *Galbreath v. Colt (Pa.)* 4 Yeates, 551, 556.

The word "conclusive," as used in the nineteenth section of the act establishing the orphans' court, Pat. 63, declaring that accounts of the estate shall be conclusive upon the parties cited to a hearing of such accounts, is made use of in contradistinction to the imperfect or inconclusive accounts sometimes formerly made without notice or citation. *Burroughs v. Mickle*, 3 N. J. Law (2 Pennin) 913, 915.

#### **CONCLUSIVE ADMISSION.**

An admission by a party in his pleading in an action is evidence tending to prove the same fact in another suit between the same parties, but is not a "conclusive admission" and would have no more force than mere admissions, which may be explained or contradicted. *Rich v. City of Minneapolis*, Minn. 82, 41 N. W. 455, 456.

#### **CONCLUSIVE EVIDENCE.**

"Conclusive" or "unanswerable" evidence is that which the law does not permit to be contradicted. For example, the record of a court of competent jurisdiction cannot be contradicted by the parties to it. *Code Civ. Proc. Cal.* 1903, § 1837; *Ann. Codes & Stat. Or.* 1901, § 690. See, also, *Moore v. Hanks*, 23 Pac. 318, 319, 83 Cal. 270.

"Conclusive evidence" means evidence that is incontrovertible. *Wood v. Chapin*, 13 N. Y. (3 Kern.) 509, 515, 67 Am. Dec. 62.

"Conclusive evidence" means either a presumption of law, or else evidence so strong as to overbear all other in the case to the contrary." *Haupt v. Pohlmann*, 24 N. J. Super. Ct. (1 Rob.) 121, 127.

Evidence is sometimes said to be "conclusive" when the law does not permit it to be contradicted, but the word "conclusive" as used in the decisions of the court relating to the character of evidence necessary in cases where it is sought to reform an instrument for fraud or mistake, means that measure or degree of proof which produced in the unprejudiced mind the belief and conviction of the truth of the fact asserted, having in view all the facts and circumstances surrounding the transaction. *West v. West*, N. W. 639, 640, 90 Iowa, 41.

If it was the intention of the Legislature that the schedule of rates fixed by the commission should be final and conclusive on the subject, it is difficult to see why they did not use the words "conclusive evidence" instead of the term "sufficient evidence."

Richmond & D. R. Co. v. Trammel (U. S.)  
13 Fed. 196, 202.

### CONCLUSIVE JUDGMENT.

A judgment is not conclusive unless it is a judgment on the merits of the case. A judgment on a dismissal, nonsuit, default, and the like, does not settle the rights of the parties. *Flynn v. Gorman*, 48 Atl. 797, 22 N. J. L. 536.

### CONCLUSIVE PRESUMPTION OF LAW.

Conclusive presumptions are inferences which the law makes so peremptory that it will not allow them to be overturned by any contrary proof, however strong. *Brandt v. Morning Journal Ass'n*, 80 N. Y. Supp. 1002, 104, 81 App. Div. 183.

"Conclusive presumptions of law" are rules determining the quantity of evidence requisite for the support of any particular verdict. It is not permitted to be overcome by any proof that the fact is otherwise. *United States v. Clark*, 14 Pac. 288, 290, 5 Utah, 226 (citing *Tayl. Ev. vol. 1, p. 85*).

### CONCLUSIVE PROOF.

In speaking of the meaning of the words "clear and decisive proof," "clear and satisfactory evidence," "clear and convincing evidence," "clear and conclusive proof," and "conclusive proof," the court quotes with approval the statement of Ballinger in his work on Community Property, where it is said that it is not believed that these terms should be considered as going to the length that their general meaning might import, and that it is certainly not required that the proof should be any more than sufficient to satisfy the mind of court or jury that its weight is enough to cause a reasonable person, under all the circumstances, to believe in its sufficiency. *Freese v. Hibernia Sav. & Loan Soc.*, 73 Pac. 172, 173, 139 Cal. 392.

### CONCLUSIVELY.

"Conclusively," as used in an instruction in a slander suit that the law conclusively presumes from the falsity of the words that they were spoken maliciously, "carries with it the idea of finality, and implies necessarily that the presumption is of such a character that no evidence may be considered to rebut it." *Smith v. Rodecap*, 31 N. E. 479, 5 Ind. 78.

A statute authorized a change of venue on the ground that a fair and impartial trial could not be had. The court, in construing the same, held that the word "conclusively," as defined by Webster, meant final determination; in a conclusive manner; to end deliberation, doubt, or contest; that which cannot

be disputed or contradicted by any other evidence; and hence, as so defined, it requires too high a degree of proof, the statute only being held to require a reasonable probability, or a probable ground to believe or apprehend, that a fair and impartial, or at least a satisfactory, trial could not be had in the county where the suit was brought. *Hilliard v. Beattie*, 58 N. H. 312.

"Conclusively," when used in reference to a thing as being conclusively proven or shown, means that it follows as the only conclusion that may flow from the facts, and does not mean that there is that actual knowledge which precludes the possibility of error or mistake. Thus it often happens that things universally believed and deemed conclusively established in one age of mankind become to a subsequent generation such palpable absurdities that the difficulty is to imagine how they ever appeared credible. So that an instruction that the defendant's guilt must be established beyond a reasonable doubt, but that it does not mean that it shall be conclusively established, is erroneous, since to be established beyond reasonable doubt is to be conclusively established. *People v. Stephenson*, 32 N. Y. Supp. 1112, 1114, 11 Misc. Rep. 141.

### CONCUBINAGE.

Concubinage is a practice of cohabiting without lawful marriage. When a single woman consents to unlawfully cohabit with a man as though the marriage relation existed between them, without any limit as to the duration of such cohabitation, and actually commences such cohabitation in pursuance of such understanding, she becomes his "concubine," or, as is usually expressed in modern times, his "mistress." *Henderson v. People*, 17 N. E. 68, 72, 124 Ill. 607, 7 Am. St. Rep. 391; *State v. Bussey*, 50 Pac. 891, 894, 58 Kan. 679.

"The relation which gives rise to the disreputable state of woman indicated by the term 'concubinage' may, like that of marriage, be contracted or assumed in a day as easily as in a year. When a single woman consents to unlawfully cohabit with a man generally, as though the marriage relation existed between them, without any limit as to the duration of such illicit intercourse, and actually commences cohabiting with him in pursuance of that understanding, she becomes his 'concubine,' or, as is usually expressed in modern times, 'his kept mistress,' which amounts to the same thing. So if we hold in this case that when the heartless libertine, by his seductive arts or other means, induces his confiding or intimidated victim, as the case may be, to abandon home and the wholesome restraints of parental authority, to accompany him whithersoever he may see proper to take her, without limit as to time or place, for the purpose of submitting to



his licentious embraces, \* \* \* he clearly brings himself within the provision of Crim. Code Ill. § 1, providing for the punishment of a person enticing an unmarried female from her home for the purpose of prostitution or concubinage." *Henderson v. People*, 17 N. E. 68, 72, 124 Ill. 607, 7 Am. St. Rep. 391.

The gravamen of the offense of concubinage is not simply living in the same house together, but having intercourse with each other as man and wife when there has been no legal marriage. In considering the statute providing that "every person who shall take away any female under the age of 18 years from her father, mother, or guardian for the purpose of prostitution or concubinage," shall be punished, etc., the court said: "The main crime contemplated by this statute is the taking away of a girl from her parents for the purpose of defiling her. After one act of sexual commerce, the happiness and honor of the girl are destroyed; her character is gone; her reputation may be ruined." *State v. Overstreet*, 23 Pac. 572, 574, 43 Kan. 299; *State v. Goodwin*, 6 Pac. 899, 901, 33 Kan. 538.

In an act relating to taking away females for the purpose of prostitution or concubinage, "taking for the purpose of concubinage" means for the purpose of cohabiting with her as man and woman in sexual intercourse for any length of time, even for a single night, without the authority of a legal marriage. *State v. Gibson*, 19 S. W. 980, 981, 111 Mo. 92; *State v. Feasel*, 74 Mo. 524, 525, 526.

The words "concubinage and prostitution" have no common-law meaning, and, in a statute relative to enticing away females for such purposes, were intended to cover all cases of lewd or illicit intercourse. *People v. Cummons*, 23 N. W. 215, 56 Mich. 544; *People v. Bristol*, 23 Mich. 118, 126.

Evidence that defendant took an unmarried female 18 years old away in a wagon to a railway station 16 miles distant, and, there being no train that night, stayed with her in a schoolhouse, and that the next morning she went to a city and stayed till after she was delivered of her child, will not support a conviction for taking her away for the purpose of concubinage, where the female testifies that, though the defendant had intercourse with her, his purpose in taking her away was to hide her disgrace and to shield his son, the father of the child, from prosecution. *State v. Gibson*, 18 S. W. 1109, 1111, 108 Mo. 576.

#### Prostitution distinguished.

"Concubinage" is defined as "a species of loose, informal marriage which took place among the ancients, and which is yet in use in some countries." It is distinguished from prostitution, which is defined by Webster as

"the act or practice of prostituting or offering the body to an indiscriminate intercourse with men; common lewdness of a female and in the legal authorities as the common lewdness of a woman for gain; the act permitting a common and indiscriminate sexual intercourse for hire. The words have this separate meaning in Rev. St. § 3484, prohibiting the abduction of a female under the age of 18 years for the purpose of concubinage or seduction. *State v. Gibson*, 19 S. W. 980, 981, 111 Mo. 92.

### CONCUR.

"Concur" means a consent evidenced in some manner; more active than mere acquiescence or silent submission. *Dillon v. Scofield*, 9 N. W. 554, 555, 11 Neb. 419.

### CONCURRENCE.

"Concurrence," as used in the constitutional provision that the county seat shall not be removed without the concurrence of two-thirds of the voters of the county, synonymous with "consent," and requiring active affirmative action on the part of the voter. *Bouldin v. Lockhart*, 62 Tenn. Baxt.) 262, 277.

Act 1891, which relates to the powers of street and water commissioners of Jersey City, and provides that, wherever there shall now or hereafter exist any limitation upon the powers conferred upon the board of street and water commissioners by requiring a "concurrence of any separate board" or municipal officer (excepting certain boards), that act shall not be construed as dispensing with such concurrence, relates to the execution of such acts as require a direct approval. It does not apply to the indirect control which the board of finance exercises by virtue of its power to limit appropriation. *Board of Finance of Jersey City v. Board of Street & Water Com'rs*, 26 Atl. 92, 93, 55 N. J. Law (26 Vroom) 230.

### CONCURRENCE DELOYALE.

For offenses such as the infringement of trade-marks, wrappers, billheads, signs, etc., the French-speaking nations have a standard name. The term used is "concurrence deloyale," which may be fairly anglicized as a dishonest, treacherous, perfidious rivalry in trade. In the German Imperial Court of Colmar, in 1873, the court said that the current jurisprudence understands by "concurrence deloyale" all maneuvers that cause prejudice to the name of a property, to the renown of a merchandise, or to lessen the custom due to rivals in business. *O. Simmons Medicine Co. v. Mansfield Drug Co.*, 23 S. W. 165, 177, 98 Tenn. (9 Pick. 84.

**CONCURRENT OR CONCURRING CAUSES.**

Causes are "concurrent" when they occur exactly the same space of time (coincident or contemporaneous), or when they act jointly and connectedly, co-operating and contributing to produce the accident. *Fleming v. Buswell*, 57 N. Y. Supp. 230, 232, 89 N. D. Div. 193.

Where a pipe line neither by its construction nor its operation tended to produce the fire which burned plaintiff's house, it cannot be said to be a "concurring cause" in the result. *Behling v. Southwest Pennsylvania Pipe Lines*, 28 Atl. 777, 778, 160 Pa. 40 Am. St. Rep. 724.

**CONCURRENT COVENANTS.**

"Concurrent covenants" are those where the actual conditions are to be performed at the same time. *Ohousteau v. Rice*, 1 Minn. 106, (Gil. 88); *Snow v. Johnson*, 1 Minn. 48, (Gil. 32); *Gray v. Smith* (U. S.) 76 Fed. 534. In covenants of this character, if one party is ready and offers to perform part of the covenant, and the other refuses or neglects to perform his part, the party who was ready may maintain an action for the breach or default of the other, though it is uncertain which was obliged to perform the first act. *Snow v. Johnson*, 1 Minn. 52 (Gil. 82). Thus in an agreement to sell land for a certain sum of money and certain other land, the covenants to transfer the land are concurrent. The performance of each must be at the same time as that by the other. *Gray v. Smith* (U. S.) 76 Fed. 534.

Covenants are either "dependent and concurrent," or "mutual and independent." The first depends on the prior performance of some act or condition and until the condition is performed the other party is not liable to an action on his covenant. In the second, mutual acts are to be performed at the same time, and if one party is ready and offers to perform his part, and the other neglects or refuses to perform his, he who is ready and offers has fulfilled his engagement, and may maintain an action for the default of the other's, though it is not certain that he is obliged to do the first act. The third sort is where either party may recover damages from the other for the injury he may have received for a breach of the covenants in his favor, and it is no excuse for the defendant to allege a breach of the covenant on the part of the plaintiff. *Bailey v. White*, 3 Ala. 330, 381.

**CONCURRENT INSURANCE.**

See "All Policies Concurrent."

"Concurrent insurance" is that which to the extent insures the same interest against

the same casualty, at the same time, as the primary insurance, on such terms that the insurers would bear proportionately the loss happening within the provisions of both policies. It is this last quality of sharing proportionately in the loss that distinguishes "concurrent insurance," from mere "double insurance." *New Jersey Rubber Co. v. Commercial Union Assur. Co.*, 46 Atl. 777, 778, 64 N. J. Law, 580.

"Concurrent" means acting in conjunction, agreeing in the same act, contributing to the same event or effect; and hence, as used in an insurance policy permitting concurrent insurance, other insurance covering the insured property and other property is within the term "concurrent insurance," since it contributes to the same event or effect. *Corkery v. Security Fire Ins. Co.*, 68 N. W. 792, 794, 99 Iowa, 382.

The term "concurrent insurance," in a fire policy permitting concurrent insurance, "should not be construed to require the later policies to exactly concur in covering all the property, otherwise it should be held that they must also cover all the time. The term includes policies running with the policy in question and sharing its risk, and includes those covering not only a part of the risk in question, but all of it, and more." The definition of lexicographers warrants such inclusion. Take that of Webster: "Concurrent—acting in conjunction; agreeing in the same act; contributing to the same event or effect; co-operating; accompanying; conjoint; associate; concomitant; joint and equal; existing together; and operating on the same objects." *Washburn-Halligan Coffee Co. v. Merchants' Brick Mut. Fire Ins. Co.*, 81 N. W. 707, 709, 110 Iowa, 423, 80 Am. St. Rep. 311.

The insertion in a policy of insurance of \$1,000 of the words "total concurrent insurance, four thousand dollars," the policy being on property which was already insured to the amount of \$3,000, included the amounts of both policies, and gave the assured no right to secure other insurance without further consent of the company. To be "concurrent," the insurance must operate at the same time, on the same property, and look to the indemnity of the insured in case of its loss or destruction from casualty insured against. The word "concurrent" means, literally, running together, and in the connection here used has the sense of "co-operating; contributing to the same event or effect." *East Texas Fire Ins. Co. v. Blum*, 13 S. W. 572, 576, 76 Tex. 653.

**CONCURRENT JURISDICTION.****Of courts.**

"Concurrent jurisdiction" means equal jurisdiction. *State v. Sinnott*, 85 Atl. 1007, 1008, 89 Me. 41.

"Concurrent" is having the same authority. Such and such courts have concurrent jurisdiction; that is, each has the same jurisdiction. "Concurrent jurisdiction" is that of several different tribunals, each authorized to deal with the same subject-matter. So that, where a probate court has been given concurrent jurisdiction over certain matters, it is authorized to deal with such case in the same manner and to the same degree and with the same jurisdiction as that of the district court. *Rogers v. Bonnett*, 87 Pac. 1078, 1079, 2 Okl. 553.

"Concurrent jurisdiction" is that jurisdiction exercised by different courts, at the same time, over the same subject-matter, and within the same territory, and wherein litigants may, in the first instance, resort to either court indifferently. *Bouv. Law Dict.* "Jurisdiction"; *Rap. & L.*, same title. Hence "concurrent jurisdiction with the circuit court," as used in *Rev. St. 1891*, c. 37, § 240, giving city courts concurrent jurisdiction with circuit courts in all civil cases, means equal power and authority with the circuit court to hear and determine all civil and criminal cases, treason and murder excepted, etc. *Hercules Iron Works v. Elgin, J. & E. R. Co.*, 141 Ill. 491, 498, 30 N. E. 1050, 1051.

#### Of states.

The term "concurrent jurisdiction on the water," used in the acts of Congress providing for the admission of the states of Wisconsin and Minnesota into the Union, refers to the effect of the law of each state within the domain of the other covered by water divided by the boundary line between the two states, as regards persons or things on the water concerned or connected in some way with the use thereof for purposes of navigation. It has no reference to the land under the water, or things of a permanent nature in or over the water. In respect to such matters and rights incident thereto, the jurisdiction of each state on its side of the boundary line is exclusive. *Roberts v. Fullerton (Wis.)* 93 N. W. 1111.

The words "concurrent jurisdiction" must have been used, in the compact between the federal government, Wisconsin, and Minnesota, in the sense in which they had previously been used and were generally understood. When, therefore, by such compact, it was in effect provided that each such state shall have "concurrent jurisdiction" on that portion of the river St. Croix constituting the boundary line between them, it included the exercise of such legislative powers by each state over the whole river as were consistent with the exercise of similar powers over the same portion of the river by the other states. In other words, by such compact each state secured to itself such concurrent jurisdiction upon the half of the river within the territorial limits of

the other state by reducing what would otherwise have been its exclusive jurisdiction upon its own half to mere concurrent jurisdiction. The result is that neither of the states could, as against the other, rightfully assume, or authorize the assumption of, permanent and exclusive occupancy, possession and control of the entire navigable portion of the river. *J. S. Keator Lumber Co. v. St. Croix Boom Corp.*, 38 N. W. 529, 542, Wis. 62, 7 Am. St. Rep. 837.

The definition of "concurrent jurisdiction" given in *Keaton L. Co. v. Boom Corp.* supra, quoted and approved, and it was held that, as used in relation to the concurrent jurisdiction over the Columbia river by the states of Washington and Oregon, it means "acting in conjunction," and, when applied to the jurisdiction of Oregon to enact penal laws for the Columbia river, it can only mean the power to enact such criminal statutes as are agreed to or acquiesced in by the state of Washington, or as are already in force within its jurisdiction. In *re Matts* (U. S.) 69 Fed. 535, 540.

"Jurisdiction," as applied to a state, signifies the authority to declare the power to enforce the law, as well as the territory within which such authority and power may be exercised. The jurisdiction of the state is coextensive with its sovereignty. Therefore, by conferring on Missouri "concurrent jurisdiction" on the river Mississippi, so that as the said river shall form a common boundary to the said state and any other state or states bounded by the same, Congress intended to declare that, subject to the other laws of the United States, transactions occurring anywhere on that river between the two states might lawfully be dealt with by the courts of either according to its law, and that, where a court of one state assumed jurisdiction in a particular case, the same should be exclusive therein until relinquishment. *Sanders v. St. Louis & N. O. Anchor Line*, 10 S. W. 595, 597, 97 Mo. 26, 3 L. A. 390.

#### CONCURRENT LEASE.

A concurrent lease is one granted for a term which is to commence before the expiration or other determination of a previous lease of the same premises made to another person, or, in other words, an assignment of a part of the reversion entitling the lessor to all the rents accruing on the previous lease after the date of the lease, and on the remedies as against the tenant under the previous lease as his lessor would have had except for the assignment. *Cargill v. Thompson*, 10 N. W. 638, 642, 57 Minn. 534.

#### CONCURRENT LIENS.

Maritime liens are "concurrent" when they are of the same rank, and for supply

materials or services in preparation for the same voyage, or if they arise on different bottomry bonds to different holders for advances at the same time for the same reasons, and will be discharged pro rata. *The W. Tucker* (U. S.) 20 Fed. 129, 132 (citing *the Exeter*, 1 C. Rob. 173; *The Albion*, 1 Jagg. 333; *The Desdemona*, 1 Swab. 158; *the Saracen*, 2 Wm. Rob. 458; *The Rapid Transit* [U. S.] 11 Fed. 322, 334, 335; *The Dragon*, 1 Ware, 325).

### CONCURRENT REMEDIES.

The use of the words "concurrent remedies" in Const. art. 2, § 12, providing that a person shall be proceeded against criminally for felony otherwise than by indictment, and in all other cases offenses shall be prosecuted criminally by indictment or information as concurrent remedies, "manifestly implied a restrictive reference to the information as a known remedy, not less than to the indictment, each within its proper sphere. One or the other must be used in every case." *Ex parte Thomas*, 10 Mo. App. 25.

"Concurrent," as used in Rev. St. N. Y. 12, c. 8, pt. 3, reciting that it was the intention of the revisers to so extend the action of replevin as to make it a substitute for detinue, and a concurrent remedy in all cases of the unlawful caption or detention of personal property with trespass and trover, does not mean "coextensive." *Sinnott Felock*, 59 N. E. 265, 165 N. Y. 444, 53 L. A. 565, 80 Am. St. Rep. 736.

### CONCURSO.

"Concurso" is the name of a suit or remedy provided by the Louisiana laws to enable creditors to enforce their claims against an insolvent or failing debtor. *Schroeder's Indics v. Nicholson*, 2 La. 350, 355.

### CONCUSSION.

"Concussion," as applied to the brain, is laceration of the brain substance without laceration of its tissue, or with only microscopical laceration. As applied to the spine, it still be admitted that such a condition may exist, is meant a condition of the spinal cord produced by a violent shock. *Maynard Oregon R. Co.*, 72 Pac. 590, 593, 43 Or. 63.

### CONDEMN—CONDEMNATION.

Confiscation distinguished, see "Confiscate—Confiscation."

To "damn" or "condemn" is to "deem, think, or judge any one to be guilty, to be criminal; to give judgment or sentence, or a verdict of guilt; to adjudge or declare the

penalty or punishment." *Blaufus v. People* (N. Y.) 2 Cow. Cr. Rep. 306, 309.

"Condemnation" is defined by Bouvier as "a sentence or judgment, which condemns some one to do, to give, or to pay something, or which declares that his claim or pretensions are unfounded." *Lockwood v. Saffold*, 1 Ga. (1 Kelly) 72, 74.

#### Of land.

The "condemnation" of land is but the appropriation in invitum of the land in the absence of the owner's consent. It is distinguished from "dedication" in that it is compulsory. *Venable v. Wabash West Ry. Co.*, 20 S. W. 493, 498, 112 Mo. 103; 18 L. R. A. 68.

To "condemn" land is to set it apart or expropriate it for public use. It is an apt term in proceedings in court for the final condemnation of land under the exercise of the power of eminent domain, and not such as is used in the exercise of legislative power; and hence the use of the term in an ordinance, declaring that it condemned, appropriated, acquired, and set apart certain land for public use, was an exercise of judicial power. *Wulzen v. Board of Sup'rs of City and County of San Francisco*, 35 Pac. 353, 356, 101 Cal. 15, 40 Am. St. Rep. 17.

"Condemnation," as used in Act Cong. Aug. 1, 1888, authorizing designated government officers to acquire for the United States by "condemnation" real estate for the erection of public buildings, must be construed to mean condemnation with just compensation, as otherwise the statute would be in conflict with Const. Amend. 5, declaring that private property shall not be taken for public use without just compensation. In *re Rugheimer* (U. S.) 36 Fed. 369, 372.

#### Of vessel.

"Condemned," as used in Rev. St. § 4582, providing that the three months' extra wages due to seamen discharged was not to be required where vessels are wrecked or stranded or "condemned" as unfit for service, does not mean condemned by decree of an admiralty court. It means that proceeding known in all ports by which ships which have suffered disaster are condemned or pronounced unfit for service, the common method being by the report of a survey, called by the consul of the nation to which the ship belongs, on the application of the master. *Gallagher v. Murray* (U. S.) 9 Fed. Cas. 1087.

### CONDEMNATION MONEY.

See "Eventual Condemnation Money."

Act Dec. 16, 1811, providing that no injunction shall be sanctioned or granted by any judge of the superior courts of the state until the party requiring the same shall have previously given to the party against whom

such injunction is to operate, by application to the clerk of the superior court for that purpose, a bond for the "eventual condemnation money," together with all further costs, means that which the law sentences the party to pay, expressed by the judgment of the court, the legitimate organ of the law. *Lockwood v. Saffold*, 1 Ga. (1 Kelly) 72, 73.

"Condemnation money," as used with reference to a recovery on an appeal bond, means damages that should be awarded against the appellant by the judgment of the court. It does not embrace damages not included in the judgment, nor costs, but such damages as have been suffered by the appellee by reason of the appeal. *Doe v. Daniels* (Ind.) 6 Blackf. 8, 9.

The phrase "condemnation money," as used in a bond obligating the principal and surety to pay the condemnation money and costs if the judgment be affirmed, means money which, by the original judgment, the plaintiff in error, the principal in the bond, is adjudged to pay. *Hayes v. Weaver*, 55 N. E. 172, 173, 61 Ohio St. 55.

#### CONDEMNATION PROCEEDINGS.

As an action, see "Action."

As civil case or suit, see "Civil Action—Case—Suit—etc."

As special case, see "Special Case."

As special proceeding, see "Special Proceeding."

As suit, see "Suit."

Condemnation proceedings are proceedings in rem, and bind all persons interested in the res, though not technically parties to the proceeding. All questions of title to the res are transferred to the money awarded after a valid condemnation. *Gardiner v. City of Baltimore*, 54 Atl. 85, 87, 96 Md. 361.

#### CONDITION.

See "Actual Condition"; "Condition Precedent"; "Condition Subsequent"; "Express Condition"; "Failing Condition"; "Good Order and Condition"; "Implied Condition"; "Mixed Condition"; "Mutual Conditions"; "Nominal Conditions"; "Potestative Condition"; "Resolutive Condition"; "Suspensive Condition"; "Testamentary Condition"; "Well Conditioned"; "Words of Condition."

Mortgage as, see "Mortgage."

Other conditions, see "Other."

In its more extended sense, the word "condition" signifies a clause in a contract or agreement which has for its object the suspension, rescission, or modification of the principal obligation, or, in case of a will, to suspend, revoke, or modify the devise or bequest. *Towle v. Remsen*, 70 N. Y. 303, 309;

*Elyton Land Co. v. South & North Alabama R. Co.* (Ala.) 14 South. 207, 208.

The word "condition" is defined by Mr. Webster to mean "the mode or state of being; state or situation with regard to external circumstances; essential quality; property; attribute." Under an ordinance requiring a street railway company to keep the portions of streets between its railway tracks and two feet on each side thereof in as good repair and condition as the city keeps the balance of the streets, it is the duty of the company to pave the portions of streets between its said tracks, and two feet on each side thereof, when the city paves the balance of the streets. For when the city paves, if the company decline so to do, it cannot be said that it keeps the parts of the streets in question in as good condition, or in as good state of being or essential quality, as the city keeps the balance. In order to meet this obligation, the company must also pave. *State v. Jacksonville St. R. Co.*, 29 Fla. 590, 613, 10 South. 590, 596 (quoting Webster, Dict.).

"A condition is a qualification or restriction annexed to a conveyance of lands, whereby it is provided that in case a particular event does or does not happen, or in case the grantor or grantees do or omit to do a particular act, an estate shall commence, be enlarged, or be defeated." *Heaston v. Randolph County Com'rs*, 20 Ind. 398, 402; *Johnson v. Gurley*, 52 Tex. 222, 226; *Thorn-ton v. Trammell*, 39 Ga. 202, 207; *Laughley v. Ross*, 55 Mich. 163, 20 N. W. 886, 887; *Blanchard v. Detroit, L. & L. M. R. Co.*, 81 Mich. 43, 49, 18 Am. Rep. 142; *Michigan State Bank v. Hastings* (Mich.) 1 Doug. 224, 252, 41 Am. Dec. 549; *Campau v. Chene*, 1 Mich. (Man.) 400, 413; *Detroit Union R. Depot & Station Co. v. Fort Street Union Depot Co.*, 87 N. W. 214, 216, 128 Mich. 184; *Warner v. Bennett*, 81 Conn. 468, 475; *Fowkes v. Wagoner* (Tenn.) 46 S. W. 586, 591; *Williamson v. Gordon Heights Ry. Co.* (Del.) 40 Atl. 933, 934; *Smith v. White*, 5 Neb. 405, 407; *Rogan v. Walker*, 1 Wis. 527, 554; *Raley v. Umatilla County*, 13 Pac. 890, 894, 15 Or. 172, 8 Am. St. Rep. 142. The condition which is to affect the estate may be express or implied, and it may be precedent or subsequent. *Raley v. Umatilla County*, 13 Pac. 890, 894, 15 Or. 172, 8 Am. St. Rep. 142; *Michigan State Bank v. Hastings* (Mich.) 1 Doug. 224, 252, 41 Am. Dec. 549 (citing Litt. § 325). "The condition is annexed to the estate; it doth always attend and wait upon the estate; it is knit to it." If it would not be competent for an individual to separate an estate from the condition annexed to it, it would not be competent for the state to do it. *Michigan State Bank v. Hastings* (Mich.) 1 Doug. 224, 266, 41 Am. Dec. 549. A condition must be reserved by words used by the grantor, but it is not necessarily confined to the covenants of the deed. So where the recital of a deed was not a mere recital of past circumstances, but a



declaration of present intention and a part of the original contract of the parties, and declared that the conveyance was "on this condition"—that is, that the grantee should discharge a certain ground rent, and also build a house on such land for the use of the grantor—the condition was effectually reserved, in addition to the security afforded by covenants in other parts of the deed. *Hamilton v. Elliott* (Pa.) 5 Serg. & R. 375, 1.

The words "and these presents are upon this condition," namely, that the lessee shall suffer the lessor to enjoy a way reserved through the demised premises without obstruction, are sufficient in a durable lease to make the estate a conditional one without an express clause of re-entry, and, if the way be obstructed, ejectment lies. *Jackson v. Allen* (N. Y.) 3 Cow. 220, 225.

A "condition" is a qualification or restriction annexed to a conveyance, and so united with it in the deed as to qualify it or restrain it. *Cooper v. Green*, 28 Ark. 48, 54.

A "condition" is something inserted in a deed for the benefit of the grantor, giving him the power, on default of performance, to destroy the estate if he will, and re-vest the estate in himself or his heirs. *Smith v. Smith*, 23 Wis. 176, 181, 99 Am. Dec. 153. A condition not only depends on the option of the grantor, but is controlled by equity in any case where the grantor attempts to make an inequitable use of it. *Duryee v. City of New York*, 96 N. Y. 477, 496.

"Conditions," as used in a deed reciting that "this conveyance is made to the parties, their heirs and assigns, absolute and in fee simple with and on the following conditions," is used in its generic sense "to denote the predicament or status of the title, its condition, and, where a subsequent portion of the deed shows that the grantor only owned an equity of redemption in the land, the deed will not be considered as passing a fee simple." *Dunlap v. Mobley*, 71 Ala. 102, 105.

The word "conditions," as used in Acts of Congress, April 14, 1802, and May 26, 1824, providing that an alien may be admitted to become a citizen on the "following conditions, and not otherwise," and specifying the proceeding for naturalization, cannot be held to mean that the applicant shall see to it that the proceedings are recorded. The conditions are well satisfied by limiting them to what the applicant is required to do in so far as his acts are concerned. In *re Coleman* (U. S.) 6 Fed. Cas. 49, 55.

"Condition, in its legal signification, means something annexed to a grant." *State Board of Public Works*, 42 Ohio St. 607, 5.

As used in Hoboken City Charter of 1861, § 11, providing that it shall be law-

ful for the council by general ordinance to grant permission to any person or corporation to lay railroad tracks over any street or highway within the city under such conditions and restrictions as the council may think proper, the words "conditions and restrictions" authorize the council to impose only such conditions and restrictions as were annexed to the grant, and such words import simply a qualification or limitation of the gift to which they are annexed, and are inapplicable to a corporation possessing its franchises and its power to lay rails by authority derived from the Legislature. *North Hudson County Ry. Co. v. City of Hoboken*, 41 N. J. Law (12 Vroom) 71, 76.

Within Code, § 3252, providing that no condition or restricted provision of a policy of insurance shall be valid as a defense to an action on the policy unless printed in certain sized type, the term "conditions" was not used in any narrow or technical sense, but was intended to cover any clause, expression, or provision included in or appended to a policy whereby the effect of the principal and essential part of the policy is modified, changed, restricted, or otherwise affected so as to materially influence the rights and liberties of the insurer thereunder; and it is of no consequence whether the language used be in the form of a condition or agreement. *National Life Ass'n v. Berkeley*, 34 S. E. 469, 97 Va. 571.

By the word "condition" is usually understood some quality annexed to real estate by virtue of which it may be defeated, enlarged, or created upon an uncertain event: also qualities annexed to personal contracts and agreements are frequently called "conditions," and these must be interpreted according to the real intention of the parties. *Bac. Abr. "Conditions."* The learning in the books relates principally to the former kind. Conditions of the latter class rest upon the same general reasoning with those of the former. "Conditions precedent" are such as must be punctually performed before the estate can vest, but on a "condition subsequent" the estate is immediately executed; yet the continuance of the estate depends upon the breach or performance of the conditions. *Selden v. Pringle* (N. Y.) 17 Barb. 458, 465 (citing *Bac. Abr. Cond. 1*).

A "condition" is a quality annexed to land whereby an estate may be divided. *Littlejohn v. Egerton*, 77 N. C. 379, 384.

The time when the enjoyment of property is to begin or end may be determined by computation, or be made to depend on events. In the latter case the enjoyment is said to be "upon condition." *Rev. Codes N. D. 1899, § 3303.*

The use in the Penal Code of any word expressive of relationship, state, condition, office, or trust of any person, as the "par-

ent," "child," "ascendant," "descendant," "minor," "infant," "ward," "guardian," or the like, or of the relative pronouns "he" or "they" in reference thereto, includes both males and females. Pen. Code Tex. 1895, art. 22.

#### **Cause of injury distinguished.**

Where one driving along a street after crossing a street car track stopped so near it to converse with a person that there was not room enough for a car to pass, such position constituted a "condition" of the injury, and was not a cause of it. *Redford v. Spokane St. Ry. Co.*, 48 Pac. 650, 651, 15 Wash. 418.

#### **As condition in life.**

The term "condition," as used in a statute relating to the property of a bankrupt, providing that there should be exempt to the bankrupt the necessary household and kitchen furniture, and such other articles or necessities as his assignee should designate and set apart, having reference in the amount to the family and "condition" and circumstances of the bankrupt, but altogether not to exceed a certain specified sum, means his position, personal or relative, which he had occupied in life at and previous to his assignment. In *re Ludlow*, 1 N. Y. Leg. Obs. 322, 323.

#### **As condition precedent.**

"Conditions," within the meaning of a statute providing that a railroad desiring to occupy a highway may agree with the public authorities upon the manner, terms, and conditions upon which the same may be used and occupied, has reference to stipulations precedent to the enjoyment of the grant. *Cleveland C. & St. L. R. Co. v. City of Cincinnati (Ohio)* 1 Prob. R. 269, 278.

"Conditions," as used in an ordinance relating to corporations supplying natural gas within the limits of a city, declaring that the privileges granted should be enjoyed only on "the following conditions," is used in the sense of regulations, and not conditions precedent. *Appeal of City of Pittsburgh*, 7 Atl. 778, 787, 115 Pa. 4.

It seems to be agreed in regard to all conditions, whether in a deed or a will, where the condition is in the nature of a consideration for the concession, its performance will be regarded as intended to precede the vesting of any right, and so a condition precedent. *Merrill v. Wisconsin Female College*, 43 N. W. 104, 74 Wis. 415 (citing 2 Redf. Wills, 283).

#### **Conditional limitation and limitation distinguished.**

"An estate in fee 'on condition' leaves in the grantor a vested right which by its very nature is reserved to him as a present

existing interest transmissible to his heirs, while a 'conditional limitation' passes the whole interest of the grantor at once, and creates an estate to arise and vest in a third person on a contingency at a future and uncertain period of time." *Church in Brattle Square v. Grant*, 69 Mass. (3 Gray) 142, 147.

The distinction between an estate upon condition and the limitation by which an estate is determined upon the happening of some event is that in the latter case the estate reverts to the grantor or passes to the person to whom it is granted by limitation over upon the mere happening of the event upon which it is limited, without any entry or other act, while in the former the reservation can only be made to the grantor or his heirs, and an entry upon breach of the condition is requisite to revest the estate. The provision for re-entry is therefore the distinctive characteristic of an estate upon condition. *Hoselton v. Hoselton*, 65 S. W. 1003, 1006, 166 Mo. 182.

A condition subsequent, followed by a limitation over to a third person in case the condition is not fulfilled, or there is a breach of it, is known as a "conditional limitation." A condition brings the estate back to the grantor or his heirs; a conditional limitation carries it over to a stranger. A condition terminates an estate; a limitation creates a new one. "A remainder may be limited on a contingency which, if it happens, will operate to abridge or determine the precedent estate, and every such remainder shall be a conditional limitation." *Real Prop. Law*, § 43; *Williams v. Jones*, 60 N. E. 240, 244, 166 N. Y. 522.

A limitation marks the period which determines the estate, without any act on the part of who has the next expectant interest. Upon the happening of the contingency prescribed, the estate comes at once to an end, and the subsequent estate arises. The condition determines an estate after breach upon entry or claim by the grantor or his heir or the heirs of the deviser. *Fowlkes v. Wagoner (Tenn.)* 46 S. W. 586, 592.

Where words of condition are used in connection with a devise, and there is another or subsequent devise of the same premises on the failure of the first or preceding devise, the "words of condition" are not strictly considered as such, or rather, have not the force and operation of words of condition, and are called "words of limitation." *Smith v. Hance*, 11 N. J. Law (6 Halst.) 244, 248.

#### **Covenant distinguished.**

A "condition" is a qualification annexed to an estate by the grantor, whereby it may be enlarged, defeated, or created on an uncertain event, and it differs from "covenant" in this: that a condition is in the words of

and binding on both parties, while a covenant is in the words of the covenantor only. *Angle v. Ross*, 20 N. W. 886, 887, 55 Mich. 43.

"A 'condition' differs from a 'covenant' in that the legal responsibility of nonfulfillment of a covenant is that the party violating it must respond in damages, while the consequence of the nonfulfillment of a condition is a forfeiture of the estate. If it be doubtful whether a clause in a deed be a covenant or a condition, the courts will decide against the latter construction." *Woodruff v. Woodruff*, 16 Atl. 4, 7, 44 N. J. Eq. 7 (Stew.) 349, 1 L. R. A. 380.

A condition is a qualification or restriction annexed to a deed or devise, by means of which an estate is made, possessed, or to be enlarged or to be defeated upon the happening or not happening of a particular event, or the performance or nonperformance of a particular act. Words declaratory of the consideration for, and the purpose for, and the purpose of the conveyance and the limitation of, the use of the property, or which direct or prohibit the performance of a particular act, do not of themselves render an estate conditional. The same words may be employed to create a covenant as to create a condition, and, if there is any doubt regarding the intention of the grantor or devisor, courts will incline toward the former construction, for conditions which destroy estates are not favored and are strictly considered. A condition is always the creation of the grantor or devisor. A covenant may be made either by a grantor or the grantee. *Detroit Union R. R. Depot & Station Co. v. Port Street Union Depot Co.*, 87 N. W. 214, 108, 128 Mich. 184.

The term "negative covenant," and not the word "condition," is correctly used to designate a provision in a deed that the premises thereby conveyed are not to be used for saloon purposes. *Star Brewery Co. v. Primas*, 45 N. E. 145, 147, 163 Ill. 652.

#### Creation and construction.

The words usually employed in creating a condition are "upon condition," and Lord Coke says this is the most appropriate expression, or the words may be "so that," "provided," "it if shall happen." Apt words of limitation are "while," "so long as," "until," "during," etc. *Campau v. Chene*, 1 Mich. (Man.) 400, 413. See, also, *Heaston v. Randolph County Com'rs*, 20 Ind. 398, 402; *Malcy v. Umatilla County*, 13 Pac. 890, 894, 5 Or. 172, 3 Am. St. Rep. 142. There are certain technical words proper in themselves to make a condition. These are "sub condition," "proviso," "ita quod," but these words are not necessary to create a condition. It may be created by any words which show a clear, unmistakable intention on the part of

a grantor or devisor to create an estate on condition, regard being had to the whole of the deed or will in which they occur. *Fowlkes v. Wagoner* (Tenn.) 46 S. W. 580, 591.

"A condition is a qualification or restriction annexed to a conveyance. The words must not only be such as of themselves import a condition, but must be so connected with the grant in the deed as to qualify or restrain it." *Laberee v. Carleton*, 53 Me. 211, 213.

No precise or technical words are required in a deed to create a condition precedent or subsequent. It is said that the words "proviso," "ita quod," and "sub conditioni" are the most proper to make a condition, yet they have not always that effect, but frequently serve for other purposes, sometimes operating as a qualification or limitation, and sometimes as a covenant. Thus where a land company conveys to a railway the right of way through a growing city, provided, however, that any other railway running into or through the city shall have the right of running a parallel track along and upon the same right of way, but reserves no right of re-entry, a breach of the proviso will be construed as a covenant and limitation rather than a condition subsequent. *Elyton Land Co. v. South & North Alabama R. Co.* (Ala.) 14 South. 207, 208.

A condition may be created by express words, which is called a "condition in fact," as where a feoffment is made on land reserved, rent payable on a certain date, on "condition" that if not paid on the day the feoffor may re-enter. The law inclines to construe conditions as subsequent rather than precedent, and to be remedied by damages rather than by forfeiture. "Conditions subsequent," says Chancellor Kent, "are to be construed strictly, because they tend to destroy estates." *Thornton v. Trammell*, 39 Ga. 202, 207.

The term "condition" in a conveyance to a church, on the express condition and limitation that it should not be sold, mortgaged, or in any way conveyed, or any buildings kept, maintained, or erected thereon except for the purposes of the church, was held, in view of the fact, to receive a liberal construction for the benefit of the grantees, and not a construction tending to defeat the conveyance. *Mills v. Davidson*, 35 Atl. 1072, 1074, 54 N. J. Eq. 659, 35 L. R. A. 113, 55 Am. St. Rep. 594.

A condition in a deed, such as will work a forfeiture of the estate if not performed, is not favored in the law, and will not be implied. It will only be enforced where the language of the instrument containing it unmistakably imposes an estate on condition. *Hamilton v. Kneeland*, 1 Nev. 40, 53.



No precise form of words is necessary in order to create a condition in a will, but, whenever it clearly appears that it was the testator's intention to make a condition, that condition will be carried into effect. Thus a legacy directed to be paid at the end of two years, provided that the legatee shall be deemed to be a reformed man in the judgment of the executors, is a conditional legacy. *Markham v. Hufford*, 82 N. W. 222, 223, 123 Mich. 505, 48 L. R. A. 580, 81 Am. St. Rep. 222.

Testator by his will gave certain estate to trustees to hold for the sole benefit of his grandchildren for three years, and at the expiration of that time to transfer the property to such grandchildren, adding, "If either of said children die before the trust ceases his or her legal heirs shall be substituted in place of the deceased in every respect." A granddaughter died within the three years, leaving a will by which she in terms gave her share of the property to her husband and others. The words of the will clearly enough created a conditional devise only. No particular set of technical words is necessary to create a condition; a common-sense construction of the words governs. The expressive word "if" is quite commonly employed to express a condition. The words "shall be substituted" have an unmistakable meaning in their place. It would be a perversion of the common meaning of common words to deny the testator's intention to create a conditional devise, and the happening of the subsequent condition defeats the precedent estate. Although a vested estate, therefore, nothing passed by her will. The husband of the devisee cannot be considered one of her legal heirs in the sense of the term as used in the devise over to "legal heirs." *Buck v. Paine*, 75 Me. 582, 588.

#### As environment of premises.

"Condition," as used in an insurance policy providing that the company shall not be liable if there be any omissions, misrepresentations, nondisclosure, or concealment of the condition of the premises, means more than location; it means location and environment. *Fromherz v. Yankton Fire Ins. Co.*, 63 N. W. 784, 786, 7 S. D. 187.

#### As essential part of contract.

In *Franklin Fire Ins. Co. v. Chicago Ice Co.*, 36 Md. 102, 11 Am. Rep. 469, the decision turned upon the meaning of the word "conditions" in a fire policy, and the court, following the suggestions in *Blake v. Exchange Mut. Ins. Co.*, 78 Mass. (12 Gray) 265, confined it to those provisions of the policy which entered into and formed a part of the contract of insurance, and are essential to make it a binding contract between parties, and which are properly designated as "conditions." *Dwelling-House Ins. Co. v. Snyder*, 34 Atl. 931, 932, 59 N. J. Law, 18.

#### As restriction.

A provision in a will that real estate which had therein been devised in fee should not be sold or alienated by the devisees for a certain number of years is properly a restriction, though called in the will a "condition." *Fowler v. Duhme*, 42 N. E. 623, 833, 143 Ind. 248.

#### As terms.

In an order granting a new trial on condition that the party pay all costs, the word "condition" is used as synonymous with the word "terms," and so does not render the order invalid as conditional. *Galveston, H. & S. A. Ry. Co. v. Borden (Tex.)* 29 S. W. 1100, 1101.

An order granting a new trial and directing the party to whom it was granted to pay witness fees as a "condition" upon which such new trial was granted, means that the payment of the fees was the terms on which the order was made, and not a condition on the performance of which it should take effect. In this connection the court says: "If the word 'condition' had no other meaning except that in which it is used in the law of conveyances, we might be constrained to hold that the order granting a new trial was to take effect only upon the contingency that the defendant should pay the costs, but such is not the fact. Among other definitions, Worcester gives its meaning as 'something to be done,' and in that sense, when plural, it is synonymous with 'terms.'" *Fenn v. Gulf, C. & S. F. Ry. Co.*, 13 S. W. 273, 76 Tex. 380.

Where, pending the submission to arbitration of a controversy as to the ownership of a tract of land known as the "Poke Run Place," the parties entered into an agreement whereby they "agreed that the contest as to the Poke Run Place be given up 'on condition' that Mr. Rugh shall in a reasonable time convey to Jacob Haymaker's three daughters the whole of the Poke Run Place by deed in fee simple, and, on said Rugh's doing so, said Haymaker quits all claims to said place," the word "condition" was obviously employed to express the same as "term of the agreement," as if it had read, "It is agreed that the contest be given up on the terms following," etc., and the agreement should be construed not as conditional, but absolute. *Meanor v. McKowan (Pa.)* 4 Watts & S. 302, 305.

#### Trust created or implied.

The word "condition" is a term of flexible meaning. In leases it is often construed as a covenant. Express words of condition shall be taken for a limitation, if the nature of the case requires it. Words of express condition are not inapt as introductory to a declaration of trust. Every conveyance to a charitable use is a conveyance

to hold upon the trust declared, and the execution of the trust is a "condition" upon which the estate is taken and held, to be given effect to, not by forfeiture of the title, but by those methods by means of which a court of equity compels the performance of such trusts. So, where a conveyance of a lot of land was made to a church and to their successors, but not to their assigns, with a habendum in these words, "To have and to hold unto the said party of the second part upon this express condition and limitation, that neither of said parties or their successors shall at any time sell, mortgage or in any way convey the said lands and premises," etc., it was held that the grant did not create a condition for the breach of which the grantors might enter for a forfeiture of the estate, but created a trust, which the grantee taking the legal estate was bound to perform. *Mills v. Davison*, 35 Atl. 1072, 1073, 54 N. J. Eq. 659, 35 N. R. A. 113, 55 Am. St. Rep. 594.

A grant of land to the bishop of a church, upon "condition" that it shall be forever held for the use of a certain church, does not necessarily create a technical estate on condition, so that the estate shall be revertible, but means simply that the estate is to be held in trust for the purpose named. The use of the term "condition" does not necessarily import the creation of a conditional estate, but "condition" may mean "trust," and vice versa. *Neely v. Hoskins*, 24 Atl. 882, 883, 84 Me. 386.

#### As warranties.

In a contract for sale of storage battery equipments for street cars, which provided that the plant shall be considered satisfactory if it fulfills the "following conditions," it was held that the "conditions" did not mean merely conditions upon which the vendor might compel the acceptance of the equipment, but were warranties for the breach of which damages might be recovered. *Accumulator Co. v. Dubuque St. Ry. Co.* (U. S.) 4 Fed. 70, 77, 12 C. C. A. 37.

In *American Popular Life Ins. Co. v. Day*, 39 N. J. Law (10 Vroom) 89, 23 Am. Rep. 198, in our court of last resort, "warranties" and "conditions" in insurance policies are treated as synonymous terms, as indeed they are. In *Sonneborn v. Manufacturers' Ins. Co.*, 44 N. J. Law (15 Vroom) 220, 22, 43 Am. Rep. 365, it was declared in the same court that a promissory warranty had the nature of a condition precedent. That every inducing statement made a warranty by a policy of life insurance shall be true plainly a condition precedent to the insurer's liability under such policy. In *Eddy Street Iron Foundry v. Hampden Stock & Mut. Fire Ins. Co.* (U. S.) 8 Fed. Cas. 300, Clifford, J., said that in the law of insurance warranty is a stipulation forming a part of the contract, and is construed as a con-

dition; and in *Hearn v. Equitable Safety Ins. Co.* (U. S.) 11 Fed. Cas. 935, he reaffirmed that doctrine. In *First Nat. Bank v. Hartford Fire Ins. Co.*, 95 U. S. 673, 24 L. Ed. 563, Harlan, J., said that, when warranted, the exact truth of statements in an application for insurance became a condition precedent to any binding contract, and he repeated the expression in *Moulton v. American Life Ins. Co.*, 4 Sup. Ct. 466, 111 U. S. 335, 28 L. Ed. 447. *Dimick v. Metropolitan Life Ins. Co.*, 51 Atl. 692, 694, 67 N. J. Law, 367.

There is an apparently irreconcilable conflict of authority as to the distinction between "warranties" and "conditions," and as to the rights and obligations of parties thereunder. Much of the confusion has arisen from the fact that what were generally considered in this country as warranties that the article shall be of the kind or species contracted for were, prior to the passage of the sales of goods act in England, and are in some of the courts of this country, treated as conditions precedent. *Benj. Sales* (7th Ed.) pp. 589, 594, 677; *Carleton v. Lombard, Ayres & Co.*, 149 N. Y. 187, 147, 43 N. E. 422. Furthermore, the word "warranties" has been used in such a great variety of senses, and the decisions thereon have been so anomalous, that, as a distinguished jurist has said, an attempt to arrive at a satisfactory conclusion about any principle supposed to be established by them would be hopeless, if not absurd. *McFarland v. Newman* (Pa.) 9 Watts, 55, 34 Am. Rep. 497. *Fairbank Canning Co. v. Metzger*, 118 N. Y. 260, 23 N. E. 372, 16 Am. St. Rep. 753, approving the doctrine that a positive affirmation, relied on as such by the vendee, is an express warranty, quotes with approval from an opinion by Judge Learned as follows: "There can be no difference between an executory contract to sell and deliver goods of such and such a quality, and an executory contract to sell and deliver goods which the vendor warrants to be of such and such a quality; the former is as much a warranty as the latter. *Kent v. Friedman*, 101 N. Y. 616, 3 N. E. 905." Manifestly there is no distinction in principle as to the rights and remedies of a purchaser between a cause of action arising out of a breach of contract by the vendor to deliver an article of a specified quality or description, or out of a breach of representation which is material to the contract, or out of such a breach when the representation or warranty is implied instead of express. In either case there is an agreement, in substance and purport, to the same effect; in either, a breach of it works the same injury to the vendee; whether the cause of action is for a breach of contract or for the breach of a warranty is a mere matter of nomenclature. *Cleveland Linseed Oil Co. v. A. F. Buchanan & Sons* (U. S.) 120 Fed. 906, 908, 57 C. C. A. 498 (citing *Bagley v. Cleveland Rolling Mills Co.* [U. S.] 21 Fed. 159).

**As wealth.**

The word "condition," in an instruction in an action for libel that in estimating damages the jury are to consider plaintiff's injured feelings and tarnished reputation, taking into account the nature of the imputation, extent of its publication, the character, "condition," and influence of the parties, and all the surrounding circumstances, refers rather to social standing than to wealth, for it would not be the legitimate and natural construction of the word to consider it as meaning wealth. *Buckstaff v. Hicks*, 68 N. W. 403, 404, 94 Wis. 34, 59 Am. St. Rep. 853.

**CONDITION CONCURRENT.**

"Conditions concurrent" are those which are mutually dependent and are to be performed at the same time. Civ. Code Cal. 1903, § 1437; Civ. Code Mont. 1895, § 1953; Rev. Codes N. D. 1899, § 3771; Civ. Code S. D. 1903, § 1123.

**CONDITION IN LIFE.**

See "Circumstances."

"Circumstances and condition in life," within the meaning of the rule that it is the duty of a husband to furnish his wife with a present comfortable support and maintenance in a manner corresponding with their circumstances and station in life, includes their social standing. "How could it be said that, in fixing the obligation of a husband for the support of his wife, her social position in society, which is the synonym of 'rank' or 'station,' should not be considered? Such is the rule in awarding alimony and in fixing the rights of a wife for separate support." *Thill v. Pohlman*, 41 N. W. 385, 386, 76 Iowa, 638.

The terms "condition in life" and "situation in life" are synonymous, and may be used interchangeably. *Ross v. Kansas City*, 48 Mo. App. 440, 447.

**CONDITION OF BOND.**

The "condition of a bond" is the statement, with necessary and appropriate recitals, of the circumstances and contingencies under and upon which the bond shall become void. The statement is necessarily in the alternative. In one case or contingency the obligation is to be null and void, and the obligor's liability will be at an end; in the other his responsibility will become absolute, and the condition is in such case said to be broken, and it is from a breach of the condition that nearly or quite all the litigation on this subject arises. *Rawson v. Taylor* (Neb.) 95 N. W. 1033, 1036 (citing *Murfree*, Off. Bonds).

**CONDITION PERFORMED.**

A "plea of conditions performed" in an action of covenant or debt for money is equivalent to a "plea for payment." *Hammit v. Bullett's Ex'rs* (Va.) 1 Call, 567.

**CONDITION PRECEDENT.**

"Precedent conditions are such as must happen or be performed before the estate can vest or be enlarged" (*Towle v. Remsen*, 70 N. Y. 303, 809; *Warner v. Bennett*, 31 Conn. 468, 475; *Star Brewery Co. v. Primas*, 45 N. E. 145, 147, 163 Ill. 652; *Cooper v. Green*, 28 Ark. 48, 54; *Moore v. Sanders*, 15 S. C. 440, 442, 40 Am. Rep. 703; *Rogan v. Walker*, 1 Wis. 527, 554; *Jarboe v. Hey*, 122 Mo. 341, 353, 26 S. W. 968), "as if a lease be made to commence from the first day of May thereafter, 'on condition' that B. pay a certain sum of money by that time." *Blean v. Messenger*, 33 N. J. Law (4 Vroom) 499, 503. If land is conveyed upon a condition precedent, the title will not pass until the condition is performed. *Star Brewery Co. v. Primas*, 45 N. E. 145, 147, 163 Ill. 652.

A "condition precedent" is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed. Civ. Code Cal. 1903, § 1436; *City of Stockton v. Weber*, 33 Pac. 332, 334, 98 Cal. 433; Rev. Codes N. D. 1899, § 3770; Civ. Code S. D. 1903, § 1122; Civ. Code Mont. 1895, § 1952.

Conditions are precedent or subsequent. The former fix the beginning, the latter the ending, of the right. Rev. Codes N. D. 1899, § 3304.

"An estate 'on condition precedent' is one where no right vests at all till the condition be performed." *White v. St. Guirons* (Ala.) Minor, 331, 341, 12 Am. Dec. 56; *Stoel v. Flanders*, 32 N. W. 114, 118, 68 Wis. 256 (citing *Wood*, Inst. 235); *Moore v. Moore* (N. Y.) 47 Barb. 257, 262; *Ludlow v. New York & H. R. Co.* (N. Y.) 12 Barb. 440, 442; *Northern Pac. R. Co. v. Majors*, 2 Pac. 322, 332, 5 Mont. 111; *Mitchell v. Mitchell*, 42 N. E. 465, 467, 143 Ind. 113; *Goff v. Pensenhafner*, 60 N. E. 110, 112, 190 Ill. 200.

A "condition precedent" in a will is one which is required to be fulfilled before a particular disposition takes effect. Civ. Code Cal. 1903, § 1346; Civ. Code Mont. 1895, § 1799; Rev. St. Utah 1898, § 2796; Rev. St. Okl. 1903, § 6866; Civ. Code S. D. 1903, § 1065.

The term "condition precedent," as used in relation to contracts, means a condition which must happen before either party becomes bound by the contract, although such conditions may be waived by the party in whose favor they are made. *Jones v. United States*, 96 U. S. 24, 26, 24 L. Ed. 644.

In the law of contracts, a "condition precedent" is a condition "which must be performed before the agreement of the parties becomes a valid and binding contract."

A condition precedent calls for the performance of some act, or the happening of some event, after the terms of the contract have been agreed upon, before the contract shall take effect—that is to say, the contract is made in form, but does not become operative as a contract until some future specified act is performed, or some subsequent event transpires; hence it is said a condition precedent does not get and gain the thing or estate made upon condition by the performance of it, as a condition subsequent keeps and continues the estate by the performance of the condition. *Redman v. Aetna Fire Ins. Co.*, 100 N. W. 591, 595, 49 Wis. 431 (citing *Jac. Law Dict.* tit. "Condition").

"Conditions precedent" are, as the term implies, such as must happen before the estate depending upon them can arise or be enlarged. *Raley v. Umatilla County*, 13 Pac. 890, 894, 15 Or. 172, 3 Am. St. Rep. 142; *Brown v. Chicago & N. W. R. Co.* (Iowa) 82 N. W. 1003, 1004. The act or event must precede the vesting of the estate, and without it the title never passes, so that, where the provisions of a deed relate to things which must be done subsequent to its delivery, they are not "conditions precedent." *Brown v. Chicago & N. W. R. Co.* (Iowa) 82 N. W. 1003, 1004.

#### Condition subsequent distinguished.

There are no technical words to distinguish between "conditions precedent" and "conditions subsequent." The distinction is a matter of construction. The same words may indifferently make either, according to the intent of the person who creates the condition. If the language of the particular clause, or of the whole will, shows that the act on which the estate depends must be performed before the estate can vest, the condition is "precedent," and unless it be performed the devisee can take nothing. If, on the contrary, the act does not necessarily precede the vesting of the estate, but may accompany or follow it, and this can be collected from the whole will, the condition is "subsequent." *Burdis v. Burdis*, 30 S. E. 462, 96 Va. 81, 70 Am. St. Rep. 825 (citing *Finlay v. King*, 28 U. S. [3 Pet.] 346, 7 L. Ed. 701). See, also, *Parmelee v. Oswego & S. R. Co.* (N. Y.) 7 Barb. 599, 617.

There are no precise technical words which distinguish conditions "precedent" and "subsequent"; whether they are one or the other is a matter of construction, to be solved by ascertaining the intention of the party creating the estate. They are not determined merely by the structure of the instrument or the arrangement of the covenants. Where mutual covenants go to the mutual consideration on both sides, they are "mutual condi-

tions," one preceding the other. Where the undertaking on one side is in terms a condition to the stipulation on the other—that is, where the contract provides for the performance of some act or the happening of some event, and the obligations of the contract are made to depend on such performance or happening—the conditions are "conditions precedent." Thus where an oil and gas lease, by which the lessor is to be compensated solely by a share of the product, contains a proviso requiring the lessee to commence and complete a well on the property within a specified time, such proviso and the time of its performance constitute a "condition precedent" to the vesting of any estate in the lessee. *Huggins v. Daley* (U. S.) 99 Fed. 606, 609, 40 C. C. A. 12, 48 L. R. A. 320.

A "condition precedent" is defined by Mr. Taylor, in his work on *Landlord and Tenant*, vol. 1, § 275, as follows: "Where the condition must be performed before the estate can commence, it is called a 'condition precedent'; but where the effect of a condition is either to enlarge or defeat an estate already commenced, it is called a 'condition subsequent.' The former avoids the estate by not permitting it to vest until literally performed, while the nonperformance of the latter defeats the estate by divesting the party of his title and the interest already vested." See, also, 2 Wood, *Landl. & Ten.* (2d Ed.) § 510. *Spencer v. Commercial Co.*, 71 Pac. 53, 54, 30 Wash. 520.

Where by the express language of a will the absolute ownership of the property is only to vest in the donee upon his becoming married, the condition is a "condition precedent" rather than a "condition subsequent." *Ransdell v. Boston*, 50 N. E. 111, 114, 172 Ill. 439, 43 L. R. A. 526.

A "condition precedent" is one which must take place before an estate can vest, and which delays the vesting of the right until the event happens, while a "condition subsequent" is one which operates upon an estate already created and vested, and renders it liable to be defeated. Where an act on which an estate or right depends does not necessarily precede the vesting of an estate or right, but may accompany it or follow it, the condition is subsequent. A college to whom a party had made certain absolute gifts of money agreed to pay the donor an annuity upon certain sums during her lifetime. The requirements of the payment of such annuity did not make the gift conditional, or less absolute than it otherwise would have been. If the payments of the annuities were conditions, they were in the nature rather of "conditions subsequent" than of "conditions precedent." *Beatty's Estate v. Western College of Toledo*, 52 N. E. 432, 437, 177 Ill. 280, 42 L. R. A. 797, 69 Am. St. Rep. 242 (citing *City of Chicago v. Chicago & W. I. R. Co.*, 105 Ill. 73).

"Conditions precedent" are such as must be punctually performed before the estate can vest. But on a "condition subsequent" the estate is immediately executed, yet the continuance of the estate depends upon the breach of performance of the condition. In a contract for the sale of an interest in certain machinery and a patent "to be applied for," the consideration in part being a note payable in 15 months, with interest, it being agreed that, if the payee in the note failed to procure a patent or was defeated in a lawsuit then pending, the contract should be void, the procuring the patent and successful termination of the lawsuit were not "conditions precedent" to the payment of the note, but were "conditions subsequent." *Selden v. Pringle* (N. Y.) 17 Barb. 458, 466.

Whether a condition in a deed is a "condition precedent" or a "condition subsequent" must be determined by the intention of the parties, and not from technical words or the collocation of the words used. Thus, where a stipulation in a deed declared that the grantee should come into immediate possession, such provision had the effect of construing a condition which might have otherwise been construed as a "condition precedent" into a "condition subsequent." *Green v. Thomas*, 11 Me. (2 Fairf.) 318, 320.

"One general rule will serve to solve most cases requiring a condition 'precedent' to be distinguished from one 'subsequent' to wit: If the thing conditioned is to exist or happen before the estate is to vest, the condition is 'precedent'; if after, it is 'subsequent.'" Opinion of Earl, J., in *Towle v. Remsen*, 70 N. Y. 303, 322.

The use of the words "conditioned grant," as used in section 9 of the act granting to the Northern Pacific Railroad certain lands, describing them as "conditioned grants," does not change the character of such conditions from conditions subsequent to conditions precedent. *Northern Pac. R. Co. v. Majors*, 2 Pac. 322, 332, 5 Mont. 111.

The word "conditioned," used in a legacy, does not necessarily imply a strict condition either precedent or subsequent. The intention must control. *McNally v. McNally*, 49 Atl. 699, 23 R. I. 180.

#### Creation and construction.

A condition precedent must happen or be performed before the estate, right, or interest to which it is annexed can vest or take effect. Where no time is fixed within which a condition shall be performed, the rule is that it must be performed within a reasonable time. *Soderberg v. Crockett*, 80 Pac. 826, 827, 17 Nev. 409.

A condition which involves anything in the nature of a consideration is, in general, a condition precedent. Thus, a condition that a legacy shall be paid to a legatee at the end

of two years, provided that the legatee shall be deemed a reformed man in the judgment of the executors, is a valid condition precedent. *Markham v. Hufford*, 82 N. W. 222, 223, 123 Mich. 505, 48 L. R. A. 580, 81 Am. St. Rep. 222.

A condition precedent in a contract is an act to be performed by one party before the accruing of a liability of the other party, and it must be pleaded and proved. *Chit. Cont.* (11th Am. Ed.) 1083. What is a condition precedent depends not on the technical words, but on the plain intention of the parties to be deduced from the whole instrument. Stipulations in a Lloyd's fire policy binding the assured to resort first to an action against the attorneys for the underwriters to determine the fact of the underwriters' liability, and then to a trust fund in the attorneys' hands, before he can sue the individual underwriters, are conditions precedent. *Ketchum v. Belding*, 68 N. Y. Supp. 1099, 1100, 53 App. Div. 295.

The fact that the word "precedent" is not included in a deed containing a condition is not essential to warrant an interpretation that a condition is a condition precedent. Conditions have no idiom. Whether they are precedent or subsequent is a question purely of intent, and the intention must be determined by considering not only the words of the particular clause, but also the language of the whole contract, as well as the nature of the act required, and the subject-matter to which it relates. *Buck-sport & B. R. Co. v. Inhabitants of Brewer*, 67 Me. 295, 298.

A condition in a fire insurance policy that the insured, "if required," shall furnish a certificate of the disinterested magistrate living nearest the place of fire, etc., is not a "condition precedent," and hence is not affirmed by an allegation of the petition that the insured has "duly performed all the conditions on his part." *McManus v. Webster Assur. Co.*, 48 N. Y. Supp. 820, 825, 22 Misc. Rep. 269.

#### CONDITION SUBSEQUENT.

A condition subsequent is one referring to a future event, upon the happening of which the obligation becomes no longer binding upon the other party if he chooses to avail himself of the condition. *Civ. Code Cal.*, 1903, § 1438; *Rev. Codes N. D.* 1899, § 3772; *Civ. Code S. D.* 1903, § 1124; *Civ. Code Mont.* 1895, § 1954.

Conditions are precedent or subsequent. The former fix the beginning, the latter the ending, of the right. *Rev. Codes N. D.* 1899, § 3304.

A condition subsequent is where an estate in interest is so given as to vest immediately, subject only to be divested by

the subsequent act or event. Civ. Code 1903, § 1349; Civ. Code S. D. 1903, § 1349; Rev. St. Okl. 1903, § 6369; Rev. St. Mo. 1898, § 2799; Civ. Code Mont. 1895, § 1349.

Condition subsequent is that kind of a condition which operates upon estates already created, and which may defeat or annul a forfeiture of such estate. Northern Pac. R. Co. v. Majors, 2 Pac. 322, 332, 5 Mont. 111; Moore v. Moore (N. Y.) 47 Barb. 263; Ludlow v. New York & H. R. Co. (N. Y.) 12 Barb. 440, 442; Towle v. Remsen, 70 N. Y. 303, 309; Wright v. Mayer, 62 N. Y. Supp. 610, 611, 47 App. Div. 604; Star Brewery Co. v. Primas, 45 N. E. 145, 147, 163 Ill. 652; Mahoning County Com'rs v. Young (S. D.) 59 Fed. 36, 103, 8 C. C. A. 27; Warner v. Bennett, 31 Conn. 468, 475; Mitchell v. Shell, 42 N. E. 465, 467, 143 Ind. 113. An estate on condition subsequent is one wherein an estate vests, but may be defeated on nonperformance." White v. St. Guilbons (N. D.) Minor, 331, 341, 12 Am. Dec. 56; Raley v. Matilla County, 13 Pac. 890, 894, 15 Or. 383 Am. St. Rep. 142. Conditions subsequent are such as, when they do happen, annul an estate already vested. Cooper v. N. 28 Ark. 48, 54. A condition subsequent defeats an estate already vested. Sanders v. Sanders, 15 S. C. 440, 442, 40 Am. 703; Rogan v. Walker, 1 Wis. 527, 554; Woodruff v. Woodruff, 16 Atl. 4, 7, 44 N. J. 17 Stew.) 349, 1 L. R. A. 380.

A "condition subsequent is" one which is a qualification annexed, by which, on the happening of a particular event, it may be annulled, enlarged, or destroyed. If set forth, the condition is expressed, and if it allows an estate to vest and then to be divided, in consequence of a nonobservance of the requirements, it is a condition subsequent." Richard v. Detroit, L. & L. M. R. Co., Mich. 43, 49, 18 Am. Rep. 142.

A condition subsequent is one by which an interest already vested may be divested, and the contingent interest defeated before vesting. Goff v. Pensenhafer, 60 N. E. 110, 112, 113 Ill. 200.

A condition subsequent operates on an estate already created and vested, and renders it liable to be defeated. Moran v. Stewart, 73 S. W. 177, 179, 173 Mo. 207.

"A condition subsequent is a contingency named on the happening of which a right may be defeated—such as a failure to pay money, erect buildings, or do any other required act, the failure to do which annuls the grantor's re-entry." Hague v. Watson (U. S.) 53 Fed. 58, 60, 3 C. C. A. 10.

In case of a condition subsequent, the estate becomes divested and ceases, and a right of re-entry arises, upon the happening of the event provided for in the condition. 2 Wds. & P.—26

of the event provided for in the condition. Towle v. Remsen, 70 N. Y. 303, 309.

A deed upon condition subsequent conveys a fee when it is executed, but the fee passes subject to a contingency of being defeated as provided in the condition, the grantor having the power of re-entry upon condition broken; and, if there is a breach of the condition, the estate continues in the grantee till defeated by actual entry. Star Brewery Co. v. Primas, 45 N. E. 145, 147, 163 Ill. 652.

A condition subsequent is one which operates on an estate already created and vested, and renders it liable to be defeated. Thus, if a man grant an estate in fee, reserving to himself and his heirs a certain rent, and that, if such rent be not paid at the time limited, it shall be lawful for him and his heirs to re-enter and avoid the estate, the grantee and his heirs have an estate on condition subsequent, which is defeasible if the condition be not strictly performed. The usual words of a condition subsequent are "so that," "provided," "if it shall happen," or "upon condition," the latter being the most appropriate. Chapin v. School Dist. No. 2 in Winchester, 35 N. H. 445, 450.

A condition in a deed, such that its performance necessarily takes place after the vesting of title, is a condition subsequent; and within this definition a deed giving title subject to the payment of the income and profit for the support of the grantors is a condition subsequent. Birdsall v. Grant, 57 N. Y. Supp. 705, 706, 37 App. Div. 348.

The failure to perform a condition subsequent does not divest the estate. The grantor or his heirs may not choose to take advantage of the breach, and until they do so by entry there is no forfeiture of the estate. Nicoll v. New York & E. R. Co., 12 N. Y. (2 Kern.) 121, 131.

A mortgage at common law is a conveyance absolute in its form, granting an estate defeasible by the performance of a condition subsequent. The estate thus created was strictly an "estate on condition," and in a court of law was treated as such, to be defeated only by the performance of the condition in the manner and at the time stipulated for in the defeasance. Shields v. Lozear, 34 N. J. Law (5 Vroom) 496, 502, 3 Am. St. Rep. 256.

#### Condition precedent distinguished.

See "Condition Precedent."

#### Covenant distinguished.

A condition subsequent is one that operates upon an estate already separated and vested, which, if not performed, may be defeated at the election of the grantor, provided he re-enters within a reasonable time after

default or asserts his rights in an equivalent manner. It is at all times difficult to distinguish a condition subsequent from a mere covenant, and, owing to the disfavor in which conditions subsequent are regarded, cases may be found which hold such conditions to be covenants. Thus, evidence that a deed was executed on the condition that subsequently thereto the grantee should care for and support the grantor if it became necessary would tend to create a condition subsequent. *Byars v. Byars*, 32 S. W. 925, 926, 11 Tex. Civ. App. 565.

The chief distinction between a condition subsequent and a covenant pertains to the remedy in the event of a breach, which in the former subjects the estate to a forfeiture, and in the latter is merely ground for the recovery of damages. Where a deed does not create an obligation on the part of the grantee, it will be held to be a condition subsequent. *Brown v. Chicago & N. W. R. Co.* (Iowa) 82 N. W. 1003, 1004.

#### Creation and construction.

In 2 Washb. Real Prop. (5th Ed.) 7, it is said that "if, from the nature of the act to be performed and the time required for its performance, it is evidently the intention of the parties that an estate shall vest and the grantee perform the act after taking the possession, then the condition is subsequent." This rule may, perhaps, properly be treated as decisive of the construction when the words themselves are not conclusive. It certainly requires that the ordinary terms of affirmance and avoidance be held to create a condition subsequent when employed in a deed given to provide for the support of the grantor. The nature of the contract contemplates the possession and use of the property in the performance of the condition. It therefore follows that a condition in a deed that the grantee shall provide for the grantor for life, and, if he fails, the instrument shall be void, is a condition subsequent, vesting title in the grantee until defeated by nonperformance of the condition and a claim of forfeiture by the grantor. *Shum v. Claghorn*, 37 Atl. 236, 69 Vt. 45 (citing *Rollins v. Riley*, 44 N. H. 9).

"A condition subsequent in a deed that will, under any circumstances, defeat the title conveyed, must provide that the conveyance is on the condition, and that the failure to perform it shall operate as a forfeiture of the estate granted. The limitation of an estate to a particular use does not constitute, without words of forfeiture, such a condition. Though a deed contain a clause declaring the purpose for which it is intended the granted premises shall be used, if such purpose will not inure specifically to the benefit of the grantor, but is in its nature general and public, and if there are no other words in the grant indicating an in-

tent that the grant is to be void if the declared purpose is not fulfilled, such a clause is not a condition subsequent." *Coffin v. City of Portland*, 17 Pac. 580, 582, 16 Or. 77.

The words of a condition subsequent are "so that," "provided," "if it shall happen," or "upon condition." The latter, according to Lord Coke, is the most appropriate. No form of expression, however, is essential to create a condition, and, if it is manifest from the terms of the grant that it was made on condition, the estate will become defeated if the condition is not kept. Conditions subsequent are not favored in the law, and are construed strictly, because they tend to destroy estates. If it be doubtful whether a clause in a deed is a condition or a covenant, the courts will incline against the condition, for a covenant is far preferable. *Chapin v. School Dist. No. 2 in Winchester*, 35 N. H. 445, 450.

Among the words which imply a condition in a grant are the following: "On condition," "providing always," "if it shall so happen," or "so that he, the grantee, pay." It is also said that to make a condition there must be added a conclusion with a clause of re-entry, or, if without such clause, they shall declare the estate shall cease or be void. *Mahoning County Com'rs v. Young* (U. S.) 59 Fed. 96, 103, 8 C. C. A. 27.

Conditions in the grant of lands in aid of a canal, as to the filing of a map of location, etc., of a canal, and the commencement of the work and completion of the same, are conditions subsequent, to be taken advantage of only by the grantor or some one under the grantor. *Wheeler v. City of Chicago* (U. S.) 68 Fed. 526, 528.

"A subscription for stock in a corporation on a condition subsequent contains a contract between the corporation and the subscriber whereby the corporation agrees to do some act, thereby combining two contracts—one, the contract of subscription; the other, an ordinary contract of the corporation to perform certain specific acts. The subscription is valid and enforceable, whether the conditions are performed or not. The condition subsequent is the same as a separate collateral contract between the corporation and the subscriber, for breach of which an action for damages is the remedy." *Morrow v. Nashville Iron & Steel Co.*, 10 S. W. 495, 501, 87 Tenn. (3 Pickle) 262, 3 L. R. A. 37, 10 Am. St. Rep. 653.

The courts will not favor the forfeiture of estates, and the rule of common law that estates upon condition may be defeated by nonperformance of the condition subsequent is to be construed strictly; and, if there is any other reasonable construction which must be given to a deed so as to avoid a forfeiture, it ought to receive such construction. In *Wier v. Simmons*, 55 Wis. 637, 13



V. 878, the language of the deed was "on the express condition"; but the court held that such language did not create an estate upon condition, and said: "The rule is well settled that conditions subsequent which work a forfeiture of the estate are disfavored by law, and no language will be construed into such condition, contrary to the intent of the parties, when such intent can be derived from a consideration of the instrument or from the circumstances attending the execution thereof; nor will the language used be construed into such a condition subsequent when any other reasonable construction can be given to it." Conditions are to be construed with great strictness because they tend to destroy estates, and the virgorous exaction of them in many cases is hardly reconcilable with conscience. The words "in trust nevertheless and on condition always" to use the premises for a life trust, in a deed of land, do not necessarily create a condition. *Sohler v. Trinity Church*, 109 Mass. 1. And the words "upon express condition," used in a will, are not to create an estate upon condition, the words being followed by others directing the trustee to pay certain bequests. And a conveyance "upon the express terms, conditions, and reservations" that a portion of the land should be used as a cemetery, and that a certain sum should be expended in its improvements, conveyed an absolute estate, and not an estate on condition. *City of Portland v. Terwilliger*, 19 Pac. 80, 93, 16 Or. (citing *Wright v. Wilkin*, 2 Best & S.

tion, limitation, or condition different from what is expressed on the face of the bill or from what the law implies upon a general acceptance. It is qualified when the drawee absolutely accepts the bill, but makes it payable at a different time or place, or for a different firm, or in a different mode from that which is the tenure of the bill. *Todd v. Bank of Kentucky*, 66 Ky. (3 Bush) 626, 628.

### CONDITIONAL APPEARANCE.

An appearance *bene esse*, if filled up at length, is an appearance conditionally if the summons of *scire facias* be returned served. If it is, there is a return with a full appearance; so much so that on the writ thus returned the party would be considered in court appearing by his attorney unless on or before the return he entered a retraxit of his appearance. *Blair v. Weaver* (Pa.) 11 Serg. & R. 84, 85.

### CONDITIONAL BEQUEST.

"A conditional bequest is one the taking effect or continuing of which depends upon the happening or nonoccurrence of a particular event." *Mitchell v. Mitchell*, 42 N. E. 465, 467, 143 Ind. 113; *Farnam v. Farnam*, 2 Atl. 325, 328, 53 Conn. 261; *Merrill v. Wisconsin Female College*, 43 N. W. 104, 74 Wis. 415.

### CONDITIONAL CONTRACT.

A conditional contract is defined by Story as "an executory contract, the performance of which depends upon a condition. It is not simply an executory contract, since the latter may be an absolute agreement to do or not to do something, but it is a contract whose very existence and performance depends upon a contingency and condition." *Nashville & N. W. R. Co. v. Jones*, 42 Tenn. (2 Cold.) 574, 584.

Mr. Story says that an executory contract of sale is absolutely to sell at a future time, while a conditional contract of sale is conditionally to sell. In the one case, he says, the performance of the contract is suspended and deferred to a future time; in the other, the very existence and performance of the contract depends upon a contingency. *French v. Osmer*, 32 Atl. 254, 255, 67 Vt. 427.

### CONDITIONAL CONVEYANCE.

A conditional conveyance is one which is illustrated and limited by some condition, the nonperformance of which will hinder it from operation and effect if it be a condition precedent. *Falconer v. Buffalo & J. R. Co.*, 69 N. Y. 491, 498.

### CONDITIONAL.

As used in an insurance policy, the terms "interest" and "title" are not synonymous. A mortgagor in possession and a purchaser acting under a deed defectively executed have both of them absolute as well as inalienable interests in the property, though neither of them has the legal title. "Absolute" here is synonymous with "vested," and is in contradistinction to "contingent" or "conditional." *Loventhal v. Home Ins. Co.*, Ala. 108, 116, 20 South. 419, 33 L. R. A. 57 Am. St. Rep. 17.

### CONDITIONAL ACCEPTANCE.

A conditional acceptance is a new offer which requires acceptance to close the bargain. A request, contained in a letter of acceptance, that the proposer take certain actions does not necessarily render the acceptance conditional. *Stotesburg v. Massengale*, Mo. App. 221, 226.

In Story, Bills, § 239, it is said an acceptance is general when it imports an absolute acceptance precisely in conformity to the tenure of the bill itself. It is conditional qualified when it contains no qualification,



### CONDITIONAL DELIVERY.

A conditional delivery of a deed is and can only be made by placing the deed in the hands of a third person, to be kept by him until the performance of some condition or conditions by the grantee or some one else, or until the happening of some event, upon the performance or happening of which the deed is to be delivered by the depository to the grantee. Again, it follows in case of a conditional delivery, or where the instrument has been deposited as the writing or escrow of the grantor, that it does not become the grantor's deed, and that no estate passes until the event or condition has happened on which it is to be delivered to the grantee, or until the second delivery or redelivery, as it is sometimes called, by the depository to the grantee. *Schmidt v. Deegan*, 34 N. W. 83, 84, 69 Wis. 300.

A conditional delivery of a deed is one which passes the deed from the possession of the grantor, but is not to be completed by possession of the grantee, or a third person as his agent, until the happening of a specified event. *Dyer v. Skadan*, 87 N. W. 277, 278, 128 Mich. 348, 92 Am. St. Rep. 461.

### CONDITIONAL DISPOSITION.

A conditional disposition is one which depends upon the occurrence of some uncertain event, by which it is either to take effect or be defeated. *Civ. Code Cal.* 1903, § 1345; *Rev. St. Okl.* 1903, § 6865; *Civ. Code S. D.* 1903, § 1064; *Rev. St. Utah* 1898, § 2795.

### CONDITIONAL FEE.

A conditional fee, at common law, was a fee restrained to some particular heir exclusive of others, as to the heirs of a man's body, by which only his lineal descendants are admitted, in exclusion of the collateral heirs. *Simmons v. Augustin* (Ala.) 3 Port. 69, 96; *Paterson v. Ellis' Ex'rs* (N. Y.) 11 Wend. 259, 277; *Baltimore & O. R. Co. v. Patterson*, 13 Atl. 369, 370, 68 Md. 606. This was at common law construed to be a fee simple upon condition that the grantee had the heirs prescribed. If the grantee die without such issue, the lands revert to the grantor. By having the issue the condition was supposed to be performed for three purposes, to wit, to alien, to forfeit, and to charge. By the performance of the condition the grantee could, by alienation, not only bar his own issue, but the possibility of reversion to the grantor. *Moody v. Walker*, 3 Ark. (3 Pike) 147, 190. It is a limited fee, which includes qualified or base fees and fees conditional, all of which differ from a fee simple, which imports an absolute inheritance clear of any condition. A conditional fee also differs from a qualified or

base fee, which is a fee confined to a person as tenant of a particular place. *Paterson v. Ellis' Ex'rs* (N. Y.) 11 Wend. 258, 277. In *Idle v. Cook*, 1 P. Wms. 74, it is said: "A fee tail was a fee simple at common law, for there were three sorts of fees simple: Absolute; qualified, which was as to time only, to wit, as long as such a tree stood, and also fee simple conditional, which was limited as to the heirs inheritable, for it was not a fee accruing upon the performance of a condition." In reference to the words necessary to create this fee conditional at the common law, we are told that, as the word "heirs" is necessary to create a fee, so the word "body" or some other single word of procreation is necessary to make it a fee tail. *Halbert v. Halbert*, 21 Mo. 277, 281.

A conditional fee, at common law, was a fee restrained to some particular heirs exclusive of others. *Kirk v. Furgerson*, 46 Tenn. (6 Cold.) 479, 483.

A fee conditional is such an estate as is to descend indefinitely in the line of the first taker. *Buist v. Dawes* (S. C.) 4 Rich. Eq. 421, 426.

### CONDITIONAL GUARANTY.

A guaranty is conditional when there is some extraneous event, beyond the mere default of the principal, by which the guaranty becomes binding. The liability does not attach immediately on nonpayment or on nonperformance by the principal. In general, it is necessary, to fix the liability of the guarantor, that there should be notice of the guaranty and notice of the principal's default, and reasonable diligence in exhausting reasonable remedies against the principal. *Yager v. Kentucky Title Co.*, 66 S. W. 1027, 1028, 23 Ky. Law Rep. 2240, 2241, 112 Ky. 832.

A conditional guaranty of a bill or note is a guaranty that it is collectible by due diligence. *Esberg-Bachman Leaf-Tobacco Co. v. Held* (U. S.) 62 Fed. 962, 963.

A conditional guaranty, in the law of negotiable instruments, means an undertaking by the guarantor of a note to pay, if payment cannot by reasonable diligence be obtained from the principal debtor. *Beardsley v. Hawes*, 40 Atl. 1043, 1044, 71 Conn. 39.

### CONDITIONAL JUDGMENT.

Under the practice in Virginia, when a defendant has been brought into court by a summons requiring him to appear on a certain day, when a declaration will be or has been filed, if he fail to appear and plead, the clerk enters what is called the "common order." This rule is called the "conditional judgment" because it threatens the defendant with a judgment unless he appear and

d according to its terms. *Mahoney v. South Building & Loan Ass'n* (U. S.) 70 N. E. 518.

A conditional judgment is one whose effect depends upon the performances of certain acts to be done in the future by one of the parties. A judgment ordering partition according to the will of testator, and directing the commissioners to charge the shares of certain of the parties with the sums expressly laid upon them by the will, is not a conditional judgment because it further directs that, if the sums so charged shall be paid before the commissioner acts, the shares shall be relieved of the charges. *Simmons v. Jones*, 24 S. E. 114, 115, 118 N. C. 472.

#### CONDITIONAL LEGACY.

A conditional legacy is a bequest, the existence of which depends on the happening or not happening of some uncertain event, by which it is either to take place or be defeated. *Harker v. Smith*, 41 Ohio 236, 238, 52 Am. Rep. 80; *Markham v. Hufford*, 82 N. W. 222, 123 Mich. 505, 48 L. R. A. 580, 81 Am. St. Rep. 222. No precise use of words is necessary in order to create a condition in wills, but, whenever it clearly appears that it was a testator's intent to make a condition, that intent should be carried into effect. *Markham v. Hufford*, 82 N. W. 222, 123 Mich. 505, 48 L. R. A. 580, 81 Am. St. Rep. 222 (citing 2 Williams' *Trs.*, p. 558); *Cannon v. Apperson*, 82 Tenn. 553, 566. Thus, a legacy directed to be paid at the end of two years, provided the legatee shall be deemed to be a married man in the judgment of the executor, is a conditional legacy. *Markham v. Hufford*, 82 N. W. 222, 123 Mich. 505, 48 L. R. A. 580, 81 Am. St. Rep. 222.

#### CONDITIONAL LIMITATION.

A condition subsequent, followed by a limitation over in case the condition is not fulfilled or there is a breach of it, is known as a "conditional limitation." *Stearns v. Frey*, 16 Me. (4 Shep.) 158, 160; *Williams v. Jones*, 60 N. E. 240, 244, 166 N. Y. 522; *Fowlkes v. Wagoner* (Tenn.) 46 S. W. 586,

A condition followed by a limitation over to a third person in case the condition is not fulfilled, or there is a breach of it, is known as a "conditional limitation." *Proprietors of Church in Brattle Square v. Grant*, 69 Mass. (3 Gray) 142, 151, 63 Am. Dec. 725.

A conditional limitation is of a mixed nature, and partakes of a condition and limitation; as, if an estate be limited to A. for life, provided that, when C. returns from abroad, it shall thenceforth remain to the use of B. in fee. *Smith v. Smith*, 23 Wis. 176, 99 Am. Dec. 153.

A conditional limitation is where property is limited over to a third party in case the condition be not fulfilled, denominated by Littleton a condition in law. 1 Inst. 234. In such case the estate determines *ipso facto* when the contingency happens. *Hammond v. Port Royal & A. Ry. Co.*, 15 S. C. 10, 83.

A condition brings the estate back to the grantor or his heirs. A conditional limitation carries it over to a stranger. A condition terminates an estate. A limitation creates a new one. "A remainder may be limited on a contingency which, if it happens, will operate to abridge or determine the precedent estate, and every such remainder shall be a conditional limitation." Real Property Law, § 48. *Williams v. Jones*, 60 N. E. 240, 244, 166 N. Y. 522.

A conditional limitation "is of a mixed nature partaking both of a condition and of a limitation; of a condition because it defeats the estate previously limited, and of a limitation because on the happening of the contingency the estate passes to the person having the next expectant interest, without entry or claim." *Proprietors of Church in Brattle Square v. Grant*, 69 Mass. (3 Gray) 142, 147, 63 Am. Dec. 725; *Lockridge v. McCommon*, 88 S. W. 38, 34, 90 Tex. 234 (citing 4 Kent, Comm. \*128; 2 Minor, Inst. p. 231); *Fowlkes v. Wagoner* (Tenn.) 46 S. W. 586, 592.

"A conditional limitation—an example of which is a grant to one so long as he occupies the premises, or to a widow during widowhood—differs from a condition subsequent, which is a contingency named on the happening of which a grant may be defeated, only in form, and the fact that re-entry is not necessary to terminate the grant." *Hague v. Ahrens* (U. S.) 53 Fed. 58, 60, 3 C. C. A. 426.

Conditional limitations are estates "limited so as to be independent of the measure or extent originally given to the first estate, and to take effect in possession upon an event which may happen before the regular determination, to which the first estate is liable from the nature of its original limitation, and so as to rescind it." *Shadden v. Hembree*, 18 Pac. 572, 575, 17 Or. 14.

If an estate conveyed is expressly so restricted by the instrument creating it that it cannot endure after the happening of a contingency upon which the estate or interest by the terms of the instrument is to cease, then the limitation is said to be conditional. *Templeman v. Gibbs*, 24 S. W. 792, 793, 86 Tex. 358.

A provision, in a deed conveying land in fee simple, that in case of the grantee's death, without having disposed of the land by deed or will, without issue or their descendants living at the time of his death, the title should pass to others, is valid as a

conditional limitation. *Lockridge v. McCom-*  
*mon*, 38 S. W. 33, 34, 90 Tex. 234.

A remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder is to be deemed a conditional limitation. Civ. Code Mont. 1895, § 1227.

#### CONDITIONAL OBLIGATION.

An obligation is conditional when the rights or duties of any party thereto depend upon the occurrence of an uncertain event. Civ. Code Mont. 1895, § 1950; Rev. Codes N. D. 1899, § 3768; Civ. Code S. D. 1903, § 1120.

Conditional obligations are such as are made to depend on an uncertain event. Civ. Code La. 1900, art. 2021. See, also, *Moss v. Smoker*, 2 La. Ann. 989, 991.

#### CONDITIONAL PARDON.

A conditional pardon is a pardon granted on condition that it shall only endure until the voluntary doing of some act by the person pardoned or some other person for him. *Ex parte Janes*, 1 Nev. 319, 321.

#### CONDITIONAL PROMISE.

A conditional promise is a clause in a contract or agreement which has for its object to suspend, rescind, or modify the principal obligation. A mere limitation as to the amount or purpose of drafts which have been drawn will not render the promise conditional. *James v. E. G. Lyons Co.*, 66 Pac. 210, 212, 134 Cal. 189.

#### CONDITIONAL PURCHASE.

To constitute a conditional purchase there must be a sale for a valuable consideration between the parties, with a right of repurchase. *Flagg v. Mann* (U. S.) 9 Fed. Cas. 202, 204.

#### CONDITIONAL SALE.

A conditional sale is where it is agreed that, until the price is paid, the title is to remain in the vendor. *Rose v. Story*, 1 Pa. (1 Barr) 190, 195, 44 Am. Dec. 121.

A conditional sale is a purchase for a price paid or to be paid, to become absolute on a particular event, or a purchase accompanied by an agreement to resell upon particular terms. *Poindexter v. McCannon*, 16 N. C. 373, 376, 18 Am. Dec. 591.

A sale with an agreement to repurchase is usually termed a "conditional sale." *Crimp v. McCormick Const. Co.* (U. S.) 72 Fed. 368, 367, 18 C. C. A. 595.

A contract by which the owner of chattels agrees to deliver them to one who

agrees to pay a certain gross sum as hire, but which does not provide for a return of the chattels, constitutes a conditional sale. *Farquhar v. McAlevy*, 21 Atl. 811, 812, 142 Pa. 233, 24 Am. St. Rep. 497.

A "conditional sale" of personal property, as the term is used in Pub. St. c. 140, § 23, relating to the reservation of vendors' liens on conditional sales, requiring the vendor to record a written memorandum signed by the purchaser, etc., means a contract of sale under which the property is delivered to the purchaser upon the condition that the title is not to pass until payment is made. *Churchill v. Demeritt*, 51 Atl. 254, 255, 71 N. H. 110.

Where, by a contract of sale, the vendor is to do anything to the goods before delivery, it is a condition precedent to the vesting of the property, and where anything remains to be done to the goods for ascertaining the price, such as weighing, testing, etc., it is a condition precedent to the transfer of the property; and likewise where the buyer is by contract bound to do anything as a condition precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer. Where an agreement to sell provided that, on the payment of the price or the execution of a mortgage, the seller was to execute a bill of sale, in the meantime title to remain in him, and on default in any payment he was to have the right of recaption, the sale was a conditional one; and this, though the promise to pay was absolute, and notes for the price were given. *Van Allen v. Francis*, 56 Pac. 339, 340, 123 Cal. 474.

To constitute a conditional delivery it is not necessary that the vendor should declare the condition in express terms at the time of delivery. It is sufficient if it can be inferred from the acts of the parties and the circumstances of the case that it was intended to be conditional. No particular words or terms of expression are necessary for the creation of a conditional sale. Any words which indicate an intention to annex a condition to the sale will be sufficient. Such words, however, as "on condition," "provided," "if it shall so happen," etc., are found in constant use in making conditional sales, and, if employed, will usually remove any doubt as to the sale or transaction. *McManus v. Walters*, 61 Pac. 686, 688, 62 Kan. 128.

To constitute a conditional sale within the statutes requiring the recording thereof in order to affect third persons, there must be a delivery of possession to the purchaser with the intention of passing immediate ownership, subject only to the reservation of title to the seller as security for the purchase mon-

*Donnelly v. Mitchell*, 93 N. W. 369, 371, Iowa, 432.

A conditional sale is one in which the seller retains the title as security, so that, in the event of a failure of the purchaser to pay the purchase money, he may replevy the property, thereby defeat the sale arising out of the plaintiff's demand. Under Act Tenn. 1858, § 1, providing for a set-off by defendant of the matter arising "out of plaintiff's demand," or "out of the original consideration of any written instrument," it is held these phrases do not mean all rights that may be asserted, of whatsoever nature, by either party, to the property, or concerning the property, which was the subject of the contract of the parties. In the first expression quoted, the word "demand" means the assertion of a right to recover a sum of money from the defendant, and subsequently the same ideas are conveyed by the word "consideration" in the second expression. *Wright v. A. Johnson & Sons* (Tenn.) 76 S. W. 914.

The expressions "cash," "cash down," or "cash on delivery," as used in sales, may be used in two different senses—one where the words indicate simply that the goods are to be paid for before the buyer is entitled to possession, and the other where they indicate an intention not to part with the title until the price is paid. A cash sale is not necessarily in law either a conditional or unconditional sale. If by the use of these terms the parties understand merely that no credit is to be given, and the seller will insist on his right to possession until the payment of the price, the sale is so far complete and absolute that the property passes, but, if it is understood that the goods are to remain in the property of the seller until the price is paid, the sale is conditional, and the title does not pass. *Austin v. Welch*, 72 S. W. 883, 31 Tex. Civ. App. 526 (citing *Scudder v. Bradbury*, 106 Mass. 422; *Towne v. Davis*, 1 Atl. 450, 66 N. H. 396).

#### Bailment distinguished.

Where one agrees with another to send goods for the latter to sell or return, it is often difficult to determine whether the contract constitutes a sale or a bailment. A contract may not constitute a sale, but a bailment, with an option on the part of the bailee to buy. Or it may be a sale with an option on the part of the vendee to return the goods; such a contract being termed a contract of sale or return. An option to repurchase if he like is essentially different from an option to return a purchase if he would not like. In one case the title will not pass until the option is determined; in the other, the property passes at once, subject to the right to rescind and return. *Hunt v. Wyman*, 100 Mass. 198. If the owner of goods deliver them to another with the un-

derstanding that there is to be no sale until the happening of a certain condition, this is a bailment, and the title does not pass until the condition happens. If the goods be delivered with the understanding that under certain circumstances the vendee may return them, this is a conditional sale, and title immediately passes, although under the contract the vendee may have the right to rescind and return the goods. In the one case the condition is precedent; in the other, subsequent. Under a contract of sale or return, the title passes, and remains in the vendee until the option to return is exercised. A bailee with an option to purchase does not become a purchaser until he exercises such option. *Furst Bros. v. Commercial Bank*, 43 S. E. 728, 729, 117 Ga. 472.

The most approved test to be applied to determine whether a contract is a "conditional sale" rather than a bailment lies in ascertaining whether there was a promise to pay for the goods. If so, as a general rule the transaction will be declared a conditional sale. Thus, where goods were consigned to a factor to be sold by him as provided by written contract stipulating that he should buy at a fixed price all goods remaining unsold on a certain date, and that the title should not vest in him until the purchase price should be paid in full, the goods remaining sold after such date are held by him as owner under a conditional sale. *Norton v. Fisher*, 85 N. W. 801, 802, 113 Iowa, 595.

A conditional sale implies the delivery to the purchaser of the subject-matter, the title passing only upon the performance of a condition precedent or becoming reinvested in the seller upon failure to perform a condition subsequent. It is not infrequently a matter of difficulty to accurately distinguish between a conditional sale and a bailment of property. It is an indelible incident to a bailment. If the identical thing, either in its original or an altered form, is to be returned, it is a bailment. In a contract of sale there is this distinguishing test common to an absolute and a conditional sale: that there must be an agreement, expressed or implied, to pay the purchase price. In a bailment, if a bailment for hire, there must be payment for the use of the thing let or bailed. If service is to be rendered to the subject-matter of the bailment, there must be compensation for the service unless the bailment be a mandate. An agreement to feed and care for cattle at the expense of a defendant whose compensation was to be money realized from the sale of the cattle exceeding a certain sum per head, but who was liable for deterioration in flesh or condition, was a bailment, and not a conditional sale. *Union Stock-Yards & Transit Co. v. Western Land & Cattle Co.* (U. S.) 59 Fed. 49, 53, 7 C. C. A. 660.

A contract that the bailee of chattels shall pay a certain stated sum monthly as rent for the use thereof, and that, when the price fixed upon the goods is in that way fully paid, they shall become the property of the bailee, amounts to a conditional sale. *Gerrish v. Clark*, 13 Atl. 870, 64 N. H. 492.

The term "conditional sale," and not the term "bailment," is correctly applied to the relation arising by a contract by a manufacturer to construct a refrigerating plant in a brewery on foundations to be furnished by the brewer, with a stipulation that the title is not to pass until the entire purchase price has been paid; and therefore, while the sale is valid between the parties, the machinery and plant are subject to be sold on execution against the brewer. *Ott v. Sweatman*, 31 Atl. 102, 106, 166 Pa. 217.

#### **Mortgage distinguished.**

A mortgage, when in the form of a deed absolute, and a conditional sale, are frequently so nearly allied to each other that it is sometimes difficult to say whether a particular transaction is the one or the other. The distinctive difference, however, appears to be this: The former is a security for a debt; the latter a purchase of land for a price paid or to be paid, to become absolute on the occurrence of a particular event, or is a purchase accompanied by an agreement to resell in a given time for a given price. *Miller v. Hulbert* (Ohio) 6 Wkly. Law Bul. 412.

Where an absolute deed is executed, and by a different instrument the grantee agrees to reconvey to the grantor upon the payment of a stipulated sum within a limited period, it is a question of intention whether the transaction constitutes a mortgage or a conditional sale. *Crane v. Bonnell*, 2 N. J. Eq. (1 H. W. Green) 264.

The distinction between a mortgage and a conditional sale is clearly drawn in *Turner v. Kerr*, 44 Mo. 429, as follows: "A mortgage and a conditional sale are said to be nearly allied to each other, the difference between them being defined to consist in this: that the former is a security for a debt, while the latter is a purchase accompanied by an agreement to resell on particular terms. A conveyance to secure a debt is a mortgage, and the stipulations of the parties cannot make it otherwise. But a conveyance to pay a debt is a totally different affair. If the conveyance extinguishes the debt, and the parties so intend, so that a plea of payment would bar an action thereon, a subsequent stipulation in the interest of the debtor, securing to him an opportunity to reacquire the title, ought not to be construed to the creditor's prejudice. Such a transaction is not a mortgage, but a conditional sale." *Holladay v. Willis* (Va.) 43 S. E. 616, 617.

"A conveyance to secure the payment of a debt still existing is a mortgage, while a

conveyance to pay a debt which extinguishes the same, and with which is coupled an agreement for repurchase, is a conditional sale. In determining whether a transaction is a mortgage or a conditional sale, the understanding and purpose of the parties are to be considered. If they intended an extinguishment of the debt and the vesting of an absolute title, subject only to an agreement to reconvey on specific terms—such, for instance, as a payment of an amount equal to the canceled debt and interest—such a transaction is a conditional sale and a mortgage. That the amount of money to be paid as a condition to the right to demand a reconveyance is measured by the amount of debt and interest is a circumstance of no controlling importance." *Turner v. Kerr*, 44 Mo. 429, 431.

"The difference between a mortgage and conditional sale is that in a mortgage, though the time of payment be passed, there is an equity of redemption, which continues until foreclosed or barred by the statute of limitations, while in a conditional sale, if the condition of payment is not complied with at or before the time limited, the sale becomes absolute." *Weathersly v. Weathersly*, 40 Miss. 462, 463, 90 Am. Dec. 344.

The material distinctions between a conditional sale and a mortgage are that in the first there is no right of redemption in the vendor after the expiration of the time fixed for payment of the stipulated price, while in the other the right of redemption continues until sale actually made under decree or until twenty years after strict foreclosure; and that in the first there is not, and in the latter there is, a continuing personal liability for the amount named as the consideration of the conveyance. It is often difficult to draw the line between a mortgage and a conditional sale. The intention of the parties is the only true and infallible test, and this intention is to be gathered from the circumstances surrounding the transaction and the conduct of the parties. A conveyance giving a grantor the right to repurchase on the payment of what he owes the grantee, where the grantee retains no possession or control of the premises, but the grantee selects the tenants, pays taxes, makes repairs, improvements, etc., is a conditional sale, and not a mortgage. *Hopper v. Smyser*, 45 Atl. 206, 208, 90 Md. 363.

#### **CONDITIONALLY PRIVILEGED COMMUNICATION.**

A "conditionally privileged communication" is a publication made on an occasion which furnishes a prima facie legal excuse for the making of it, and which is privileged unless some additional fact is shown which so alters the character of the occasion as to prevent its furnishing a legal



use." *Ruehs v. Backer*, 53 Tenn. (6 Sk.) 395, 405, 19 Am. Rep. 598.

In speaking of a publication, the nature which exempts the publisher from an action of libel for matters therein stated, a better term is "privileged publication" instead of "privileged communication." Although these terms are often used interchangeably and as synonymous, the term "privileged communication" in its ordinary application has reference to that class of written messages which either entitle or exempt the party to whom they are communicated to withhold the disclosure of matters thereof. *Coogler v. Rhodes*, 21 South. 109, 38 Fla. 240, 56 Am. St. Rep. 170.

### CONDITIONALLY PRIVILEGED PUBLICATION.

A conditionally privileged publication is a privilege to publish by speech or writing whenever a party honestly believes it is essential to the protection of his own rights or to the rights of another, provided the publication is not necessarily made to others than those persons whom the publisher honestly believes can assist him in the protection of his own rights, or in those whom he believes by reason of the knowledge of the matter published, be better able to assert or protect from invasion either their own rights or the rights of others intrusted to their guardianship. *George Knapp & Co. v. Campbell*, 36 S. W. 765, 767, 14 Tex. Civ. App.

A conditionally privileged publication is a place where circumstances exist, or are reasonably believed by the defendant to exist, which cast upon him the duty of making a communication to certain other persons, to whom he makes such communication in the bona fide performance of such duty. In slightly different language it is where a person is so situated that it becomes right, in the interest of society, that he should tell to a third person certain facts, and if he, bona fide and without malice, does tell them, it is a privileged communication. *Coogler v. Rhodes*, 21 South. 109, 38 Fla. 240, 56 Am. St. Rep. 170.

The author of *Black, Const. Law*, § 164, speaking of the freedom of the press, says that a publication is said to be conditionally privileged, and the author of it is not to be held accountable for its falsity, if it is made for good ends and from justifiable motives, but otherwise if it is made with malicious intent to injure individuals. In applying this precept to the case of a newspaper, that author formulates the modern doctrine thus: It has often been claimed that publishers of newspapers, in view of the peculiar nature of their business of gathering and disseminating news, should have a more liberal exemption from liability to the law of

libel than persons engaged in other occupations, but this claim has never been conceded by the courts. *Fitzpatrick v. Daily States Pub. Co.*, 20 South. 173, 179, 48 La. Ann. 1116.

Where a matter alleged to be libelous was contained in a letter written by defendant to his mother, and its only publication was by sending the letter to his mother by mail, written by the son for the purpose of informing her as to her rights in certain property, and the danger of their loss unless she took some action to protect them, the communication was a conditional privilege, and it was incumbent on plaintiff to establish malice on the part of defendant. *Kimble v. Kimble*, 44 Pac. 866, 14 Wash. 369.

### CONDITIONED.

Rev. St. Tex. art. 2201, provides that an administrator appealing from an order of removal shall give a bond with two or more good and sufficient sureties, payable to the county judge, conditioned that the appellant shall prosecute said appeal to effect. Held, that the word "conditioned" indicated that there should be in the bond an obligation to pay a specific sum. *Munzesheimer v. Wickham*, 12 S. W. 751, 752, 74 Tex. 638.

### CONDONATION.

Mr. Bishop has defined the doctrine of "condonation" to be the remission of one of the contracting parties of an offense which he or she knows the other has committed against marriage on condition of being treated by the other with conjugal kindness. This definition necessarily implies a valid marriage and a lawful reinstatement of the matrimonial position or status. *Pain v. Pain*, 37 Mo. App. 110, 115.

"Condonation is a pardon or forgiveness of a past wrong, fault, or deficiency which has occasioned a breach of some duty or obligation. If there has been an actual forgiveness of a breach of contract on the part of a master to a defaulting servant, he cannot afterwards rely upon such breach in discharging the servant; but such condonation can in no respect extend to subsequent offenses or to a continued deficiency." *Leatherberry v. Odell* (U. S.) 7 Fed. 641, 648.

A condonation sufficient to defeat a cause for divorce must consist of an offer on the one side to forgive the offense and the acceptance of such forgiveness on the other. "The term 'condonation' necessarily includes that operation of the mind evinced by words or acts as forgiveness; the free, voluntary, and full forgiveness and remission of a matrimonial offense." *Betz v. Betz*, 25 N. Y. Super. Ct. (2 Rob.) 694, 696.

Within the provisions of the Code that a divorce must be denied on the ground of desertion when there is an unreasonable lapse of time before the commencement of the action such as establishes a presumption of connivance, collusion, or condonation of the offense, the word "condonation" means forgiveness, and is revoked when the condonee commits the offense, and condonation does not exist where the plaintiff alleged that defendant deserted him, and still continues such desertion without cause and against his will and without his consent, and such allegations are proven. *Thomson v. Thomson*, 53 Pac. 403, 121 Cal. 11.

"Condonation is not so readily presumed against the wife as the husband. Knowledge of the guilt of the husband and forgiveness by the wife are not legally to be presumed, and must be clearly and distinctly proved in order to bar her action." *Odom v. Odom*, 36 Ga. 286, 318. It is not so readily presumed as a bar against the wife as against the husband. Forgiveness by a wife with hope of reclaiming her husband is meritorious. *Johnson v. Johnson* (N. Y.) 14 Wend. 637, 643.

#### **Cohabitation.**

Condonation takes place where, after the injury, the parties have become reconciled and have lived together or cohabited as husband and wife. Such cohabitation is a forgiveness of the injury, which prevents it afterwards being brought forward as a ground of divorce. *Phillips v. Phillips*, 27 Wis. 252, 253; *Wood v. Wood* (N. Y.) 2 Paige, 108, 110; *Hall v. Hall*, 4 N. H. 462, 463.

Condonation, as applied to marital offenses, means a voluntary forgiveness thereof; and, while "condonation" will in general be inferred from the sexual intercourse between the parties, such will not be the case, however, where it appears that it was not "voluntary," in any proper sense of the term, on the part of the wife. Thus, where, pending divorce proceedings, negotiations were entered into for a reconciliation and a dismissal of the action, and the parties met in the ladies' room of a hotel, ostensibly for the purpose of making further efforts towards the dismissal of the action, and while the parties were together in such room the husband requested intercourse, which his wife declined, but thereafter submitted to, but not voluntarily, she testifying that "he was so much determined I could not get away from him," and there was a fair inference that the entire arrangement on his part was for the purpose of using the occurrence to defeat the action for divorce, it would not be held that such fact constituted a "condonation" nor a bar to the wife's action. *Harnett v. Harnett*, 7 N. W. 394, 395, 55 Iowa, 45.

"Condonation" means forgiveness, and refers to all marital offenses. It will be inferred from the fact of sexual intercourse after knowledge of guilt. The general presumption is that a husband and wife living in the same house lived on terms of matrimonial cohabitation. This presumption, however, may be met and overcome by a proof of facts and circumstances which destroy the probability from which the presumption springs that married persons living in the same house maintained marital relations. Thus, if it is satisfactorily established that the parties occupied separate apartments, or had no access to each other, the presumption is destroyed. *Graham v. Graham*, 25 Atl. 358, 363, 50 N. J. Eq. 701.

"Condonation," as applied to offenses against the marital relation, means the forgiveness of such offenses, which may be evidenced, and most generally is evidenced, by acts of the parties as well as by mere words. Thus, the act of a wife in allowing her husband to return and cohabit with her after she had obtained a decree for separate maintenance, on the ground of his desertion, amounts to a "condonation," though she did the same under the impression that her refusal would furnish ground for divorce, which would entail a cessation of the maintenance. *Wade v. Wade* (Cal.) 31 Pac. 258, 259.

"Condonation" implies a condition subsequent; that the forgiving party must be treated with conjugal kindness. Civ. Code, § 117. In an action for divorce on the ground of cruelty, there can be no condonation unless there is a reconciliation between the parties, a remission of the matrimonial offenses, and an expressed agreement to condone. Thus, the fact that plaintiff lived and cohabited with defendant after the action was commenced, and until the summons was served, does not effect a condonation. *Morton v. Morton*, 49 Pac. 557, 558, 117 Cal. 443.

"Condonation" of a married person's acts which will constitute a bar to divorce by the other party is not an absolute term, which can be applied alike to all circumstances. Its application will vary as the offense said to have been condoned may vary. If the offense be adultery, knowledge of the fact by the defendant, followed by cohabitation, is ipso facto condonation; but if, for instance, it is habitual drunkenness on the part of the husband which is the ground for condonation from cohabitation, it does not take place until the final crisis is reached, for the term "habitual" implies growth from various and increasing stages until drunkenness becomes a fixed or established habit, and since until this degree is reached it is not a ground for divorce it cannot be maintained that when this degree is reached the wife would be repelled be-

she had remained loyally with her husband, suffering, and yet striving to save until the final crisis is reached. So of cruelty. Cruelty is cumulative, admitting degrees and augmenting by addition, so it may be condoned, and even forgiven, at any time and up to a certain point without bar, in sense or reason, to bring it all to an end when the continuance of it has rendered it no longer condonable. Cruelty existing through series of years must consist of numerous acts, many of which might, possibly would, be of themselves of a character not to warrant a divorce, yet, constantly recurring, they would indicate a wicked mind, and taken all together would show that the condition of the suffering was such, and beyond the point of further forgiveness. Mere endurance is not a condonation. *McClanahan v. McClanahan*, 56 S. W. 2d 553, 861, 104 Tenn. 217 (quoting 2 Bish. Mar. & Div. § 306).

In *Youngs v. Youngs*, 22 N. E. 806, 130 Ill. 30, 6 L. R. A. 548, 17 Am. St. Rep. 313, it was held that where a wife, after acts of cruelty, lived with her husband from December to March, and cohabited with him, such condonation as would prevent a divorce. *Abbott v. Abbott*, 61 N. E. 350, 192 Ill. 439.

#### a conditional forgiveness.

"Condonation" of acts by one of the parties to a marriage which would furnish grounds of divorce to the other is "a conditional forgiveness, the condition being that the offense shall not be repeated. If the offense or offense be repeated, then the condition is to be deemed withdrawn or annulled, and the party forgiving may avail himself of the facts alleged to have been condoned, just as if no condonation had occurred." *Eggerth v. Eggerth*, 16 Pac. 650, 15 Or. 626.

Condonation is a conditional forgiveness of one of the married parties of a matrimonial offense committed by the other, and which would constitute a cause of divorce; if a person has a right to a divorce for a cause he is not bound to exercise it, he may waive or abandon it. The peace and equity of families, the tranquility of society, and a proper regard for the welfare of the issue of the marriage which may be affected after the time of the condonation, constitute the most potent reasons on which the principle rests. *Turnbull v. Turnbull*, 23 Cal. 615, 619.

"Condonation" is defined to be the forgiveness, either express or implied, by a husband and of his wife, or by a wife of her husband, for a breach of marital duty, with an implied condition that the offense shall not be repeated. *Sullivan v. Sullivan*, 34 Cal. 368, 369 (citing *Webst. Dict.*).

The condonation which will bar a suit for divorce is forgiveness upon condition that the injury shall not be repeated, and is dependent upon future good usage and conjugal kindness; but it must be free, for if obtained by force and violence it is not binding, and if made upon express conditions the conditions must be fulfilled, and it must also be fairly obtained. An act of condonation induced by false representation can be no more binding than any contract obtained by fraud. *Farnham v. Farnham*, 73 Ill. 497, 500.

It is a settled and familiar law that cohabitation which will condone past matrimonial offenses is conditioned upon future good behavior of the spouse whose offenses are condoned, and that when, after the condonation, the offenses are repeated, the right to make them a ground of divorce revives. *Twyman v. Twyman*, 27 Mo. 383. Where a wife has separated from her husband for causes which would entitle her to a divorce, her return to him for the sole purpose of nursing him while he is suffering from a supposed mortal ailment is not necessarily a condonation of past offenses, even though she remain with him for several years. *Guthrie v. Guthrie*, 28 Mo. App. 566, 573.

Civ. Code, § 115, defines "condonation" as the conditional forgiveness of a matrimonial offense constituting a cause of divorce, and section 116 makes the following requirements essential to condonation: (1) A knowledge on the part of the condoner of the facts constituting the cause of divorce; (2) reconciliation and remission of the offense by the injured party; (3) the restoration of the offending party to all marital rights. *Wolff v. Wolff*, 36 Pac. 767, 768, 102 Cal. 433.

All "condonations," especially the implied, are upon the condition both that the offense shall not be repeated, and likewise that continually afterwards the party forgiven shall treat the other with conjugal kindness, whereupon a breach of the condition revives the original right of divorce. 2 Bish. Mar. & Div. § 308. *Fisher v. Fisher*, 48 Atl. 833, 834, 93 Md. 298 (citing *Johnson v. Johnson* [N. Y.] 14 Wend. 637); *Creech v. Creech*, 85 N. W. 726, 126 Mich. 267; *Sharp v. Sharp*, 6 N. E. 15, 19, 116 Ill. 509; *Heist v. Heist*, 67 N. W. 790, 791, 48 Neb. 794; *Owens v. Owens*, 31 S. E. 72, 74, 96 Va. 191; *Armstrong v. Armstrong*, 32 Miss. 279, 289; *Sullivan v. Sullivan*, 34 Ind. 368, 369; *Odom v. Odom*, 86 Ga. 286, 318.

"Condonation," as the term is used in the divorce law, is always a forgiveness of an offense upon condition that it will not be repeated; and we have held that where an offense has been condoned, such as cruelty, and the party forgiven has subsequently been guilty of such conduct as to lead the



wife or husband condoning the offense to believe that it will or may be repeated, the condonation will be thereby avoided. *Abbott v. Abbott*, 61 N. E. 350, 351, 192 Ill. 439.

"Condonation of criminal treatment is not absolute, but only conditional, forgiveness. It is subject to the implied condition that the injury shall not be repeated, and that the other party shall thereafter be treated with conjugal kindness. After condonation, former injuries will be revived by subsequent similar misconduct, although of a slighter nature." *Crichton v. Crichton*, 40 N. W. 638, 640, 73 Wis. 59; *Phillips v. Phillips*, 27 Wis. 252, 253; *Lutz v. Lutz*, 28 Atl. 315, 316, 52 N. J. Eq. (7 Dick.) 241; *Abbott v. Abbott*, 61 N. E. 350, 351, 192 Ill. 439. In *Farnham v. Farnham*, 73 Ill. 497, it was held that condonation of personal acts of violence and cruelty may be avoided by abusive language and opprobrious epithets.

Condonation is forgiveness for the past upon the condition that the wrongs shall not be repeated, and is dependent upon future good conduct. It must be free and voluntary. Where a wife, while sick and suffering intense pain, scarcely knowing what she did or said, on being asked by her husband to forgive him all the wrongs he had done her, told him she would forgive him, whatever of condonation there may have been in this was forfeited on his thereafter renewing and repeating his acts of cruelty. *Wessels v. Wessels*, 28 Ill. App. 253, 258.

Condonation implies a condition subsequent; that the forgiving party must be treated with conjugal kindness. Civ. Code, § 117. Condonation is revoked, and the original cause of divorce revived, (1) when the condonee commits acts constituting a like or other cause of divorce; (2) when the condonee is guilty of great conjugal unkindness not amounting to a cause of divorce, but sufficiently habitual and gross to show that the condition of condonation had not been accepted in good faith or not fulfilled. Section 121. Thus, where a wife left her husband because of his violent treatment of her, but was persuaded to return to him, and he thereafter renewed his former cruel treatment, there was no condonation. *Andrews v. Andrews*, 52 Pac. 298, 299, 120 Cal. 184.

"Condonation," as used in the chapter relating to the dissolution of marriage, is the conditional forgiveness of a matrimonial offense constituting a cause of action. The following requirements are necessary to condonation: (1) A knowledge on the part of the condoner of the facts constituting the cause of divorce; (2) reconciliation and remission of the offense by the injured party; (3) restoration of the offending party to all marital rights. Condonation implies a con-

dition subsequent that the forgiving party must be treated with conjugal kindness. When the cause of divorce consists of a course of offensive conduct, or arises in cases of cruelty from successive acts of ill-treatment, which may aggregately constitute the offense, cohabitation or passive endurance or conjugal kindness shall not be evidence of condonation of any of the acts constituting such cause, unless accompanied by an express agreement to condone. In such cases condonation can be made only after the cause of divorce has become complete as to the acts complained of. A fraudulent concealment by the condonee of facts constituting a different cause of divorce from the one condoned, and existing at the time of condonation, avoids such condonation. Rev. Code N. D. 1899, §§ 2747, 2748; Civ. Code S. D. 1903, §§ 77, 78.

#### Knowledge of facts required.

"Condonation" is the conditional forgiveness of a matrimonial offense constituting a cause of divorce. Civ. Code Mont. 1895, § 163; Civ. Code Cal. 1903, § 115.

"Condonation" of an act done by one of the parties to a marriage means forgiveness, absolution, wiping out of all the past. It must be with knowledge and such knowledge as will satisfy a prudent man that a crime has been committed, and done with the intention of forgiving the offense. *Ellis v. Ellis* (N. J.) 9 Atl. 884, 886; *Owens v. Owens*, 81 S. E. 72, 74, 96 Va. 191; *Wolff v. Wolff*, 86 Pac. 767, 768, 102 Cal. 433.

"Condonation," as the term is used in the law of divorce, means a continuance of the connubial relation, with full knowledge of all the facts giving rise to a cause of divorce. *Polson v. Polson*, 39 N. E. 496, 499, 140 Ind. 310; *Odom v. Odom*, 36 Ga. 286, 318.

There can be no "condonation" or forgiveness of adultery unless the party condoning has knowledge of the offense, or of such facts as fairly import that she should have known. *Merrill v. Merrill*, 58 N. Y. Supp. 508, 504, 41 App. Div. 347.

The term "condonation" in the law of divorce cannot be applied to an act of the husband in living with his wife after she has given him cause to sue for divorce, if the husband has no knowledge of her wrongful acts, but merely a suspicion. *Bailey v. Bailey*, 29 Atl. 847, 67 N. H. 402.

To establish condonation as a defense to an action for divorce for the adultery of the wife, it is not only necessary that the husband should have full knowledge of the facts, but that he should be able to prove them. Hence a private oral confession by the wife to the husband would not suffice, as there would be no means of proving it, nor would mere circumstances of a suspi-

nature be sufficient to constitute ledge. It is further necessary that the and should believe the wife to be guilty, a knowledge of the fact implies not y acquaintance with the facts concur- to prove the particular charge of adul- but of all then existing charges of ery. *Uhlman v. Uhlman* (N. Y.) 17 N. C. 236, 263.

er to return.

Condonation "is a meeting of the minds e parties on an offer on one side to e upon specified conditions, and the stance of such forgiveness, and the per- nance of those conditions by the other; an act of condonation, to be effectual, be one to which husband and wife assent, and in which each participates. naccepted offer to return to the matri- l bed is not of itself a condonation, nly an expression of willingness to ne." *Betz v. Betz* (N. Y.) 19 Abb. Prac.

voluntary promise merely by a wife urn and live with her husband does nstitute a condonation, since it neither ted his offenses nor restored him to al rights. *Wolff v. Wolff*, 36 Pac. 767, 02 Cal. 433.

## DUCE.

he word "conduce" means to tend or bute toward a proof of the fact. Evi- may conduce to establish the proof of hich it is very far from establishing, hich could not be fairly inferred from hus an instruction that the demurrant be considered as admitting all that easonably be inferred by the jury the evidence given against him is much correct than the expression that the rrant must admit or is considered as tting every fact which the evidence conduce to prove. *Hansbrough's Ex'r* om (Va.) 3 Leigh, 147, 159.

## DUCT.

ee "Disorderly Conduct"; "Good Con- duct"; "Improper Conduct"; "Justifi- able Conduct."

o "conduct" is defined by Worcester as rry on, to manage, to regulate; and e use of the term "as heretofore cted," when used in the conveyance of ery as it had theretofore been con- d, refers to how the fishery was carried anaged, or regulated, and had no ref- e to the extent of the fishery, where extent of the grant was clearly defined. *Key v. Vandergrift*, 89 Pa. 346, 352.

o "conduct" is defined in the Century onary to mean "to direct the course of,

to manage, to carry on." *Thompson v. Ack- erman*, 12 O. C. D. 456, 463.

An order of court directing a receiver to "conduct and run" a hotel is sufficient authority to perform acts necessary to the conduct of the business, and hence sufficient to authorize the receiver to make purchases of necessary merchandise on credit, in the absence of any provision enabling him to raise money. *Highland Ave. & B. R. Co. v. Thornton* (Ala.) 16 South. 699, 700.

Under Pilot Act, 6 Geo. IV, c. 175, § 70, providing that if one who is not a li- censed pilot shall continue in the "charge or conduct" of any ship or vessel after any duly licensed pilot shall have offered to take charge of such ship, such unlicensed pilot shall forfeit a certain sum, a person employ- ed to tow or move a vessel, if the bona fide object of the employment be the moving power, is not included, as such person is not a pilot and has not the conduct or charge of the vessel. The words mean the taking the charge and direction of as a pilot, whose proper and sole duty is to select the course and take the management and con- duct of the vessel for the purpose of direct- ing her in that course. *Bellby v. Scott*, 7 M. & W. 93, 100.

### Of actions.

Under a statute providing that the town clerk shall be paid the usual personal char- ges for "conducting or opposing bills in par- liament and conducting actions or suits," in law or equity, the clerk is not confined to actual proceedings in an action or suit, but would extend, for instance, to a mandamus if one had been directed for the purpose of settling a question in dispute. He is en- titled to charges for having prevented litigation by his laudable exertions made under the sanction of the town. *Regina v. Prest*, 16 Q. B. 31, 44.

### Of business.

The "conduct of business" of necessity includes necessary agents or servants. *Peo- ple v. Feitner*, 61 N. E. 762, 763, 168 N. Y. 494.

### Of election.

"Conducted," as used in Gen. St. § 1753, providing that all local option elections shall be "conducted" according to the laws gov- erning municipal elections of the city, town, or village in which they are held, was in- tended to embrace the declaration of the re- sult, and was not used in its strict and lim- ited sense. *Blake v. Walker*, 23 S. C. 517, 524.

"Conducting," as applied to an election, relates to the mode of voting, the mode of receiving and registering the votes, and com- puting them. The giving a casting vote is not a part of the manner of conducting an

election, but is effecting the election. It is so far from being the manner of conducting the election that it is absolutely making the election. *State v. Adams* (Ala.) 2 Stew. 231, 242.

#### Of person or party.

The "conduct" of a party, in its broad sense, consists of acts, words, silence, or negative omission to do anything. It consists of the entire manner of life of a person. The term is frequently used and is an important factor in the law of estoppel, especially in that class of estoppels the foundation of which is justice and good conscience; its object being to prevent the unconscientious and inequitable assertion of claims or rights which might have existed or been enforced by other rules of law unless prevented by estoppel. *Hallowell Nat. Bank v. Marston*, 27 Atl. 529, 531, 85 Me. 488.

If there be a metaphysical distinction between character and conduct, there is no authority in law for admitting evidence of conduct where evidence of character would be excluded. Character or reputation is generally regarded as the voice of the community, but that is just what the conduct of the individual makes it. "The speech of the people," as it is most descriptively called, is suggested by the general tenure of the conduct, so that to prove the one is in effect to prove the other. The text-writers of the adjudged cases generally speak of "conduct" and "character" as convertible terms. *Zitzer v. Merkel*, 24 Pa. (12 Har.) 408, 410.

"Conduct" is defined as personal deportment, mode of action, and behavior, and is so used in Gen. St. 1889, § 2591, providing that in all actions against incorporated cities for damages, in consequence of the action of mobs, the reputation and conduct of the person injured may be given in evidence in mitigation of damages. *Adams v. City of Salina*, 48 Pac. 918, 919, 58 Kan. 246.

#### CONDUCTED AND HOLDEN.

The words "conducted and holden," in Acts 1901, p. 60, c. 4930, § 7, providing that a copy of the record of the result of the canvas of the returns of the election held under the local option law should be prima facie evidence that such election was legally called, conducted, and holden, should be construed to embrace a declaration of the result. By the provision that the record of the canvas should be evidence of an election legally called, conducted, and holden, it was certainly intended that the result of the election, as well as the fact that an election had been had, should be shown thereby, and this includes the canvas. *Brass v. State* (Fla.) 34 South. 307, 309.

#### CONDUCTOR.

As laborer, see "Laborer."

"Conductor" is the name of a bailee in a bailment in which goods are left with the bailee to be used by him for hire. Per Holt, C. J., in *Coggs v. Bernard*, Ld. Raym. 909, 913.

In construing a statute providing that "every railroad corporation shall be liable for damages sustained by any employé thereof without contributory negligence on his part, when such damage is caused by the negligence of any train dispatcher, telegraph operator, superintendent, yard master, conductor, or engineer, or of any other employé who has charge or control of any stationary signal, target point, block or switch," the court said: "There were at the time of the enactment, and had been for a long period of years theretofore, and have been subsequently, in railroad service everywhere in this country, as a matter of common knowledge, officers known as superintendents in the operating department of the road—general superintendents of the whole line and superintendents of divisions. The general duties of such superintendents are intimately connected with the movement of trains and cars. Now, it must be presumed that the Legislature used the word as it was commonly used; that they had in mind the officers of railroads to whom the term was generally applied. The position of superintendent in the railway service is as definitely and well known as that of train dispatcher, telegraph operator, conductor, or engineer. It could not be sincerely claimed that the word 'conductor' can be applied to the foreman of a section gang or of a bridge crew because he merely conducts or manages the work, or that it can be applied to any other conductor than the one who manages the railroad train; and yet the act does not say 'train conductor.' It could not be sincerely claimed that the word 'engineer' can be applied to the engineer who locates tracks and does engineering work of that kind, or who runs some little stationary pumping engine, or to any one of many other persons connected with railroad service that might properly be called engineers; and yet the act does not say 'locomotive engineer.' And the same illustration might be given in respect to each of the persons specifically named in the act. It may thus be clearly seen that to apply the word 'superintendent' to the mere foreman of a repair shop would be entirely inconsistent with the obvious purpose of the act." *Hartford v. Northern Pac. R. Co.*, 64 N. W. 1033, 1034, 91 Wis. 374.

#### CONDUIT.

"Conduit," as used in Revision, p. 659, conferring on a corporation the right to "take

divert any and all such springs and  
ms of water, and erect, alter, and re-  
reservoirs and works, and lay down all  
pipes and conduits as shall be neces-  
" etc., includes an open canal cut in the  
, and laid in and lined with cement.  
ney v. Atlantic City Water Works Co.,  
11. 95, 96, 55 N. J. Law (26 Vroom) 235.

Conduit is a general word which applies  
y channel or structure by which flow-  
water can be conducted from one point  
other. It includes a ditch, flume, pipe,  
y kind of aqueduct." Sefton v. Pren-  
37 Pac. 641, 642, 103 Cal. 670.

## CONFECTIONERY.

A "confectionery," as defined by Web-  
is a place where sweetmeats and simi-  
things are made and sold. Such busi-  
ness does not include the selling of liquors  
he drink, and hence a confectioner's  
e in a city whose ordinance requires  
licensing of both confectionery and  
ing saloons is not sufficient to authorize  
older to sell liquors by the drink. City  
w Orleans v. Jane, 34 La. Ann. 667, 668.

An indictment charging the defendant  
fraudulently adulterating one pound of  
fectionery" is insufficient to describe the  
ance adulterated. "The word 'confec-  
ry' is a generic word, which includes a  
variety of kinds of articles usually  
in a confectioner's shop, and does not  
be the substance which the defendant  
arged with adulterating with the pre-  
and certainty that the Constitution of  
commonwealth and rules of criminal  
ing require." Commonwealth v. Chase,  
Mass. 202, 203.

## CONFEDERACY.

Confederacy (confederatio) is when two  
ore persons combine together to do any  
age or injury to another, or to do any  
vful act." State v. Crowley, 41 Wis. 271,  
22 Am. Rep. 719; Watson v. Harlem &  
York Nav. Co. (N. Y.) 52 How. Prac.  
353.

## CONFEDERATE.

Confederate currency as cash, see  
"Cash."  
Confederate treasury note as bill of  
credit, see "Bill of Credit."

## CONFEDERATE MONEY.

"Confederate money" was and is an ob-  
on or a promise of the Confederate  
s to pay a certain number of dollars  
in mentioned to bearer, in a specified  
after a treaty of peace between the  
ederate States and the United States.

It did not purport to be of any value unless  
the Rebellion should prove to be a success.  
Goodman v. McGehee, 31 Tex. 252, 254.

## CONFESSION.

See "By Confession"; "Extrajudicial  
Confession"; "Implied Confession";  
"Indirect Confession"; "Judgment by  
Confession"; "Judicial Confession";  
"Relative Confession"; "Simple Con-  
fession"; "Voluntary Confession."

"A 'confession' means ordinarily the  
acknowledgment of some facts." Adams v.  
Tator, 10 N. Y. Supp. 617, 618, 57 Hun, 302.

Confessions are divided into two classes  
—judicial and extrajudicial. Judicial con-  
fessions are such as are made before a mag-  
istrate or court in due course of legal pro-  
ceedings, while extrajudicial confessions are  
such as are made by a party elsewhere than  
before a magistrate or any court, and include  
either express or implied confessions. Speer  
v. State, 4 Tex. App. 474, 479.

A confession is an admission of some-  
thing done antecedently, and hence the ad-  
mission of a member of a firm, while the  
firm is in existence, that the proceeds of a  
note executed by him actually went to the  
use of the firm, was not a confession. Uhler  
v. Browning, 28 N. J. Law (4 Dutch.) 79, 82.

A confession in an answer that plaintiff  
was entitled to recover damages to a cer-  
tain amount is an admission of a cause of  
action as alleged in the description only to  
the extent of its terms, and no further, and  
must then be taken as it is made, since the  
policy of the law relative to confessions is to  
enable the defendant, by an admission of  
so much of the claim as he thinks fit, to lim-  
it the controversy to the matters really in  
dispute, without changing in any respect the  
situation of the parties as to the matters not  
admitted, and it would defeat the entire  
object of confession if it were held to con-  
tain any implied admission as to the matters  
left open to controversy. A confession may  
doubtless be made in such form as to admit  
the entire cause of action; but where a  
cause of action is in its nature divisible, and  
the defendant confesses it in part only, it  
is immaterial in what terms and in what  
manner the extent of the confession is lim-  
ited—it will not be construed to extend be-  
yond those terms. Hackett v. B. O. & M. R.  
Co., 35 N. H. 390, 397, 398.

### As acknowledgment of guilt.

A "confession," as defined in Black's  
Law Dictionary, "is a voluntary statement  
made by a person charged with the com-  
mission of a crime or misdemeanor, com-  
municated to another person, wherein he  
acknowledges himself to be guilty of the of-  
fense charged, and discloses the circumstan-

ces of the act, or the share and participation which he had in it." *Spicer v. Commonwealth (Ky.)* 51 S. W. 802, 808.

A "confession" is an admission or declaration, made by a party who has committed a crime or misdemeanor, of his agency or participation therein, and is generally restricted to acknowledgments of guilt. *People v. Parton*, 49 Cal. 632, 637; *People v. Velarde*, 59 Cal. 457, 461; *People v. Le Roy*, 4 Pac. 649, 650, 65 Cal. 618; *People v. Ammerman (Cal.)* 50 Pac. 15, 18; *People v. Strong*, 30 Cal. 151, 157; *People v. Miller*, 54 Pac. 523, 524, 122 Cal. 84; *State v. Red*, 4 N. W. 831, 835, 53 Iowa, 69; *State v. Carr*, 53 Vt. 37, 44; *Territory v. Underwood*, 19 Pac. 898, 400, 8 Mont. 131; *State v. Carson (S. O.)* 15 S. E. 588, 590; *Mora v. People*, 35 Pac. 179, 182, 19 Colo. 255; *Taylor v. State*, 37 Neb. 788, 796, 56 N. W. 623, 625; *Johnson v. People (Ill.)* 64 N. E. 286, 287.

"Confession" or admission, in that sense, means something to the effect that the party himself had some criminal or questionable relation to the alleged crime. *State v. Carr*, 53 Vt. 37, 44.

"A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind by the flattery of hope or the tortures of fear comes in so questionable a shape, when it is to be considered as evidence of guilt, that no credit should be given it." Citing *Eyre, C. B.*, in *Warickshall's Case*, 1 Leach, Cr. Cas. 299: "The important inquiry is whether the confession has been made under the influence of hope or fear brought to bear on the prisoner's mind by third persons. When these influences are direct and strongly made, the courts uniformly reject the confession, and this is especially so when made under arrest to the officer having the prisoner in charge or by other persons having authority." *Territory v. Underwood*, 19 Pac. 898, 400, 8 Mont. 131.

A confession is rather a fact to be proved by evidence than evidence to prove a fact. It is not so much proof that a particular thing took place as it is a waiver by the party charged of his right to have certain facts alleged against him technically proved. Where defendants were on trial together, and neither defendant implicated himself in the statement made by him, such statements are not confessions. *State v. Carson*, 15 S. E. 588, 590, 36 S. C. 524.

By confession is meant direct confession; where a person charged directly confesses the crime with which he is charged.

This direct confession is the highest confession which can be, and carries with it so strong a presumption of guilt that an entry on record, "Quod cognovit indictamentum," etc., in an indictment for trespass, estops the defendant to plead not guilty to an action brought afterwards against him for the same matter. *State v. Oxendine*, 19 N. C. 435, 437 (citing 2 How. 466 [B 2, c. 31, §§ 1, 2]).

Where the term "confession" is used in criminal law, it is generally restricted to an acknowledgment of guilt. Where words in themselves are consistent with the innocence of the party, and are therefore admissible in evidence, it is erroneous for the court to charge the jury as to the effect of a confession. *Lee v. State*, 29 S. E. 264, 265, 102 Ga. 221.

The confession made by an accused without intimidation, threats, or inducement on the part of the officer of the law is admissible in evidence. *State v. Berry (La.)* 24 South. 329, 331.

A confession is an admission made at any time by a party stating or suggesting that he committed that crime. Under such definition a statement made by the accused shortly prior to the homicide, on the accusation by the decedent of stealing his money, that she did not have his money, does not constitute a confession. *State v. Spillers (La.)* 29 South. 490, 481.

A statement by defendant denying that he had stolen the money as charged, and accounting for his possession by claiming to have found it, is not a confession. *People v. Ammerman*, 50 Pac. 15, 18, 118 Cal. 23. A declaration by the person accused of crime, denying any criminal act, and explaining incriminating circumstances brought against him, to show his innocence of any crime, is not a confession. *Mora v. People*, 35 Pac. 179, 182, 19 Colo. 255.

The statement by the accused, in an answer to the statement of an officer, that "this looks suspicious," "well, damned if it don't," is not a confession. *People v. Hickman*, 45 Pac. 175, 176, 113 Cal. 80.

The common-law confession is practically the testimony of the accused given in open court, conclusively proving the facts in issue, and sufficient of itself to support conviction. *State v. Willis*, 41 Atl. 820, 824, 71 Conn. 293.

Acts and admissions of one charged with criminal libel, tending to show his proprietorship of the paper in which the libel was published, are not confessions, in legal contemplation. *People v. Miller*, 54 Pac. 523, 524, 122 Cal. 84.

The confession must be voluntary. It is well said that if induced by the flattery of

hope or the torture of fear the confession is inadmissible. *State v. Mills*, 91 N. C. 581, 597.

The confession of an infant, disclosing no fact pregnant with any circumstance to give it authority, or in any way to corroborate it, is a simple, naked confession, and when obtained from an infant under the age of 11 years by some degree of pressure, at least after a firm denial, ought not to have been admitted in evidence, and, if admitted, ought not to be ground of a conviction. *State v. Aaron*, 4 N. J. Law (1 South.) 231, 240, 7 Am. Dec. 592.

#### **Admission or declaration distinguished.**

The word "confession" is not the mere equivalent of the word "statement" or "declaration." *Taylor v. State*, 37 Neb. 788, 796, 56 N. W. 623, 625; *People v. Miller*, 54 Pac. 523, 524, 122 Cal. 84 (citing *People v. Strong*, 80 Cal. 151).

A confession in criminal law is the voluntary declaration made by a person who has committed a crime or misdemeanor to another of the agency or participation which he had in the same. The term "admission" usually applied to civil transactions and to those matters of fact in criminal cases which do not involve criminal intent; the word "confession" relating to the acknowledgment of guilt and admission relating to the acknowledgement of fact. *State v. Heidenreich*, 45 Pac. 755, 29 Or. 381; *State v. Porter*, 49 Pac. 964, 966, 32 Or. 135; *State v. Reinhart*, 38 Pac. 822, 825, 26 Or. 466. Thus, the statements of the accused admitting that he purposely committed the homicide are, strictly speaking, confessions, though they embrace narrations tending to show or present an excuse for the killing. *State v. Porter*, 49 Pac. 964, 966, 32 Or. 135. So, where the evidence merely shows an admission of facts from which a conclusion of guilt might in a certain instance be drawn, the use of the word "confession" in a charge was erroneous. *State v. Heidenreich*, 45 Pac. 755, 29 Or. 381.

A "confession" is a person's declaration of his agency of participation in a crime. The term is restricted to acknowledgments of guilt. A confession is limited in its precise scope and meaning to the criminal act itself. It does not apply to acknowledgments of facts merely tending to establish guilt, since a damaging fact may be admitted without any intention to confess guilt. These are criminating admissions, rather than confessions. Where a person only admits certain facts from which the jury may or may not infer guilt, there is no confession. *State v. Picton (La.)* 25 South. 375, 377; *State v. Reinhart*, 38 Pac. 822, 825, 26 Or. 466; *Taylor v. State*, 56 N. W. 623, 625, 37 Neb. 788. The false entries in the books of a firm kept by the defendant, though they tend to prove

the commission of the crime charged, do not constitute a confession. *State v. Reinhart*, 38 Pac. 822, 825, 26 Or. 466.

There is a clear distinction between a confession and an admission or declaration, unless the admission or declaration has within it the scope and purpose of a confession, in which its distinguishing feature as an admission or declaration is lost in the broader term "confession." A confession is a voluntary admission or declaration by a person of his agency or participation in a crime. To make an admission or declaration a confession, it must in some way be an acknowledgment of guilt, and be so intended, for it must be involuntary. A mere admission or declaration by a defendant against his interests is not necessarily a confession, and this is true even though the admissions are criminating. A confession of guilt is an admission of a criminal act itself, and not an admission of a fact or circumstance from which guilt may be inferred. *State v. Novak*, 79 N. W. 465, 468, 109 Iowa, 717.

The term "admission" is usually applied to civil action, and confession or acknowledgment of guilt in criminal prosecution. Where statements are made by a defendant to an officer, they may be received as an admission against interest, even though they might be regarded as a confession in a criminal court. *Notara v. De Kamalaris*, 49 N. Y. Supp. 216, 219, 22 Misc. Rep. 337.

The word "confession" is not the mere equivalent of the word "statement" or "declaration." *People v. Strong*, 80 Cal. 151, 157; *People v. Velarde*, 59 Cal. 457, 461.

#### **As confidential communications.**

"Confessions," as used in Acts 1879, p. 245, providing that clergymen shall be incompetent to testify concerning confessions made to them in the course of discipline enjoined by their church, includes only such confessions as are penitential in their character, or were made to clergymen in obedience to some supposed religious duty or obligation, and do not embrace communications to clergymen, however confidential, which were not made in connection with or in discharge of some supposed religious duty, or when made to them while in the discharge of duties other than those which pertain to the office of a clergyman. *Knight v. Lee*, 80 Ind. 201, 208.

#### **Wrongdoing implied.**

"Confess" has several different meanings, but is ordinarily used to characterize the admission of sin or wrongdoing, and such is its meaning when used in a newspaper statement that a person has made a confession to the district attorney of the entire affair. *Gallagher v. Bryant*, 60 N. Y. Supp. 844, 845, 44 App. Div. 527.

## CONFESSION AND AVOIDANCE.

See "Plea of Confession and Avoidance."

The expression "confession and avoidance" means the same as "new matter constituting a defense," used in many codes with reference to the answer. *Finley v. Quirk*, 9 Minn. 194 (Gil. 179, 187), 86 Am. Dec. 93.

## CONFESSION OF JUDGMENT.

See "Offer to Confess Judgment."

The phrase "confession of judgment" has a popular as well as a technical significance. As popularly understood, it signifies an acknowledgment of indebtedness, upon which it is contemplated that a judgment may and will be rendered. *Kinyon v. Fowler*, 10 Mich. 16, 18.

Confession of judgment is the voluntary submission to the jurisdiction of the court, giving by consent, and without the service of process, what could otherwise only be obtained by summons and complaint and through formal proceedings. A person who confesses a judgment submits to be sued in that form and manner. The confession of a judgment is but one of the ways and processes, one manner, by which a person is sued. *First Nat. Bank v. Garlinghouse* (N. Y.) 53 Barb. 615, 619.

## CONFIDE.

See "Wholly Confiding."

A statute providing that physicians are not competent witnesses as to matters "confided" to them in the course of their profession, unless with the consent of the party making such confidential communication, does not mean that the knowledge which he has was obtained through statements by the patient under an injunction of secrecy, expressed or implied, but matters which he has learned by observation or by examination of the patient are matters "confided" to him within the meaning of the statute, and he cannot be compelled to testify concerning them without the patient's consent. *Masonic Mut. Ben. Ass'n v. Beck*, 77 Ind. 203, 209, 40 Am. Rep. 295.

1 Wag. St. 500, § 9, providing that if any guardian of any female under the age of 18 years, or any other person to whose care or protection any such female "shall have been confided," shall defile her, he shall be punished, etc., means that the other person alluded to should occupy a position similar to that of a guardian, or stand in some attitude in which a peculiar or confidential trust was reposed. It is not necessary that he should be the legal protector of the female, but it is essential that she should have been committed to his special

care with the expectation that he should exercise a supervision over her; and hence a female who was allowed by her father to go and assist the defendant in laboring for one day was not specially confided to his protection and care within the meaning of the statute. *State v. Arnold*, 55 Mo. 89, 91.

The word "confide," as used in a will, according to *Perry on Trusts* (volume 1, c. 4, § 112), in a clause that the testator confides in a legatee to make a certain disposition of the fund bequeathed, is a word of intention, which the court will carry into effect as if the testator had used an absolute word of devise in trust, and the court will direct the donee or first taker to hold as a trustee for those whom the donor intended to benefit. *Cockrill v. Armstrong*, 31 Ark. 580, 589.

## CONFIDENCE.

See "Full Confidence."

The word "confidence" is a word peculiarly appropriate to create a trust. It is, as applicable to the subject of a trust, as nearly a synonym as the English language is capable of. "Trust" is a confidence which one man reposes in another, and "confidence" is a trust. *Appeal of Coates*, 2 Pa. (2 Barr) 129, 133.

The words "having confidence," when used in a will in which testator bequeaths certain property to certain beneficiaries, having confidence that they will use the property for certain purposes, have always been held by the courts not to impose any obligation or create any trust. *Willets v. Willets* (N. Y.) 35 Hun, 401, 407.

## CONFIDENCE GAME.

"A confidence game" is the "obtaining, or attempting to obtain, money or property by means of the use of any false or bogus check, or by any other fraudulent means, instrument, or device." *Morton v. State*, 47 Ill. 468, 474.

A "confidence game" is any swindling operation in which advantage is taken of the confidence reposed by the victim in the swindler. *Maxwell v. People*, 41 N. E. 965, 998, 158 Ill. 248. See, also, *Du Bois v. People*, 65 N. E. 658, 659, 200 Ill. 157, 93 Am. St. Rep. 183.

"Confidence game," as used in *Rev. St. Mo. 1889*, § 2836, providing that every person who, with intent to defraud, obtains money or valuables by means of an instrument or a device commonly called the "confidence game," shall be deemed guilty of a felony, is not a charge of any specific offense, as the words are no expression of the nature and cause of the accusation against the defendant. *State v. Cameron*, 22 S. W. 1024, 1025, 117 Mo. 371.



Inducing men to bet on the top or bottom of dice, and procuring money from a man for that purpose, or getting possession of his pocketbook for the purpose of betting, enough of a "confidence game" to sustain conviction therefor and distinguish it from larceny, although fear is aroused in him by the loss of his money by threats and innuendoes in regard to the danger of gambling in a saloon. *Van Eyck v. People*, 52 Ill. 852, 853, 178 Ill. 199.

#### CONFIDENCE MAN.

Any person or persons who shall obtain, procure, or attempt to obtain or procure, from any other persons any money or valuable thing by means of any game or games, or any fraudulent pretense or pretenses, or practice or practices, scheme, trick, device, or deception, and any person who shall conspire, or combine with any bunster or other person or persons for the purpose and with intent to procure or obtain, or to attempt to procure or obtain, from any other person or persons, any money or other valuable thing by means of any game or games, fraudulent pretense or pretenses, practice or practices, scheme, trick, device, or deception, shall be deemed "confidence man." *Mills' Ann. St. Colo.* 1901, § 1399.

#### CONFIDENTIAL COMMUNICATION.

There are certain admissions and communications excluded from public policy. Among these are: (1) Communications between husband and wife; (2) between attorney and client; (3) among grand jurors; (4) secrets of state. *Civ. Code Ga.* 1895, § 188.

##### Between attorney and client.

A communication to a lawyer, taken for the most part in the presence of other witnesses, and with no injunction as to secrecy, is not a confidential communication. In *Hills v. State*, 85 N. W. 836, 61 Neb. 589, 595, 10 L. R. A. 155, it is said the mere fact that a communication is made to a lawyer, a doctor, or a priest does not of itself make such communication privileged. To have such effect, it must have been made in confidence of the relation, and under such circumstances as to imply that it should forever remain a secret in the breast of the confidential adviser. *Elliott v. Elliott* (Neb.) 92 W. 1006, 1008.

Confidential communications of which an attorney cannot testify without the consent of his client include "not only all communications made to an attorney with the view of the prosecution or defense of a suit by legal process pending or immediately contemplated, but it extends to all communications made to an attorney or counselor duly

qualified and authorized as such, and applied to by the party in that capacity with a view to obtain his advice and opinion in matters of law in relation to his legal rights, duties, and obligations, whether with a view to the prosecution or defense of a suit or other lawful object." *Hatton v. Robinson*, 31 Mass. (14 Pick.) 416, 421, 25 Am. Dec. 415.

A "confidential communication" is any communication by the client in a professional consultation with his counsel, and is not confined to facts disclosed in relation to suits actually pending at the time, but extends to all cases in which a client applies to his counsel for his aid in the line of his profession. If the principle was confined to cases actually pending at the time, there would be no safety for a person consulting counsel as to the expediency of bringing a suit, or of compromising it if contemplated to be brought against him. *Parker v. Carter* (Va.) 4 Munf. 273, 287, 6 Am. Dec. 513.

"Confidential communications between attorney and client" are communications taking place between a person and his attorney which are not allowed to be divulged or inquired into in legal proceedings. The privilege is not that of the attorney, but that of the client, and it is indispensable for the purpose of private justice. Whatever facts are communicated by a client to his counsel solely on account of that relation, such counsel are not at liberty, even if they wish, to disclose. *Chirac v. Reinicker*, 24 U. S. (11 Wheat.) 280, 292, 6 L. Ed. 674.

"Confidential communications" are communications made by a client to his attorney during the existence of the relation, and an attorney cannot, after he ceases to be the attorney of a party, disclose what was communicated to him in that capacity. But this is the privilege of the client, and if he chooses, after this relation has ceased, to volunteer any communications, he is not protected, although they may be in substance the same as were given while that relation subsisted. *Yordan v. Hess* (N. Y.) 13 Johns. 492, 494.

"Confidential communications" between attorney and client include only such communications as are made for conducting the cause, and do not include extraneous or impertinent communications. *Riggs v. Denniston* (N. Y.) 3 Johns. Cas. 198, 203, 2 Am. Dec. 145.

##### Between husband and wife.

Confidential communications, "within that section of the Code forbidding confidential communications between husband and wife to be given in evidence, are such communications as are expressly made confidential, or such as are of a confidential nature, or induced by the marital relation. Ordinary conversations relating to matters of business, which there is no reason to suppose he would



have been unwilling to hold in the presence of any person, are not confidential." *Parkhurst v. Berdell*, 110 N. Y. 386, 18 N. E. 123, 6 Am. St. Rep. 384. In none of the cases in Vermont has there been any attempt to define "matters of confidence." It may be difficult to frame a definition which will be applicable to all the varying circumstances of the married life. In these decisions we have carefully guarded statements, both positive and negative, of what are and what are not "confidential communications." Their nature is so dependent upon the existing circumstances of each case that it would be difficult to enlarge or limit these statements. In Vermont, under the common law, a divorced wife is a competent witness to testify against her divorced husband to any facts or acts, occurring during their marriage, which did not come to her knowledge in confidence growing out of the marital relation, though they may tend to show that the husband has committed a fraud, or to discredit him as a witness, or to indirectly, but not directly, show that he has been guilty of a crime. *French v. Ware*, 26 Atl. 1096, 1099, 65 Vt. 338, 345, 346.

In a criminal case, conversation between defendant and her husband, tending to show an admission of her guilt to him, and overheard by a witness who was in an adjoining room, is not such a confidential communication as the law excludes as evidence. *State v. Center*, 35 Vt. 378, 386.

In *Parkhurst v. Berdell*, 18 N. E. 123, 110 N. Y. 386, 6 Am. St. Rep. 384, Judge Earl defined the "confidential communications" between a husband and wife which are rendered incompetent as against either party by Code Civ. Proc. § 881, as "not all communications made between husband and wife when alone. They are such communications as are expressly made confidential, or such as are of a confidential nature, or induced by the marital relation. This definition is not wholly satisfactory, because it does not define what communications are of a confidential nature. It is probably impossible to give an exact and comprehensive definition of the term 'confidential communications.' Defined by exclusion, however, we think it may be safely said that unfounded charges of immorality, abusive language, and profanity towards a wife, are not such communications as the Legislature intended to protect." *Millspaugh v. Potter*, 71 N. Y. Supp. 184, 135, 62 App. Div. 521.

*Ballinger's Ann. Codes & St. § 5994*, providing that no husband or wife shall be examined for or against the other, without the other's consent, as to any communication made during marriage, was held to apply only to "confidential communications"—that is, such as are expressly made confidential, or as are of a confidential nature, or are induced by the marital relations—and not to ordinary conversations relating to matters

of business in which either party had a right to engage, such as to acquiring real estate separate from the other. *Sackman v. Thomsen*, 64 Pac. 819, 827, 24 Wash. 660.

Whether a communication is to be considered as "confidential" depends on its character as well as upon the relation of the parties. It is essential that it should be made in confidence, and with the intent that it should not be divulged. The term does not include a boastful and defiant declaration by a husband to his wife of his misconduct, and of his intention to openly persist in his course, accompanied by insolent and brutal taunts. *Seitz v. Seitz*, 32 Atl. 578, 1 Pa. 71.

Testimony by a husband, in a prosecution of a third person for fornication committed with his wife before their marriage, was not a "confidential" communication made by the one to the other during their marriage. *State v. Wiseman*, 41 S. E. 884, 1 N. C. 726.

#### CONFIDENTIAL CREDITOR.

The term "confidential creditor" has been given to creditors of a failing debtor who have furnished him with the means of obtaining credit to which he was not entitled, involving in loss the unsuspecting and fair-dealing creditors. *Gay v. Strickland* (Ala.) South. 919, 921.

#### CONFIDENTIAL POSITION.

Laws 1896, c. 112, § 10, provides that special agents appointed by the state commissioner of excise shall be deemed the "confidential" agents of the state commissioner. The duties of such agents are to perform acts in the name of the commissioner which are secret and which involve trust and confidence. It was said that, notwithstanding the civil service commission placed the position of special agent in the list where competitive examinations are required, such agents hold "confidential" positions, which are expressly excepted from the operation of Laws 1896, c. 821, providing that Union veterans shall be preferred in civil service positions. It was said in the case of *People v. Palmer*, 152 N. Y. 217, 220, 46 N. E. 328, in considering a similar statute, that such statute had reference to officials, and that the confidential relations mentioned undoubtedly had reference to official acts, including not only those that are secret, but those that involve trust and confidence which are personal to the appointing officer. *People v. Lyman*, 52 N. E. 182, 188, 157 N. C. 368.

"Confidential" is defined as having or enjoying another's confidence; having private or secret relations with another. So that a person who is a subpoena server, and whose duty is to serve subpoenas upon such persons

may be affected as witnesses in prosecutions of persons charged with the commission of crime, does not hold a confidential position in relation to a district attorney, within the provision of the statute providing that no honorably discharged Union soldier shall be removed from office except for incompetency or misconduct, except such as holding a strictly confidential position. *People v. Gardiner*, 53 N. Y. Supp. 451, 453, 1 App. Div. 204.

Under Laws 1896, c. 821, prohibiting the removal of a veteran from office, except on just cause, but providing that it shall not be construed to apply to the position of private secretary or deputy of an official of any department, or to any other person holding a strictly "confidential position," the secretary of the fire department, whose duties require him to open all letters addressed to the commissioners, to supervise the keeping of the department records, to make disbursements for office expenses, to maintain discipline in the office, and to grant leave of absence to employes, is liable to removal. *People v. Scannell*, 64 N. Y. Supp. 593, 594, 51 App. Div. 360.

#### CONFIDENTIAL RELATION.

See "Strictly Confidential Relation."

The meaning of "confidential" has two meanings—that of secrecy, and that of trust and confidence. A "confidential relation," in the sense as defined by the Century Dictionary, is a relation of parties in which one is bound to act for the benefit of the other, and cannot derive any advantage to himself from his acts relating to the interest of the other. Such a relation arises whenever a continuous trust is reposed by one person in the skill or integrity of another. Thus the assistant war clerk of the comptroller of the city of Brooklyn holds a "confidential relation" to the comptroller. *People v. Palmer*, 46 N. E. 829, 152 N. Y. 217.

Any relation may be deemed "confidential" arising from nature, or granted by law, or resulting from contract, where one party is situated as to exercise a controlling influence over the conduct and interest of another, or where, from similar relations of equal confidence, the law requires the utmost good faith, such as partnerships, principal and agent, etc. Civ. Code Ga. 1895, §

A "confidential relation," such as the law infers, always exists as between parent and child, guardian and ward, counsel and client, principal and agent. But it also exists in numerous cases where only the facts warrant the inference. Beach, Mod. Eq. Jur. says: "But when the relations existing between the contracting parties appear to be of such a character as to render it certain they do not deal on equal terms, but

that on the one side from overmastering influence, or on the other side from weakness, dependence, or trust justifiably reposed, an unfair advantage in a transaction is rendered probable, then the burden is shifted, and the transaction is presumed void; and it is incumbent on the party in whom such confidence is reposed to show affirmatively that no deception was used, and that all was fair, open, voluntary, and well understood. This principle is of very general application, and the courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise." And that is the principle announced by this court in *Appeal of Hetrick*, 58 Pa. (8 P. F. Smith) 477. *Stepp v. Frampton*, 36 Atl. 177, 179, 179 Pa. 284.

"The phrases 'confidential relation' and 'fiduciary relation' seem to be used by the courts and law-writers as convertible terms. It is a peculiar relation which undoubtedly exists between client and attorney, principal and agent, principal and surety, landlord and tenant, parent and child, guardian and ward, ancestor and heir, husband and wife, trustee and cestui que trust, executors or administrators and creditors, legatees, or distributees, appointer and appointee under powers to partners and part owners. In this and the like case the law, in order to prevent undue advantage from the unlimited confidence, affection, or sense of duty which the relation naturally creates, requires the utmost degree of good faith in all transactions between the parties." *Robins v. Hope*, 57 Cal. 493, 497 (quoting Story's Eq. Jur. 218).

The term "confidential relation" is not confined to any specific association of the parties to it. While its most frequent illustrations are between persons who are related as trustee and cestui que trust, guardian and ward, attorney and client, parent and child, husband and wife, it embraces partners and copartners, principal and agent, master and servant, physician and patient, and generally all persons who are associated by any relation of trust and confidence. *Scattergood v. Kirk*, 43 Atl. 1030, 1032, 192 Pa. 263.

All the variety of relations in which dominion may be exercised by one person over another fall within the general term "confidential relations." *Harraway v. Harraway* (Ala.) 34 South. 836.

The phrase "confidential relation," as used in the statement of a rule that, where a conveyance is made to one standing in a confidential relation to the grantor, the burden is on the grantee to show the transaction fair, is sometimes difficult of definition; but such a relation will be presumed in certain cases, as, for instance, in that of a guardian and ward, parent and child, attorney and client, principal and agent, and may exist in other relations. *Brown v. Mercantile Trust & Deposit Co.*, 40 Atl. 256, 257, 87 Md. 377.

"Fiduciary" or "confidential" relation, as used in the law relative to undue influence, is a very broad term. It has been said that it exists and relief is granted in all cases in which influence has been acquired and abused, in which confidence has been reposed and betrayed. The origin of the confidence and the source of the influence are immaterial. The rule embraces both technical fiduciary relations, and those informal relations which exist wherever one man trusts in and relies on another. *Thomas v. Whitney*, 57 N. E. 808, 810, 186 Ill. 225.

One who, prior to the last illness of the grantor in a deed, was the manager of the grantor's business, and also was connected with him by blood, stood in a confidential relation to the grantor. *Adair v. Craig*, 33 South. 902, 135 Ala. 332.

## CONFINE—CONFINEMENT.

See "Close Confinement."

The words "confined," "imprisoned," "in custody," "confinement," "imprisonment," refer not only to the actual, corporeal, and forcible detention of a person, but likewise to any and all coercive measures, by threats, menaces, or the fear of injury, whereby one person exercises a control over the person of another and detains him within certain limits. *Code Cr. Proc. Tex.* 1895, art. 171; *Ex parte Snodgrass*, 65 S. W. 1061, 1062, 43 Tex. Cr. R. 359.

The word "confine," in a statute providing that one who, without lawful authority, seizes, inveigles, or kidnaps another with intent to cause her to be securely confined or imprisoned in the state, or to be sent out of the state, etc., or detained against her will, is guilty of kidnapping, ordinarily contemplates actual force. *People v. De Leon*, 16 N. E. 46, 47, 109 N. Y. 226, 4 Am. St. Rep. 444.

"Confinement additional," as used in *Crimes Act*, § 194 (Revision, p. 261), providing that, if any offender sentenced to imprisonment shall escape, he shall on conviction suffer such additional confinement as the court shall direct, means "added punishment," and has no reference to the place, so as to require the additional confinement to be in the place from which he escaped. *State v. Strauss*, 13 Atl. 173, 174, 50 N. J. Law (21 Vroom) 345.

### Of master of vessel.

*Crimes Act*, 1 Stat. 112, § 12, declaring that the confining of the master of a ship shall be a misdemeanor means any "confinement of the master, whether by depriving him of the use of his limbs, or by shutting him up in the cabin, or by intimidation preventing him of the free use of every part of

the vessel." *United States v. Sharp* (U. S. 27 Fed. Cas. 1041, 1043; *Same v. Smith*, 1247; *Same v. Hemmer* (U. S.) 26 Fed. Cas. 259, 260.

If the person of the master of a vessel is in fact seized, or if he is in fact held by personal restraint, whether for a long or short time is immaterial, it is a "confinement" within the meaning of a statute making the "confinement of the master" of a vessel punishable, although it may be for the purpose of inflicting personal chastisement upon him. *United States v. Savin* (U. S.) 27 Fed. Cas. 988.

*Crimes Act* 1790, c. 9, § 12, providing punishment for the confinement of the master of a vessel, means a confinement by a moral, as well as physical, restraint of the master which prevents his free movement and commands of the ship, but "must be either case be an illegal restraint, for it is not an offense for the seamen to confine the master for a justifiable cause or in justifiable self-defense." *United States v. Thomson* (U. S.) 28 Fed. Cas. 102.

Assault and battery by a seaman upon the master of a vessel does not amount to "confinement" of the commander. *United States v. Lawrence* (U. S.) 26 Fed. Cas. 8.

Under *Act* 1790, c. 9, § 12, providing that "if any seaman shall confine the master of any ship or other vessel," etc., such person or persons shall on conviction be punished, etc., the word "confinement" is to be limited to mere personal restraint preventing the master and preventing the free movement of his body, nor to imprisonment in any specific place, as locking him in the stateroom or cabin. It is equally a confinement within the statute to prevent him free movement about the ship by force of intimidation, as by limiting him to walking on a particular part of the deck by threat of bodily injury or by present force. If he is surrounded and prevented from moving where he pleases, according to his right duty as master, under threats or force, or he is restrained from going to any part of the ship by an avowed determination of the crew, or of any part of them, to resist him and to employ force adequate to prevent these fall within the meaning of "confinement." *United States v. Hemmer* (U. S.) 26 Fed. Cas. 259, 260.

Under *Act* 1790, c. 9, § 12 (1 Stat. 112) prohibiting the confining of a master of a ship on the high seas, such confinement must be by a moral or physical restraint, such as threats of violence with a present force which restrains the master from his freedom of movement or command in his ship or by physical restraint of his person. In the present case the defendant seized the master and held him back against the ship's rail, against his will. This is, therefore,



the sense of the act, a clear case of confinement of the master; and it matters not whether it was for a long or short time, for a minute, or for an hour, or for a day. The law looks to the fact, and not to the duration of the confinement. But every confinement is not an offense within the act; it must be an illegal confinement or restraint. If the master is about to do an illegal act, and especially to do a felony, a seaman may lawfully confine or restrain him. So a seaman may confine a master in justifiable self-defense. *United States v. Thompson* (U. S.) 10 Fed. Cas. 102.

**Of prisoner.**

"Confinement," as used in Act March 1, 1796, for the benefit of insolvent debtors, and extending in its provisions to all persons now in confinement for debt," means actual confinement in jail, and one who has been committed on a capias ad respondendum and permitted to go at large is not "in confinement for debt" within the meaning of the statute. In *re Brush*, 6 N. J. Law (1 Halst.) 44.

"Confinement in jail," as used in a statute requiring six months' confinement in jail of one imprisoned for debt before such person should be entitled to be discharged by the jail commissioners, "does not mean free and promiscuous going at large during such time, but requires actual confinement within the jail." *State v. Lamoine*, 53 Vt. 48, 573. If the party sees fit not to abide the confinement, and by permission of the jailer goes at large ad libitum because he prefers to, all that need be said is that he will fail of qualifying himself for the interposition of the jail commissioners. *Hutchins v. Tyler*, 53 Vt. 572, 573.

The word "confined," as used in P. L. 1835-36, p. 740, providing that the court of common pleas of any county in which any person may be confined by sentence or order of any court of the commonwealth until he restore any stolen goods or chattels, or pay the value thereof, etc., shall have power to discharge such person on his making application, does not mean actual imprisonment in jail, but a man is "confined" the moment he is handed over to the sheriff under sentence. *Appeal of Luzerne County*, 19 Atl. 1063, 135 A. 468.

Rev. Code, § 1060, authorized the circuit judge to institute an inquiry into the sanity of any person in confinement under an indictment or on other than civil processes. Held, that the words "in confinement" "are used to import those who are imprisoned in the county jail awaiting a final trial, or in the actual custody of the officers of the law, distinguished from those not having been arrested, or, being arrested, have been discharged from arrest on bail. It is true that

a man's bail are looked upon as jailers of his own choosing, and for some purpose he is esteemed to be in their custody and in the prison of the court. This, however, is rather a legal fiction indulged to secure to the bail the ample right by law to detain the principal, and to surrender him in discharge of their recognizance or obligation." *Ex parte Trice*, 53 Ala. 546, 548.

**Of stock.**

The stock law requiring that stock shall be "confined" in the nighttime meant that they should be "prohibited from running at large," as that expression is used in the county herd law. *St. Louis & S. F. Ry. Co. v. Mossman*, 2 Pac. 146, 150, 30 Kan. 336; *Osborne v. Kimball*, 21 Pac. 163, 164, 41 Kan. 187.

**CONFINED TO THE HOUSE.**

The words "confined to the house," as used in an accident policy, were not intended to mean a constant restraint within doors. One may be sick and able to move about, and, on occasion, temporarily pass to the outside. A complete withdrawal from business was undoubtedly necessary, but exceptional and temporary absences from the house are not inconsistent with the idea of a general confinement within it. *Mutual Ben. Ass'n v. Nancarrow* (Colo.) 71 Pac. 423, 424.

**CONFIRM—CONFIRMATION.**

To "confirm" is to make firm or certain; to give new assurance of truth or certainty; to put past doubt. Webster. Thus "confirmation of land titles," within the meaning of a statute requiring such confirmation, imports some title previously existing, and the confirmation only becomes conclusive evidence of that which it concedes existed before. Confirmation can only be matter of evidence. It makes certain; gives new assurance; puts past all doubt. *Boggs v. Merced Min. Co.*, 14 Cal. 279, 305.

A confirmation is making firm what was before infirm, so that an instrument reciting that, in consideration of the premises, the parties have fully ratified and confirmed a sale of land, makes the title valid. *Missouri, K. & T. Ry. Co. of Texas v. Ransom*, 41 S. W. 826, 830, 15 Tex. Civ. App. 689.

In construing a deed where the language used was, "For value received of G. and B., I hereby make over and confirm unto them and their heirs," etc., the court observed that the words "make over" have no precise technical import, and must be taken in their popular sense. The word "confirm" has no application unless there is a previous estate in possession. A confirmation makes a voidable estate sure, or increases

a particular estate. There must be a previous estate on which it is to operate. It was held that the words used were sufficient to raise a trust under the statute, and to convey the premises to the bargainee in fee. *Jackson v. Root* (N. Y.) 18 Johns. 60, 68, 79.

"Confirmation" is the approbation or consent to an estate already created which, as far as it is in the confirming power, makes it good and valid; so that confirmation does not regularly create the estate, yet such words may be mingled in the confirmation as may create or enlarge an estate, but that is by force of words foreign to the business of confirmation, and which by their own force and power tend to create the estate. *People v. Law* (N. Y.) 34 Barb. 494, 511.

"Confirmation," as used in a statute regulating an assessment for improvements, and limiting the issuance of a certiorari to 30 days from the date of confirmation, does not apply to an invalid confirmation. *Evans v. Inhabitants of North Bergen Tp.*, 39 N. J. Law (10 Vroom) 456, 457.

In construing the treaty by which Spain ceded Florida to the United States, and which required that grants of land previously made by the King of Spain should be ratified and confirmed to persons in possession, which treaty was reduced to writing in both the English and Spanish languages, Chief Justice Marshall said that although the words "ratify and confirm" are properly the words of contract, stipulating for some future legislative act, they are not necessarily so, but may import that they shall be ratified and confirmed by the force of the instrument itself. It was held that the latter was the proper meaning to be given to the words in the treaty, according to the meaning shown by the Spanish copy of the treaty, the court approving the doctrine that the construction by which the English and Spanish parts of the treaty could be made to agree was that to be adopted. *Viterbo v. Friedlander*, 7 Sup. Ct. 962, 978, 120 U. S. 707, 30 L. Ed. 776.

"Confirmation" is the approbation or consent to an estate already created, which, so far as it is in the confirming power, makes it good and valid. So that a confirmation does not regularly create an estate, but such words may be mingled in the confirmation as may create or enlarge an estate; that is, by the force of such words as are foreign to the business of confirmation, and by their own force and power tend to create the estate. *People v. Law* (N. Y.) 22 How. Prac. 109, 126 (citing Gilbert, Tenures, 69). See, also, *Fauntleroy's Heirs v. Dunn*, 42 Ky. (3 B. Mon.) 594, 608.

#### As a conveyance.

"A confirmation is the conveyance of an estate or right, that one hath in or unto

lands or tenements, to another that hath possession thereof, or some estate therein whereby a voidable estate is made sure and unavoidable; or whereby a particular estate is increased or enlarged." *De Mares v. G. pin*, 24 Pac. 568, 570, 15 Colo. 76 (citing *She Touch*, 311); *Northern Pac. R. R. Co. Majors*, 2 Pac. 322, 323, 5 Mont. 111 (citing *Co. Litt.* 295b, 2 Bl. Comm. 325); *Turk Skiles*, 30 S. E. 234, 235, 45 W. Va. 82; *Langdeau v. Hanes*, 88 U. S. (21 Wall.) 521, 532, 22 L. Ed. 606.

A confirmation is of a nature similar to a release. To make sure a voidable estate is the proper form of a confirmation. Thus where, under a deed of trust, a mortgagee of the premises transferred joined and the words used are, "do grant, bargain, sell, and confirm unto the trustee," the mortgagee released his lien to the extent of the purpose specified in the deed of trust. *Turk v. Skiles*, 30 S. E. 234, 235, 45 W. Va. 82.

"A legislative confirmation of a claim to land is a recognition of the validity of such claim, and operates as effectually as a grant from the government." *Langdeau v. Hanes*, 88 U. S. (21 Wall.) 521, 530, 22 L. Ed. 606.

#### Covenant of title or warranty implied.

"Lord Eldon, in *Browning v. Wright*, 2 B. & P. 21, said the words 'confirm' granted, bargained, sold, and enfeoffed' certainly import a covenant in law. It seems now to be settled that in conveyances of deeds of bargain and sale they have such effect, but, on the creation of an estate less than freehold, a covenant of title is implied from the words of leasing." *Phillips v. City of Hudson*, 31 N. J. Law (2 Vroom) 141, 151 (citing *Rawle*, 272).

Since the case of *Frost v. Raymond* (N. Y.) 2 Caines, 188, 2 Am. Dec. 228, it has been regarded as settled in this state that neither the words "grant, bargain, sell, alien, or confirm," when used in a conveyance of real estate, import a warranty. *Butwell v. Jackson*, 9 N. Y. (5 Seld.) 535, 541.

#### As judicial sanction.

"Confirmation" of a sale by the court is but a signification in some way of its approval. Until confirmation the sale is not complete. Confirmation of a sale by the chancery court is not necessary where the acts of the parties amount to confirmation. "A confirmation by the parties themselves by their own acts, is as valid as if by the court." *Johnson v. Cooper*, 56 Miss. 606, 618 (quoting *Tooley v. Gridley*, 11 Miss. 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000).

Confirmation is the "judicial sanction of the court, and by 'confirmation' the court makes a judicial sale, a sale of its own, and the purchaser is entitled to the full benefit of his contract, which is no longer executory but executed, and which will be enforced against him and for him. As soon as the sale is confirmed by the court, there is a completed contract; the bidder becomes a purchaser, and is thenceforth regarded and treated as an equitable owner of the land, with the right reserved to compel him to comply with his contract by payment of his purchase money." *Langyher v. Patterson*, 77 Va. 470, 473.

#### **Ratification distinguished.**

"Confirmation" is a ratification of previous transaction known to be voidable. *De Hereu v. Hereu* (Ariz.) 56 Pac. 871, 876.

"Confirmation" applies to that by which what was before voidable is made valid, as where one makes valid a voidable contract of his own which he might have repudiated; while "ratification" applies to the act of another in the nature of an act of agency. While such is the primary use of the words "confirmation" and "ratification," they are often used interchangeably as synonymous. *Seiffert & Wiese Lumber Co. v. Hartwell*, 33 N. W. 333, 334, 94 Iowa, 576, 58 Am. St. Rep. 413.

#### **CONFIRMATION OF JUDGMENT.**

A "dismissal" of an appeal for want of prosecution is not a "confirmation" of the judgment below. There is a striking difference between a dismissal of the appeal and the confirmation of the judgment. Had they been "affirmed," there would have been an end to the cases; but in "dismissing" the appeals, the court places the parties in the same condition as if no appeal had been prayed or allowed. *Ashley v. Brasil*, 1 Ark. (1 Pike) 144, 149.

#### **CONFIRMED DRUNKENNESS.**

"Gross and confirmed drunkenness," as used in St. Mass. 1889, c. 447, making gross and confirmed drunkenness caused by the voluntary excessive use of opium and other drugs a ground for divorce, includes an occasional condition of drunkenness from the use of a drug, where the gross and confirmed character of the use of the intoxicant or drug has ceased for some length of time; the use must be excessive, and must produce a certain result. *Burt v. Burt*, 46 N. E. 622, 624, 168 Mass. 204.

#### **CONFIRMED HABITS OF INTOXICATION.**

"Confirmed habits of intoxication" means intoxication whenever opportunity offers.

Thus, evidence that a person had been grossly intoxicated as often as three or four times a year for a period of 12 or 15 years, and remained in that condition for 7 to 10 days on each occasion, and at such times went or was sent to the asylum for inebriates; that when the desire for drink came upon him he could not resist, and that a single glass of liquor would bring on excessive drinking and a renewal of gross intoxication; that there had been no apparent improvement in his habits in this respect, and that any undue excitement made him drink—is sufficient to justify a finding that he had contracted and was confirmed in the habit of intoxication. *Blaney v. Blaney*, 126 Mass. 205.

#### **CONFIRMED SWAMP LANDS.**

The word "confirmed" was employed in the earliest state legislation with reference to swamp lands. Gould, Dig. p. 717, § 3; Id. p. 719, § 7. In the earlier acts the authority of state officers to make sales was confined to the confirmed lands, while the right of settlement and pre-emption was provided for the unconfirmed lands. So at one time the Governor was authorized to issue a patent only upon being satisfied that the lands were confirmed. In determining whether the lands were "confirmed" within the meaning of the act, the court said, in *Hendry v. Willis*, 33 Ark. 833: "The selections have been made in fact by agents of the state, sent to the Secretary of the Interior through the Commissioner of the General Land Office, approved, and returned to the Governor. When those lists so approved have been transmitted to the Governor, they have been treated in our legislative and official acts as 'confirmed,' and so we must understand the word." *Ohism v. Price*, 54 Ark. 251, 257, 15 S. W. 883, 885, 1031.

#### **CONFISCABLE.**

All things come within the description of "confiscable personal property" which a man has in his own right, whether they be in action or possession. *Camp v. Lockwood* (Pa.) 1 Dall. 393, 403, 1 L. Ed. 192.

#### **CONFISCATE—CONFISCATION.**

The verb "confiscate" is derived from the Latin "con," with, and "fiscus," a basket or hamper, in which the Emperor's treasure was formerly kept. The meaning of the word "confiscate" is to transfer property from private to public use, or to forfeit property to the prince or state. *Ware v. Hylton*, 3 U. S. (3 Dall.) 199, 234, 1 L. Ed. 568, 584.

To "confiscate" does not mean the taking of property by the government to provide for the general wants, or protection of the public and the support of institutions of society. The term ought not to be applied

to a legitimate exercise of the powers of taxation, though the taking of property because the thing taken is required for public use may sometimes be called "confiscation." The term ordinarily implies a taking by some extraordinary process, or for some extraordinary purpose other than the general purpose of government or the general process of taxation. *State ex rel. Rosenblatt v. Sargent*, 12 Mo. App. 228, 234.

**Condemnation distinguished.**

"Condemnation" is the act of a belligerent against another belligerent, and can only be made in accordance with the principles of law recognized in the common jurisprudence of the world; while "confiscation" is the act of a sovereign against a rebellious subject, and may be effected by such means, either summary or arbitrary, as the sovereign, expressing its will through lawful channels, may please to adopt. Both are proceedings in rem, but confiscation recognizes the title of the original owner to the property which is to be forfeited, while in condemnation the tenure of the property seized is qualified, provisional, and destitute of absolute ownership. *Winchester v. United States* (U. S.) 14 Ct. Cl. 13, 48.

**CONFLICT.**

"Conflict," as used in Revision, p. 762, § 53, defining those who shall constitute the family entitled to the benefit of section 52, providing for the setting apart of certain property to the family of a deceased person out of his estate, to be the widow and child or children who shall reside in the family of the decedent at his death, and adding that nothing in section 52 shall be permitted to "conflict" with the provisions of any last will, means that the will shall be supreme where the complete execution of its provisions does not admit, expressly or impliedly, of the bestowal of the bounty provided by the statute. *Carey v. Monroe*, 35 Atl. 456, 458, 54 N. J. Eq. 632.

**CONFLICTING INTERESTS.**

In Rev. Civ. Code, § 283, declaring that every person who shall have "interests conflicting" with those of a minor in any matter, in which a family meeting may be necessary shall be incompetent to be a member of such family meeting though he be one of the nearest relatives, the lawmakers did not contemplate, by the use of the words "conflicting interest," to restrict the ground of exclusion to cases which would only fall under a narrow technical definition of those terms; it was evidently meant to extend the judge's control over the subject-matter. In *re Bothick*, 11 South. 712, 714, 44 La. Ann. 1037.

**CONFORM.**

Rev. St. Tex. 1895, art. 5043k, provided that any quarantine right fixed by the commission for a quarantine of splenic fever in cattle shall conform to the federal quarantine established by the United States Department of Agriculture. Held, that the word "conform" is used in the sense of "comply with" or "adopt," and means that the quarantine lines should be identical. *Worth & D. C. Ry. Co. v. Masterson*, 68 W. 833, 834, 95 Tex. 262.

**CONFORMABLY TO THE LAWS.**

Rhode Island Declaration of Rights guarantying to every person in the state remedy for injuries "conformably to the laws," means that a legal adequate remedy for every injury shall be supplied, but does not entitle suitors to any particular form or extent of remedy, which is necessarily subject to the legislative power of the state. In *re Nichols*, 8 R. I. 50, 54.

**CONFORMITY.**

Bonds issued by a municipal corporation reciting that the bonds have been issued "in conformity with" the statutes, import favor of bona fide purchasers a full compliance with the statutes, and preclude inquiry as to whether the precedent conditions were performed before the bonds were issued. *Independent School Dist. v. Stone*, 1 S. Ct. 84, 87, 106 U. S. 183, 27 L. Ed. 90. See also, *Bates v. Independent School Dist.* (S.) 25 Fed. 192, 194.

"Conformity," as used in Lynch's Code § 288, authorizing the clerk of the court to enter judgment in conformity with the verdict of the jury, means agreement—congruity with something else—and as applied to cases of this kind its use was intended to convey the idea that the judgment should carry out the intent of the verdict. *Eason v. Miller*, 15 S. C. 194, 200.

A certificate by a judge that he has discharged a certain duty in "conformity" with the law means that the duty was done "according to the spirit and intent" of the law. The two expressions are of equivalent import. The use of the latter phrase in the certificate would import to it no additional substance or force. *Friend v. Hamill*, Md. 298, 303.

**As indicating identity.**

"Conformity" means correspondence in character or manner; resemblance; agreement. It is often followed by the word "or" or "with," and is frequently qualified by the word "perfect," without which qualification identity is not indicated; so that Code Civ. Proc. § 540, requiring a writ of attachment

state the amount of plaintiff's claim in conformity" with the complaint, does not require the amount to be identical. *Deionis v. Etchepare*, 52 Pac. 718, 721, 120 Al. 407.

## CONFRONT.

The right given accused in criminal cases "confront" his witnesses was intended not merely to secure to him the privilege of examining witnesses in his behalf, but was in firmance of the rule of common law that in trials by jury the witness must be present before the jury and accused, so that he may be "confronted"; that is, put face to face. *State v. Behrman*, 114 N. C. 797, 805, 19 S. 220, 25 L. R. A. 449; *Westfall v. Madison County*, 17 N. W. 614, 615, 62 Iowa, 427.

As used in Const. U. S. art. 6, providing that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witnesses against him, "confronted" means examined in the presence of the accused, and be subject to cross-examination. *Cowser v. Commonwealth*, 51 Pa. (1 P. F. Smith) 332, 338.

"Confront" means to stand facing or in front of; to face; to sit face to face for examination and discovery of the truth; and as used in Const. art. 1, § 12, providing that in criminal prosecutions accused shall have the right to be "confronted" by the witnesses against him, means that the witnesses on the part of the state shall be personally present when the accused is on trial, or that they shall be examined in his presence, and be subject to cross-examination by him; so that, where defendant is required to sit in part of the courtroom out of the sight of the witness, his constitutional right is infringed. *State v. Mannion*, 57 Pac. 542, 543, 9 Utah, 505, 45 L. R. A. 638, 75 Am. St. rep. 753.

"Confronted with the witnesses," as used in the sixth amendment of the United States constitution, providing that the accused shall be confronted with the witnesses against him, does not absolutely require the presence of the witness at trial, but the taking of a deposition of a witness in the presence of the defendant, where he has the right of cross-examination, is being "confronted with the witness," and hence such deposition is admissible. *Territory v. Evans*, 23 Pac. 232, 234, 1 Idaho (Hasb.) 651, 7 L. R. A. 646.

The statement that the accused has the right to be "confronted with the witnesses against him" does not require that the accused shall in all cases be confronted with the witnesses against him upon a pending trial of the indictment, and where he has been confronted with the witnesses against him in former trial it is sufficient. *People v. El-*

*Hott*, 64 N. E. 837, 838, 172 N. Y. 146, 60 L. R. A. 318.

## CONFUSION.

The term "confusion" as used in the civil law is synonymous with "merger" as used in the common law. *Palmer v. Burnside* (U. S.) 18 Fed. Cas. 1022, 1023.

"Confusion," as applied to the condition of the minds of the jury after receiving instructions by the court, is the synonym of "bewilderment" and "distraction" in respect thereto, and no mind can be said to be "reasonably satisfied" as to the existence of a particular fact which is in a state of confusion. *Alabama G. S. R. Co. v. Hill*, 9 South. 722, 727, 93 Ala. 514, 30 Am. St. Rep. 65.

## CONFUSION OF DEBTS.

"Confusion of debts," according to Mr. Story's definition, is the concurrence of two adverse rights to the same thing in one and the same person. *Story, Prom. Notes*, § 439. Pothier says the reason given for the doctrine is that a person cannot at the same time be both creditor and debtor. Pothier on Obligations (Evans' Ed.) note 607. "But," says the same author, "in order to induce a confusion of the debt, the characters not only of debtor and creditor, but of sole debtor and sole creditor, must concur in the same person." *Woods v. Ridley*, 30 Tenn. (11 Humph.) 194, 198.

## CONFUSION OF GOODS.

The doctrine of confusion of goods has been often discussed, and may be considered as clearly and distinctly settled. If the goods of several intermingled can be easily distinguished and separated, no change of property takes place, and each party may lay claim to own. If the goods are of the same nature and value, although not capable of actual separation by identifying each particular, if the portion of each owner is known, and a division can be made of equal property and value, as in the case of a mixture of corn, coffee, tea, and wine, or other articles of the same kind and quality, then each may claim his aliquot part. *Belcher v. Cassidy Bros. Live Stock Commission Co.*, 62 S. W. 924, 926, 26 Tex. Civ. App. 60 (citing *Robinson v. Holt*, 39 N. H. 557, 563, 75 Am. Dec. 233). But if the mixture is undistinguishable, because a new ingredient is formed not capable of a just division according to the original rights of each, or if the articles mixed are of different values or quantities and the original values and quantities cannot be determined, the party who occasions, or through whose fault or neglect occurs, the wrongful mixture, must bear the whole loss. So where one permitted the hay of another to be so mixed with hay mort-



gaged to him by such other party that a sheriff, in attempting to levy an execution upon the unmortgaged hay, was unable to distinguish the one from the other, after making every reasonable inquiry and effort so to do, the mass of hay became subject to the levy. *Robinson v. Holt*, 39 N. H. 557, 563, 75 Am. Dec. 233. To the same general effect is the language of Mr. Story in his work on Bailments (9th Ed.) § 40, where he states: "But there may be a case of confusion of property neither by consent nor by willfulness, as where a bailiff, by negligence, unskillfulness, or inadvertence, mixed up his own goods of the same sort with those bailed; and there may also be a confusion arising from mere accident and unavoidable casualty. In the latter case—that of intermixture by accident—the civil law deemed the property to be held in common, whether the mixture produced a thing of the same sort or not, as if the wine of two persons were mixed by accident. The latter rule would probably be adopted by our law under like circumstances." *Belcher v. Cassidy Bros. Live Stock Commission Co.*, 62 S. W. 924, 928, 28 Tex. Civ. App. 60.

"Confusion of goods" arises where the goods of two or more persons are so intermingled that the several parts or portions can no longer be distinguished. *Hawkins v. Spokane Hydraulic Min. Co.*, 33 Pac. 40, 43, 3 Idaho (Hasb.) 650; *Hesseltine v. Stockwell*, 30 Me. (17 Shep.) 237, 1 Am. Rep. 627.

The doctrine of "confusion of goods" is derived from the civil law, and means a mixture of goods, and is generally confined to a mixture of liquids so that they cannot be separated. It also includes the mingling of other property of the same kind; but the placing of crockery, china, or other articles resembling each other on the same shelf is not a "confusion" of them. *Treat v. Barber*, 7 Conn. 274, 280.

"Confusion" is the inseparable intermixture of property belonging to different owners. If a party having charge of the property of others so confounds it with his own that the line of distinction cannot be traced, all the inconvenience of the confusion is thrown on the party who produces it, and it is for him to distinguish his own property or lose it. *Hart v. Ten Eyck* (N. Y.) 2 Johns. Ch. 62, 108.

Where logs of the plaintiff and defendant are intermingled, but are distinctly marked and their identity not lost, there was no "confusion" or "commixture" of goods in the sense applied by these terms in law. *Goff v. Brainerd*, 5 Atl. 393, 394, 58 Vt. 468.

The doctrine of "confusion of goods," which has sometimes been invoked to suppress an entire publication, is not applicable where the infringing portions can be pointed out and separately condemned. *West Pub.*

*Co. v. Lawyers' Co-operative Pub. Co.* (U. S.) 64 Fed. 360, 384, 25 L. R. A. 441.

## CONGREGATE.

Within the statute punishing a person who shall allow minors to congregate in a billiard saloon, the word "congregate" necessarily implies the joint action or co-operation of two or more persons, and it is meaningless to say that a man can "congregate" at any given place without the co-operation of some one else, or that one man by himself can form a "congregation" of any kind. *Powell v. State*, 62 Ind. 531, 532.

## CONGREGATION.

See "Religious Congregations."

A congregation professing to be Roman Catholic must not only hold the same faith but must render submission to the government and discipline of the church of which it is a branch. Obedience to the laws of the church by its members is as essential to harmony and existence as obedience to the municipal laws is essential to good order and the existence of civil government. *Smith Bonhoof*, 2 Mich. 115, 126.

"Congregation," as used in a New York statute providing for the incorporation of religious societies and congregations, means an assembly met or a body of persons who usually meet in some stated place for the worship of God and religious instruction. *Robertson v. Bullions* (N. Y.) 9 Barb. 64.

A "congregation" is an assemblage or union of persons in society for some religious purpose, to unite in the public worship of their God in such manner as they deem most acceptable to him. *Runkel v. Winemiller* (Md.) 4 Har. & McH. 429, 452, 1 Am. D. 411.

The term "congregation," in 2 Starr & Ann. St. c. 120, § 2, cl. 2, exempting from taxation all church property actually and exclusively used for public worship, if owned by the congregation, means that some body or congregation shall own the property as an organization, but does not import that others may not worship in the church by permission. *People v. Watseka Camp Meeting Ass'n*, 43 N. E. 716, 717, 160 Ill. 576.

"Congregation," as used in St. 1 W. 504, § 30, providing that every person who shall maliciously disturb any congregation, etc., shall be guilty of misdemeanor, means a congregation actively engaged in religious worship, and after the minister in charge has dismissed the congregation it ceases to be a "congregation" within the meaning of the law. "There must be some point of time when the purpose for which the congregation met is ended, and that time has always been understood to be when the head of the

congregation dismisses it." *State v. Jones*, 3 Mo. 486, 489.

The words "colleges, universities, academies, and schoolhouses," in Act July 2, 1839, exempting five acres of land, with the improvements thereon, attached to religious congregations, universities, colleges, academies, and schoolhouses belonging, etc., shows that the term "religious congregations," is to be construed not to mean "congregations," but church buildings." *Cumberland County v. Big Spring Church (Pa.)* 17 Leg. Int. 300.

The word "congregation," in the United States, means the members of a particular church who meet in one place to worship. Every church building which has been constructed for or is devoted to the purpose of providing a room or place in which the congregation of the church and other persons may assemble for devotional exercises should, if no part is devoted to secular uses, be regarded as exclusively devoted to public worship, together with the land or lot of sufficient size for the location of the building, though it should also contain rooms for the safe-keeping of wraps, umbrellas, etc., or rooms required to secure the comfort of the worshipping congregation, or a study for the pastor, or rooms for Sunday schools or suborganizations of the church. In *re Walker*, 66 N. E. 144, 147, 200 Ill. 566.

A "congregation" evidently consists of two kinds of members, one possessing the right to vote, and the other not. *State v. Crowell*, 9 N. J. Law (4 Halst.) 390, 423.

#### Church distinguished.

A congregation or religious society is that is usually denominated a "poll parish." It consists of a voluntary association of individuals or families united for the purpose of having a common place of worship, and to provide a proper teacher to instruct them in religious doctrines and duties, and to administer the ordinances of baptism, etc. The 'church,' strictly so called, comprises only that part of the congregation or society. The 'church' consists of an indefinite number of persons of one or both sexes, who have made public profession, and who are associated together, by a covenant of church fellowship, for the purpose of celebrating the sacrament and watching over the religious welfare of each other. Though a church or body of professing Christians is almost uniformly connected with such a society or congregation, the members of the church have no other or greater rights than any other members of the society who statedly attend with them for the purpose of divine worship. All questions relating to the faith and practice of the church and its members belong to the church judicatories to which they have voluntarily subjected themselves. But, as a general principle, those ecclesiastical judicatories cannot interfere with the temporal concerns of the

congregation or society with which the church or the members thereof are connected." *Baptist Church in Hartford v. Witherell (N. Y.)* 8 Paige, 296, 301, 24 Am. Dec. 223.

#### Noncommunicants.

All the ecclesiastical authorities hold that the "congregation" is composed of all noncommunicants, as well as communicants, who contribute statedly to the support of divine worship in the particular church. *Everett v. Trustees of First Presbyterian Church*, 32 Atl. 747, 749, 53 N. J. Eq. (8 Dick.) 500 (citing *Hodge, Presb. Law*, pp. 35, 37, 38, 40, 41; *Moore, Presb. Dig.* pp. 404, 405, 855).

"Congregation" might be construed as composed of all who meet together at the chapel, or in a more limited sense it might mean the members only, and it will be so limited in a devise to the congregation of a Scotch chapel in which the members exercise the right of electing the minister. *Leslie v. Birnie*, 2 Russ. 114, 120.

#### CONGREGATIONAL CHURCH.

"A 'congregational church' is a voluntary association of Christians united for discipline and worship, connected with and forming part of some religious society having a legal existence." *Anderson v. Brock*, 3 Me. (3 Greenl.) 243, 247.

"A Congregational society is generally made up first of the church, and next of those who worship with the church and favor the same views, and who assist in supporting the preaching and public worship of that church. The society, as such, often, perhaps generally, has no creed or published religious opinions distinct from the church; the church is the basis or foundation of the whole. This is true in the Congregational societies in this country generally, whether orthodox or Unitarian." *Hale v. Everett*, 53 N. H. 9, 83, 16 Am. Rep. 82.

"A Congregational society is a voluntary association from which the members might secede at pleasure, and to which, in order to perpetuate the society, new members would of course from time to time be added; and the society was associated with an organized church." *Attorney General v. Town of Dublin*, 38 N. H. 459, 574.

The leading American lexicographers make the primary meaning of the word "congregational" pertain to church government, although a secondary and popular meaning relates to doctrine. So it is held that a provision of the will of Benjamin Franklin designating the minister of the oldest Congregational church in Boston as one of the board of managers of a trust fund bequeathed by the will referred to the oldest church of that kind, well known in Boston and elsewhere in Massachusetts as Congregational, chiefly

from the form of government, and did not have reference to any doctrinal tenets which an individual church might hold in reference to the Trinity. *City of Boston v. Doyle* (Mass.) 68 N. E. 851, 854.

### CONGREGATIONALIST.

A "Congregationalist" is one who holds to the independence of each congregation or church of Christians, and the right of the assembled brethren to elect their own pastors and determine all ecclesiastical matters. *Attorney General v. Town of Dublin*, 38 N. H. 459, 541 (citing *Webst. Dict.*)

### CONGRESS.

A joint resolution, passed by Congress, suspending the execution of a certain act "until the further order of Congress," meant not only a suspension of the execution during the existence of that Congress, and until such Congress should further order, but until the further order of the legislative body called in the Constitution of the United States (article 1, § 1) a "Congress of the United States." *United States v. Stockslager*, 9 Sup. Ct. 382, 384, 129 U. S. 470, 32 L. Ed. 785.

### CONJECTURE.

"Conjecture," as to the meaning of a will, is when you suppose what would have been the testator's meaning if he had had the whole case before him, and what, if he had thought of such an event, he would have said upon it. *Jones v. Morgan*, *Fearne*, Rem. Append. 3, pp. 577, 589 (cited in *Weed v. Scofield*, 49 Atl. 22, 25, 73 Conn. 670).

### CONJOINT USE.

The words "conjoint use" are constantly applied to denote a use in the same machine or apparatus, and are to be construed as having such meaning in a bill, in a suit for the infringement of five patents, which alleges that the things patented in the said patents are so nearly allied in character as to be capable of conjoint as well as separate use. *Union Switch & Signal Co. v. Philadelphia & R. R. Co.* (U. S.) 69 Fed. 833, 834.

### CONJUNCTION.

The word "conjunction," in its ordinary meaning, is the state of being conjoined, united, or associated; union; association; league. An indictment charging that S., acting for himself and in conjunction with H., placed a letter, etc., charges H. with a participation in the offense. *Hume v. United States* (U. S.) 118 Fed. 689, 695, 55 C. C. A. 407.

### CONJUNCTIVE DENIALS.

In *Doll v. Good*, 38 Cal. 287, it is said: "If several material facts are stated conjunctively in a verified complaint, an answer which undertakes to deny their averment as a whole, conjunctively stated, is evasive. Such an answer constitutes what is called 'conjunctive denials.'" *Hardy v. Purington*, 61 N. W. 158, 159, 6 S. D. 382.

### CONJUNCTIVE OBLIGATION.

A "conjunctive obligation" is one in which the several objects in it are connected by a copulative, or in any other manner which shows that all of them are severally comprised in the contract. This contract creates as many different obligations as there are different objects, and the debtor, when he wishes to discharge himself, may force the creditor to receive them separately. *Civ. Code La.* 1900, art. 2063.

### CONJURATION.

"Conjuration" signifies a plot or compact made by persons combining by oath to do any public harm. The term is more especially used to describe personal influence with the Devil, or some evil spirit, to know any secret or effect any purpose. Conjuration is the act of using certain words or ceremonies to obtain the aid of a supreme being, the act of summoning, in a sacred name, the practice of arts to expel evil spirits, all storms, or perform supernatural or extraordinary acts. *Cooper v. Livingston*, 19 Fla. 684, 693.

### CONJURISTS.

"Conjurists" are those who, by force of certain magic words, endeavor to raise the devil and oblige him to execute their commands, and such persons are punished as rogues and vagabonds. *Tomlin's Law Dict.* 4 Bl. Comm. 60. Webster defines "conjurer" as one who attains to the secret art of supernatural or extraordinary by the aid of supreme powers; an impostor who pretends by unknown means. *Cooper v. Livingston*, 19 Fla. 684, 694.

### CONNECT—CONNECTED.

To "connect" is to join, unite, bind, or fasten together. A highway that does not intersect an existing highway at more than one of its terminal points does not connect existing highways, and is not authorized by the provisions of a statute authorizing the laying of a highway of less than a certain width to "connect" existing highways. It is not enough that one terminal point connects with an existing highway. *Bridgman v. Town of Hardwick*, 31 Atl. 33, 34, 67 Vt. 13.

"Connected to" means bound or fasten-together, united, or joined, or coupled to like a connecting rod. Claims for an air-brake emergency valve controlled by a piston connected to" said valve, and for a piston stem, a valve on the piston stem controlling the passage, etc., are not infringed by a device in which the valve is unseated by the piston, whose stem merely rests against it, which cannot be resealed by the piston without want of actual connection therewith. *Westinghouse v. New York Air-Brake Co.* 189 S. 59 Fed. 581, 605.

1 Comp. Laws, § 2032, provides that every devise, gift, or bequest of real estate hereafter made by lease, will, or testament shall be void, so far as such devise shall be purport to be for the use of any church, religious society, or for the use of any ecclesiastical or educational institution "connected or to be connected" with any such church, unless such will shall have been executed at least two months prior to the decedent's death. Held, that the Legislature, using the word "connected," must have used it according to its common and approved usage in the language, which meant "linked" or "united to another." The word "affiliate," as sometimes used, is synonymous with it. Webster defines "affiliated societies" as "local societies connected with a central society or with each other." It is evident, therefore, that the sense of a term thus used required that the related bodies should severally continue to exist, since one body could not be said to be "connected with" itself. *Allison v. Smith*, 16 Mich. 405.

#### With business of employer.

Acts 1887, c. 270, declares that the master shall be liable for injuries to his servant because of defects in the ways, works, or machinery connected with or used in the business of the employer. Held, that the phrase "connected with or used in the business of the employer" could not be taken generally, but when used in connection with ways, works, or machinery, must be understood to mean "ways, works, or machinery connected with or used in the business of the employer by his authority and subject to his control." Thus, the statute does not render a railroad company liable for injuries sustained by an employé from a defective track of another company over which he had had no control, but which it sometimes went on to get cars under a license. *Ask v. Old Colony R. R. Co.*, 31 N. E. 6, 156 Mass. 298.

#### With dwelling house.

A plantation, about five miles distant from the town in which the decedent resided at the time of his death, and from which he drew his supplies and derived his income, and the superintendence of which constituted his only business, is not "connected with

the dwelling house," within the Code of Alabama, entitling the widow to the possession or rents of the property connected with the dwelling house where the deceased usually resided, next before his death, until her dower is assigned. *McAllister's Ex'r v. McAllister*, 37 Ala. 484, 487. It does not include a plantation in the occupancy of a tenant under a contract of renting, in the country, several miles distant from the dwelling house in the city where the husband most usually resided. *Ogbourne v. Ogbourne's Adm'r*, 60 Ala. 616, 619.

#### With railroad.

Act April 23, 1861, conferring the power on railroad companies to lease other roads, providing the roads of said companies so leasing shall be directly or by means of intervening railroads "connected with each other," means, either such a union of tracks as to allow the passage of cars from one track to the other, or such intersection of roads as to admit the convenient interchange of freight and passengers at the point of intersection, and implies a closer union than can be made between railroad tracks of different gauges, since in its material sense the word "connect" means to tie together, to be joined or united. The meaning of the word is derived from the process of knitting, where the union of parts becomes very intimate, and it would be difficult to say that railroads of different gauges could be knit together. *Philadelphia & E. R. Co. v. Catawissa R. Co.*, 53 Pa. (3 P. F. Smith) 20, 59.

Const. Colo. art. 15, § 4, providing that every railroad company shall have the right with its road to intersect, "connect" with, or cross any other railroad, cannot be construed to mean the right of connecting business with business. "The railroad companies are not to be connected, but their roads. A connection of roads may make a connection in business convenient and desirable, but the one does not necessarily carry with it the other. It applies to the road as a physical structure, not to the corporation or its business." *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 4 Sup. Ct. 185, 187, 110 U. S. 667, 28 L. Ed. 291.

Act April 4, 1868, giving railroad companies the right to "connect their roads with roads of a similar character," means a mechanical connection with a road of similar gauge, so as to permit the running of cars from one road to the other. *Altoona & P. Connecting R. Co. v. Beech Creek R. Co.*, 35 Atl. 734, 735, 177 Pa. 443.

"Connected," as used in the charter of a railroad declaring that any county through which the road may run, and every county through which any other road may run with which this road may be "connected," may and are hereby authorized to aid in the construction of the same, etc., means joined to,



or afforded with facilities whereby transportation may be transferred from one road to the other. *Kenicott v. Wayne County*, 83 U. S. (16 Wall.) 452, 466, 21 L. Ed. 319.

Laws 1847, c. 270, making a railroad company which "connects" with one or more roads, and receives freight to be transported to a place on the line of a road thus connected, liable as common carriers for the delivery thereof, applies to roads connected with others wholly beyond the state, as well as roads that are within the state. *Burtis v. Buffalo & S. L. R. Co.*, 24 N. Y. 269, 273.

#### With subject-matter of action.

"Connected," as used in Code Civ. Proc. § 1201, subd. 1, providing that a counterclaim must be a cause of action connected with the subject of the action, is said, in *Carpenter v. Manhattan Life Ins. Co.*, 93 N. Y. 552, 556, to have a broad signification. The connection may be slight or intimate, remote or near, but the counterclaim must have such a relation to and connection with the subject of the action that it will be just and equitable that the controversy as to the matters alleged in the complaint and in the counterclaim should be settled in one action by one litigation, and that the claim of the one should be offset against or applied on the claim of the other. *Siebrecht v. Siegel-Cooper Co.*, 56 N. Y. Supp. 425, 426, 38 App. Div. 549.

"Connected," as used in Code Civ. Proc. in reference to counterclaims, cannot be construed to apply to a set-off in an action for unlawfully, wrongfully, and maliciously commencing an action against the plaintiff in causing him to be arrested, setting up a cause of action for deceit against the plaintiff in inducing the defendants to sell goods on credit by false representations which constituted one of the causes of action for which the prosecution of the plaintiff was instituted. *Rothschild v. Whitman*, 10 N. Y. Supp. 427, 57 Hun, 135.

In an action for an alleged wrongful taking and a conversion of a quantity of wood, defendant set up as a counterclaim, in substance, that it held a bond as a mortgage as collateral upon certain lands, which were insufficient security, as the obligor was insolvent; that plaintiff, being a second mortgagee in possession of the lands, with knowledge of the facts, and with intent to reduce and deprive defendant of its security, and to defraud it, wrongfully cut the wood in question from the said land, and that, on foreclosure of defendant's mortgage and sale thereunder, a large deficiency was left. Held, that defendant's claim was "connected with the subject-matter of the action," within Code Civ. Proc. § 501, and so constituted a proper counterclaim. *Carpenter v. Manhattan Life Ins. Co.*, 93 N. Y. 552, 556.

A cause of action set out in a counterclaim is "connected with the subject-matter of the action," within the meaning of the statute relating to counterclaims, only when it is directly connected, or so connected that a cross-bill would have been sustained or a coupment allowed before the enactment of the statute. *Akerly v. Vilas*, 21 Wis. 88, 19.

In an action for possession of a schooner alleged to have been wrongfully detained, together with damages for its detention, a claim for services rendered by defendant in caring for the schooner is "connected with the subject-matter of the action" so as to constitute a proper counterclaim. *Lapham v. Osborn*, 20 Nev. 168, 173, 18 Pac. 881.

#### CONNECTING ROADS.

"Connecting roads," as used in Act 1877, entitled "An act to prohibit monopolies," § 719q, declaring that all railroad companies shall at their terminus or intermediate point deliver to the "connecting road" all cars, etc., means "where any road at its terminus, or at any intermediate point along its line, joins another, or where two railroads have the same terminus, or where a railroad is adjacent to another and capable of being joined to it by a switch, either at its terminus or anywhere along its line where they meet and converge." *Logan v. Central R. R.*, 74 G. 684, 685.

#### CONNECTION.

See "In Connection With."

A policy of insurance insuring plaintiff's wheat on the steamer *Colorado* and "connections" was not intended to cover a casual, unusual, and unanticipated connection with a ship substituted for the occasion, on a state of things temporary in the nature, and unknown at the time the contract was made, but referred to the regular connections of the company only. *Schroeder v. Schweizer Lloyd Transport Versicherungs-Gesellschaft*, 60 Cal. 467, 478, 44 Am. Rep. 61.

St. Mass. 1897, c. 500, § 17, providing that, wherever a certain elevated railroad company is authorized to construct its road, the transit commission shall construct a tunnel of sufficient size for two railway tracks, etc., from a certain point to another point, where a suitable "connection" with surface tracks may be made, means an actual physical contact, and hence such end of the tunnel must touch the subway, or at least come in immediate connection with it, and the tracks between them must come to the same grade at the point of junction, so that the passengers may pass directly from one to the other. *Browne v. Turner*, 54 N. E. 515, 174 Mass. 150.

In construing an act granting a right way for a switch road, and reserving to the grantor "the right to make or cause to be made and built on his own lands such switch road connection with the said line of switch, provided such connection shall in no manner obstruct or interfere with the use of said switch," the courts say that the words "switch road connection" and "switch road" are used as synonymous terms. *Palfrey v. Foster*, 17 Cal. 425, 426, 47 La. Ann. 939.

#### Relations synonymous.

"Connections," as used in a will providing that in case of the death of the testator's daughter the property devised to her should revert to the testator's nearest relations or connections, is synonymous with "relations," and includes only those who could be entitled to take under the statute of distributions had the testator died intestate, and does not include the testator's widow. *Storer v. Wheatley's Ex'rs*, 1 Pa. (1847) 506, 507.

In a bequest to the two nearest female relatives or "connections of my mother," the word "connections" may have a larger significance than "relatives," and it may have been the testator's intention, when giving to relatives or connections, to include connections by marriage in default of there being any relatives by consanguinity. *Ennis v. Ennis* (N. Y.) 8 Bradf. Sur. 382, 385.

#### CONNIVANCE.

"Connivance" is the corrupt consent of one party to the commission of the acts of the other constituting the cause of divorce. *Rev. Code Cal. 1903, § 112; Civ. Code Mont. 1905, § 161.* Corrupt consent is manifested by passive permission with intent to connive at or actively procure the commission of the acts complained of. *Rev. Codes N. D. 1909, § 2745; Civ. Code S. D. 1903, § 75.*

Connivance is the corrupt consenting of one married party to that conduct of the other which afterwards complaint is made. It bars the right of divorce because no injury is received, for what a person has consented to he cannot set up as an injury. Connivance is a thing of the intent resting in the mind. It is the consenting. But the connivance may be the passive permitting of the misconduct as well as the active procuring of its commission. If the mind consents, that is connivance. *Dennis v. Dennis*, 3 Atl. 34, 36, 68 Conn. 186, 34 L. R. A. 449, 10 Am. St. Rep. 95 (citing *Ross v. Ross*, L. R. 1 Prob. & Div. 734; *Pierce v. Pierce*, 20 Mass. [3 Pick.] 299, 15 Am. Dec. 210).

Connivance is an agreement or consent, directly or indirectly given, that something unlawful shall be done by another. *Oakland Bank of Savings v. Wilcox*, 60 Cal. 126, 137.

Within the rule that connivance by a husband in his wife's adultery will bar him from a divorce, a corrupt intention is necessary to constitute connivance. The reasonable foundation of the rule that connivance prevents the libellant from maintaining his libel for adultery is that he has consented thereto, though the consent is unknown to the wife. *Robbins v. Robbins*, 5 N. E. 837, 839, 140 Mass. 523, 54 Am. Rep. 488.

Within the provisions of the Code providing that a divorce must be denied on the ground of desertion when there is an unreasonable lapse of time, such as establishes the presumption of connivance or collusion or condonation of the offense, "connivance" implies consent to the act complained of, and does not exist where the plaintiff alleged that defendant deserted and still continues such desertion without cause and against his will and without his consent, and such facts have been proved. *Thomson v. Thomson*, 53 Pac. 403, 121 Cal. 11.

"Passive sufferance and connivance" imply knowledge, and, where acts are suffered without remonstrance, it would be assent, although perhaps not choice. *Sherwood v. Titman*, 55 Pa. (5 P. F. Smith) 77, 81.

If a party who desires the testimony of a disobedient witness has "participated in his disobedience" (1 Bish. Cr. Proc. § 1191), or has been guilty of "connivance" at the fault of the witness (*Keith v. Wilson*, 6 Mo. 435, 35 Am. Dec. 443)—that is to say, has been guilty of "voluntary oversight" or "passive consent" (Webst. Int. Dict.) while the witness, by his presence, was violating the rule—all the authorities agree he should not be allowed to testify. *State v. Gesell*, 124 Mo. 531, 536, 27 S. W. 1101, 1102.

#### CONQUEST.

Conquest is the right to conquer which results from a state of war. *United States v. Castillero*, 67 U. S. (2 Black) 17, 109, 17 L. Ed. 360.

#### CONQUETS.

In the French law, "conquets" means the profits; property jointly acquired by a husband and wife during the marriage. *Picotte v. Cooley*, 10 Mo. 312, 313, 314.

#### CONSANGUINITY.

See "Collateral Consanguinity"; "Direct Consanguinity"; "Lineal Consanguinity."

Consanguinity is the having the blood of some common ancestor, and is in its nature incapable of dissolution. *Blodget v. Brinsmaid*, 9 Vt. 27, 30.

Consanguinity is blood relationship. *Holt v. Watson*, 71 S. W. 262, 263, 71 Ark. 87; *Farmers' Loan & Trust Co. v. Iowa Water Co.* (U. S.) 80 Fed. 467, 468.

"Consanguinity" means the connection or relation of persons descended from the same stock or common ancestor, and is either lineal or collateral. Lineal is that which subsists between persons of whom one is descended in a direct line from the other. Collateral kindred descends from the same stock, but differ from the lineal in that they do not descend one from the other. *State v. De Hart*, 33 South. 605, 606, 109 La. 570.

"Consanguinity," as used in a by-law of a beneficial association providing that, when no relationship by marriage or consanguinity is shown in the direction for the payment of the benefit, proof of dependency must be furnished, means blood relationship. *Tepper v. Supreme Council of Royal Arcanum*, 45 Atl. 111, 115, 59 N. J. Eq. 321.

Consanguinity is either lineal or collateral. Lineal consanguinity is that which subsists between persons of whom one is descended in a direct line from the other, as between an intestate and his father or grandfather, etc., in the direct ascending line, or between him and his son or grandson, etc., in a direct descending line; and every generation in lineal, direct consanguinity constitutes a different degree, reckoning either upward or downward. *Brown v. City of Baraboo*, 62 N. W. 921, 90 Wis. 151, 30 L. R. A. 320.

"Consanguinity" is used by Blackstone synonymously with "kindred," and is defined as the relations of persons descended from the same stock or common ancestor. Authors use the term "kin" or "kindred" as descriptive of those only who are related by consanguinity in the ordinary sense. The word may sometimes be used in a different sense, and is descriptive of those who are related by affinity. *Rector v. Drury* (Wis.) 3 Pin. 298, 302.

Consanguinity is the basis of the laws which regulate the degrees between which marriage is forbidden, the rules of succession and tutorship, recusation of judges, and the admission or rejection of persons who are offered as witnesses. *Bernard v. Vignaud*, 10 Mart. (O. S.) 482, 562.

#### Affinity distinguished.

The word "consanguinity" denotes relationship by blood as distinguished from "affinity," which is the connection existing in consequence of marriage between each of the married persons and the kindred of the other. *Tegarden v. Phillips*, 42 N. E. 549, 551, 14 Ind. App. 27; *Carman v. Newell* (N. Y.) 1 Denio, 25, 26; *Spear v. Robinson*,

29 Me. (16 Shep.) 531, 545; *Doyle v. Commonwealth*, 40 S. E. 925, 926, 100 Va. 808.

#### Computation of degrees.

"Consanguinity is the connection or relation of persons descended from the same stock or common ancestor, *vinculum personarum ab eodem stipite descendentium* (Toller, 87). Lineal consanguinity falls strictly within this definition, and is reckoned in the same way in the canon and common law; the rule being to begin at the common ancestry and reckon downward, and in whatever degree the two persons or the most remote of them is distant from the common ancestor, that is the degree in which they are related to each other." *Sweezy v. Willis* (N. Y.) 1 Bradf. Sur. 495, 498.

### CONSCIENCE.

"Conscience is defined to be internal or self-knowledge; the judgment of right and wrong, or the faculty, power, or principle within us which decides on the lawfulness or unlawfulness of actions and affections, and instantly approves or condemns them. Conscience is called by some writers the moral sense, and considered as an ordinary faculty of our nature." *People v. Stewart*, 7 Cal. 140, 143.

Every man of ordinary intelligence understands, in whatever other words he may express it, that conscience is that moral sense which dictates to him right and wrong. True, this sense differs in degree in individual members of society; but no reasonable being, whether controlled by it or not in his conduct, is wholly destitute of it. *Miller v. Miller*, 41 Atl. 277, 280, 187 Pa. 572.

#### Principle distinguished.

"Principle is the result of judgment, is tested by reason, definable by argument, and yields to the decision of an intelligent mind. Conscience springs from some internal source of self-knowledge which acknowledges no superior, bows to no authority, yields to no administration, and is governed by no law; it ignores reason, defies argument, and is unaccountable and irresponsible to all human tests and standards. In many cases conscience and principle have no connection whatever, and a man may be opposed on principle to what he conscientiously believes to be right." *People v. Stewart*, 7 Cal. 140, 143.

### CONSCIENTIOUSLY.

"Conscientiously" is a word of quality rather than of quantity, and is not a proper substitute, therefore, for the expression "beyond a reasonable doubt," in a charge as to the quantum of evidence required in a criminal case. One may conscientiously—that is, sincerely, honestly—believe, having

ference to the gravity of his belief, a thing to be true, which he does not, having reference to the strength of his belief, believe beyond a reasonable doubt. *Burt v. State*, 342, 344, 72 Miss. 408, 48 Am. St. 563; *Hammond v. State*, 21 South. 149, 74 Miss. 214; *Orr v. State* (Miss.) 18 South. 118.

## CONSCIOUS.

A charge in a criminal case that, if the prisoner had power of mind enough to be conscious of what he was doing" at the time, then he was responsible to the law for that act, was held not to be error; the court (New, C. J.) saying: "It is contended this language was incorrect, and was liable to mislead the jury, because the prisoner might be conscious of what act he was doing, and, in consequence of mental disability or disease, be incapable of refraining from its commission. But the charge has a plain English meaning, referring to the nature of the act, and, when taken in connection with other parts of the charge, this portion is not susceptible of misconstruction. All the language said referred plainly not to the mere act, but to the prisoner's consciousness of what he did as a crime. The phrase 'conscious of what he was doing' is idiomatic, and is understood to mean the real nature and true character of the act as a crime, and not to the mere act itself. As used by the judge in connection with what else he said, it was not contradictory or misleading. A memorable instance of this idiomatic use of the word 'what' is found in the language of our Saviour on the cross, when he said, 'Father, forgive them, for they know not what they do.' Clearly, the Jews knew well that they were crucifying Jesus, but their darkened minds were unconscious of the great crime they were committing." *Commonwealth v. Commonwealth*, 78 Pa. (27 P. F. 122, 123).

## CONSCRIPT—CONSCRIPTION.

See "Bureau of Conscription."

"A 'conscript' is one taken by lot from conscription or enrollment list, and compelled to serve as a soldier or sailor." *Webster's Dict.*, "Conscript." *Kneedler v. Commonwealth*, 45 Pa. (9 Wright) 238, 267.

A note for the payment of a sum of money, conditioned that, if the conscript should die a certain person, the note should be paid, and, if the conscript does not take to the person, it should remain in full force. The word was held to mean the actual placing of the person in the conscript's service, and if the conscript law should take such person. Conscription was what the parties were acting to and providing against, and con-

scription in its popular sense means a finished complete enrollment of the soldier in the public service, not merely the extension of the law so as to embrace it. It means "taken by the conscript officer for a conscription and placed in the conscript service." *Lively v. Robbins*, 39 Ala. 461, 463.

## CONSECUTIVE.

"Consecutive" is synonymous with "successive," and these words are often used interchangeably; so that a decision that a publication for 3 successive weeks must be made for a period of 21 days authorizes such holding as to a publication required to be made for 3 consecutive weeks. *Dever v. Cornwell*, 86 N. W. 227, 230, 10 N. D. 123.

The requirement that the same person shall not be elected sheriff for two consecutive full terms, in Const. art. 9, § 2, does not apply to two terms separated by a period of two years. *Gorrell v. Bier*, 15 W. Va. 311, 321.

While the term "consecutive days" primarily means that many days directly following one another, it is also defined as meaning successive; but in cases of contracts that significance should be given it which the parties evidently intended it should have. A contract providing for publication in a paper for 10 consecutive days must mean publication in consecutive numbers as such paper was published. We do not regard the word "consecutive" as any more forcible than the word "continuous." Both signify "unbroken," and the fact that the newspaper published no issue on Sunday did not render the publication other than consecutive. *City of El Paso v. Ft. Dearborn Nat. Bank* (Tex.) 71 S. W. 799, 802.

## CONSEDO.

A word used in Mexican conveyances which is to be translated as "granted." *Mulford v. Lu Franc*, 26 Cal. 83, 103.

## CONSENT.

See "Age of Consent"; "Implied Consent"; "Mutual Consent"; "Without Consent"; "Written Consent."

The word "consent" has been defined to be an agreement of the mind to what is proposed or stated by another. *Plummer v. Commonwealth*, 64 Ky. (1 Bush) 76, 78.

Consent, says Story, is the act of reason, accompanied with deliberation, the mind weighing as in a balance the good and evil on both sides. To give consent there must be capacity, therefore, to know and understand fully the nature of the act done and



its effects upon the interests of the agent. *Dicken v. Johnson*, 7 Ga. 484, 492.

Consent in law is more than a mere formal act of the mind. It is an act unclouded by fraud, duress, or sometimes even mistake. *Butler v. Collins*, 12 Cal. 457, 463.

The consent of a local government controlling public streets, on which the right to construct and operate a railroad through or on public streets is dependent, whether it be permanent or for a number of years or at the will of such local government, is what the law denominates an easement, the duration of which is dependent only upon the extent of the interest the grantor had authority to grant, and the terms of the consent itself. *Detroit Citizens' St. Ry. Co. v. City of Detroit* (U. S.) 64 Fed. 628, 644, 12 C. C. A. 365, 26 L. R. A. 667.

Where papers showing the required consent of taxpayers have been filed, and an affidavit attached to them stating that the consent in writing had been obtained of persons owning, etc., which consent has been proved and acknowledged according to the acts—specifying them definitely—but the affidavit did not state otherwise what the consent was to or for, it must nevertheless be taken to mean the consent required by the statutes designated. *Pheips v. Lewiston* (U. S.) 19 Fed. Cas. 450, 459.

The term "consent," as used in Act May 16, 1894 (P. L. 1894, p. 374), providing that a petition for the designation of route, construction, maintenance, and operation of a street railway company shall not be granted by the governing body of any municipality until there be filed with the clerk of such municipality the consent in writing of the owners of at least one-half in amount in lineal feet of property fronting on the street over which the street railway is to run is neither a license nor concession, granting to the street railway company some interest in land or right in the highway, but, on the contrary, it is the statutory mode of conferring upon the legislative body of the municipality jurisdiction over a special subject. *Currie v. Atlantic City*, 48 Atl. 615, 616, 66 N. J. Law, 140.

Acts 1888, c. 126, § 1, requiring that desertion, in order to justify a divorce, should be without the consent of the party deserted, meant without the manifested consent, and the undisclosed emotions of the deserted party did not affect his rights. *Ford v. Ford*, 10 N. H. 474, 475, 143 Mass. 577.

The "consent" of the parties in a contract of sale, as explained by Pothier, consists in the concurrence of the will of the vendor to sell a particular thing to the purchaser for a specified price, with the will of the purchaser to buy the same thing for that price. *Mactier's Adm'rs v. Frith* (N. Y.) 6

Wend. 103, 114, 21 Am. Dec. 262 (citing *Contrat de Vente*, pl. 1, § 2, art. 8, No. 31).

"Consent" implies a degree of superiority; at least, the power of preventing. It implies not merely that the person accedes to, but authorizes, an act. *Cowen v. Pad-dock*, 17 N. Y. Supp. 387, 388, 62 Hun, 622.

#### Acquiescence.

Mere acquiescence in the erection or alteration of improvements by lessees is not a consent to the lessees making such improvements. There must be something more. Consent is not a vacant or neutral attitude in respect of a question of such material interest to the property owner. It is affirmative in its nature. It should not be implied contrary to the obvious truth unless upon equitable principles the owner should be estopped from ascertaining the truth. *De Klyn v. Gould*, 59 N. H. 95, 97, 165 N. Y. 282, 80 Am. St. Rep. 719.

In a statute providing that no part of a county shall be taken from another county to form a new county, or a part thereof, without the consent of two-thirds of the qualified voters, in such part taken off, "consent" means the active concurrence of the voters, and not a passive acquiescence, and that the votes of two-thirds of the qualified voters must be had in favor of the change in order to authorize the same. *Cocke v. Gooch*, 52 Tenn. (5 Helsk.) 294, 310; *Braden v. Stump*, 16 Lea, 581 (quoted in *Philomath College v. Wyatt*, 81 Pac. 206, 217, 28 Or. 390, 28 L. R. A. 689).

Within the provision of an act conferring on contractors and others improving real property, with the consent and at the request of the owner thereof, a lien for such improvements, the word "consent" implies that the owner must either be an affirmative factor in procuring the improvement to be made, or, having possession and control of the premises, assent to the improvement in the expectation that he will reap the benefit of it. Thus, where an owner of land leased it to a corporation, the lessee to have the right to remove all buildings, etc., erected by it, the landlord was not liable for work done upon the buildings erected by the lessee, which was in no way to his interest, but was liable for work done in grading the premises at the lessee's instance, but with the landlord's knowledge, before the execution of the lease, and before possession had been given to the lessee. *Rice v. Culver*, 64 N. H. 761, 762, 172 N. Y. 60.

#### As agreement.

"The consent of the parties in a contract of sale, as explained by Pothier, consists in the concurrence of the will of the vendor to sell a particular thing to the purchaser for his specified price, with the will of the purchaser to buy the same thing for that price."

Chier Traite de Contrat de Vente." Mac-  
Adm's v. Frith (N. Y.) 6 Wend. 103,  
21 Am. Dec. 262.

As used in Gen. St. 1872, c. 120, §  
giving a lien for labor and material fur-  
nished by consent, "consent" is to be con-  
sidered as meaning an agreement or contract,  
express, at least implied. Geddes v.  
Wenden, 19 S. C. 1, 8.

A wife allowed her husband, at his  
expense, to build houses on land held  
a title of record to her sole and separate  
and the contractor furnished materials  
built the houses, supposing that the hus-  
band was the owner. It was held that the  
contractor was not entitled to a lien under  
Gen. St. § 3018, giving a mechanic's lien for  
materials furnished or services rendered un-  
der an agreement with or by the consent  
of the owner of the land. The court said:  
"Consent means unity of opinion; the ac-  
cord of minds; to think alike; to be of one  
mind. Consent involves the presence of two  
or more persons, for without at least two  
persons there cannot be a unity of opinion  
or an accord of mind or an; thinking alike.  
When the statute uses the words 'by the  
consent of the owner of the land,' it means  
that the person rendering the service or fur-  
nishing the materials and the owner of the  
land on which the building stands must be  
of one mind in respect to it. The words  
'consent of the owner' are used in the statute  
to mean something different from an agreement  
between the owner, and, while it may be urged  
that they do not require such a meeting of  
minds of the parties as would be essen-  
tial to the making of a contract, there must  
be enough of a meeting of their minds to  
make it fairly apparent that they intended  
the same thing in the same sense. It can-  
not be supposed that the statute was design-  
ed to be made a cover for entrapping a par-  
ty into seeming consent when there was no  
unity of mind. Without this degree of unanimity  
there could be no real consent. Gilman v.  
Brown, 45 Conn. 563; Flannery v. Rohr-  
yer, 46 Conn. 560, 33 Am. Rep. 36. It is  
inferred from the finding that the owner never  
consented to the thing which the plaintiff  
claims. She consented, indeed, to the build-  
ing of houses on her land by her husband  
under the promise that they should be built  
without any expense to her and without any  
interference with her interest in the land. She did not  
consent even that her husband should build  
them at her expense or upon the credit of  
her land; much less did she ever consent  
that the plaintiff should build them at her  
expense." Huntley v. Holt, 20 Atl. 469, 470, 58  
N. H. 445, 9 L. R. A. 111.

"Consent," as used in Laws 1885, c. 342,  
providing that any person who shall  
perform any labor or service or furnish any  
materials which have been used, or which  
are to be used, in erecting, altering, or re-

pairing any house, with the consent of the  
owner, may have a lien on such house and  
on the lot, arises from a contract for the  
sale of the land which obligated the vendee  
to erect houses thereon within a specified  
time, and in which the vendor agreed to ad-  
vance the vendee a designated sum to part-  
ly pay the cost of their construction. Miller  
v. Mead, 28 N. E. 387, 388, 127 N. Y. 544, 13  
L. R. A. 701.

#### Aiding, abetting, and assisting distin- guished.

There is a plain distinction between con-  
senting to a crime, and aiding, abetting, or  
assisting in its perpetration. "Aiding, abet-  
ting, or assisting" are affirmative in their  
character, while "consenting" may be a mere  
negative acquiescence, not in any way made  
known at the time to the principal male-  
factor; such consenting, though involving  
moral turpitude, not amounting to aiding,  
abetting, or assisting. Jones v. People, 46  
N. E. 723, 725, 166 Ill. 264; White v. People,  
81 Ill. 333, 337; State v. Douglass, 26 Pac.  
476, 479, 44 Kan. 618.

The words "approve of" and "consent  
to" do not, singly or combined, express the  
idea of contribution to, or procurement of,  
a felonious act, for a person may be present  
and heartily approve of an act after it is  
done without being at all willing to or capa-  
ble of aiding or advising or procuring it to  
be done, especially if it be felonious; or he  
may consent in the sense of offering no re-  
sistance to the commission of the act, or the  
slightest contribution to it of his own will;  
and therefore it is erroneous, in a homicide  
case, to instruct that, if defendant did in  
some manifest manner approve of or consent  
to the killing of deceased by another, he  
would be guilty of the crime. True v. Com-  
monwealth, 14 S. W. 684, 685, 90 Ky. 651;  
Omer v. Commonwealth, 25 S. W. 594, 596,  
95 Ky. 353.

"Consent," as a substantive, is a syn-  
onym of "assent," "acquiescence," "concur-  
rence," and means an agreement or harmony  
of opinion or sentiment. It does not imply  
any manifestation or expression of such con-  
currence, though this may sometimes be in-  
ferred from the connection in which the  
word is used; so that an instruction that,  
if murder was committed with the knowl-  
edge and consent of defendant, she was  
guilty as a principal, is erroneous in that  
it does not require any manifestation or  
overt act of such consent. Clem v. State, 33  
Ind. 418, 431 (cited in Drury v. Territory,  
60 Pac. 101, 107, 9 Okl. 398).

The word "consent" has been defined as  
an agreement of the mind to what is pro-  
posed or stated by another; but it is improp-  
erly used as tending to be misleading in an  
instruction in a homicide case, authorizing  
a conviction if deceased was murdered by

the hand of some person other than either of the prisoners, and the prisoners, or either of them, were present, knowing of and consenting to the murder, for though such word might be properly understood to mean a participation in the murder, yet it might have been understood by the jury in a different sense, so as to authorize a conviction if defendants were present and acquiesced in the homicide, without aiding or abetting its perpetration or having any participation in the deed. *Plummer v. Commonwealth*, 64 Ky. (1 Bush) 76, 78.

**As assent or permit.**

"Consent," as used in Laws 1885, c. 342, providing that any person furnishing materials or erecting buildings with the consent of the owner or his agent is entitled to a lien therefor, does not mean express authority or consent; and there is no distinction to be drawn between the meaning of the word as used and the word "assent" or "permit," though, as set forth in *Crabb's English Synonyms*, there may be a recognized and real difference between the words "assent," "consent," "permit," and "allow." He says: "As the act of an equal we consent to that in which we have a common interest with others; we permit or allow what is for the accommodation of others; we allow by abstaining to oppose; we permit by a direct expression of our will; contracts are formed by the consent of the parties who are interested. Consent respects matters of serious importance; permit and allow regard those of an indifferent nature. A parent consents to the establishment of his children; he permits them to read certain books; he allows them to converse with him familiarly. Assent may be given to anything, whether positively proposed by another or not, but consent supposes that what is consented to is proposed by some other person." *Cowen v. Paddock*, 17 N. Y. Supp. 387, 388, 62 Hun, 622.

"Consent" is an agreement to do something proposed, and differs from "assent." The word is generally used in cases where power, rights, and claims are concerned. We give consent when we yield that which we have a right to withhold." *Geddes v. Bowden*, 19 S. C. 1, 7.

The word "consent" implies some positive action, while the word "permit" implies merely passivity. *Anll v. Columbia, N. & L. R. Co.*, 20 S. E. 302, 304, 42 S. C. 431.

As used in the laws giving a lien for material furnished with the consent of the owner, the word "consent" has the same legal meaning as the word "permission," and one permitting the erection of buildings gives a "consent," within the meaning of the act. *Miller v. Meed*, 8 N. Y. Supp. 784, 785; *Rice v. Culver*, 68 N. Y. Supp. 24, 25, 57 App. Div. 552; *Hackett v. Badeau*, 63 N. Y. 476.

"Consent" is defined to be an agreement in opinion or sentiment, the being in one mind, accord, concurrence, and is synonymous with "assent." *Hawkins v. Carroll County Sup'rs*, 50 Miss. 735, 759.

"Consent" and "assent" are not synonymous terms, but, when used in the phrases "assent to the sale" and "consent to the sale," are practically synonymous. *Kornegay v. Styron*, 11 S. E. 153, 105 N. C. 14, 18.

**Conduct as indicating.**

Under Bankr. Act July 1, 1898, c. 541, § 23b, 30 Stat. 553 [U. S. Comp. St. 1901, p. 3431], providing that suits by a trustee in bankruptcy shall be brought only in those courts where the bankrupt might have brought them if proceedings in bankruptcy had not been instituted, unless by "consent" of the proposed defendant, a person against whom the trustee files a petition in the court of bankruptcy for an order requiring him to surrender property alleged to belong to the bankrupt, and who answers on the merits, gives a bond for delivery of the property, and proceeds to a hearing before the referee without objection, must be taken to have "consented" to the proceedings. In *re Connolly* (U. S.) 100 Fed. 620, 626.

In the statement that a party is liable for the reasonable value of labor performed for him without an expressed contract as to payment therefor, but with his consent, consent is often treated as meaning conduct expressive of consent. *Jacksonville Nat. Bank v. Williams*, 20 South. 931, 935, 38 Fla. 305.

The phrase "without the consent," in a divorce statute making the desertion without the consent of the party deserted a ground for divorce, means the manifested consent, and the mere undisclosed emotion of the deserted party is immaterial. *Ford v. Ford*, 10 N. E. 474, 475, 143 Mass. 577.

**Power to decide implied.**

"The usual signification of the word 'consent' implies assent to some proposition submitted. In cases of contract it means the concurrence of wills. Consent supposes a physical power to act, a moral power of acting, and a serious determination and free use of these powers." The word is used in this sense in Const. art. 15, § 9, providing that a homestead shall not be alienated without the joint consent of husband and wife, and therefore the consent of a wife to such conveyance must be at the time of its execution, and an attempted consent thereafter is of no effect. *Howell v. McCrie*, 14 Pac. 257, 261, 36 Kan. 636, 59 Am. Rep. 584; *Locke v. Redmond*, 49 Pac. 670, 671, 6 Kan. App. 76.

"Consent" means a voluntary agreement by a person in the possession and exercise of sufficient mental faculty to make an intelligent choice to do or allow some lawful

ng. A man cannot consent to the taking of his own life or to an injury which is likely to result in his own death. If a person is divested of the power of refusal for reason of total or partial want of mental faculties, the damage cannot be excused on ground of consent given, and consent given by a person in such a condition is equivalent to no consent at all; more especially so when the state of mind is well known to the party doing him the injury." *McCue v. Klein*, 60 Tex. 168, 169, 48 Am. Rep. 260.

"Consent," as used in *Mechanic's Lien Law* 1885, § 1, providing that mechanics shall have a lien for labor done with the consent of the owner of the property, implies that the owner has the power to give or withhold his consent in respect to the construction, alteration, or reparation of the building. *Vosseller v. Slater*, 49 N. Y. Supp. 480, 25 App. Div. 368 (affirmed 163 N. Y. 57 N. E. 1127); *National Wall Paper v. Sire*, 55 N. Y. Supp. 1009, 1010, 37 App. Div. 405; *Rice v. Culver*, 64 N. E. 761, 762, 130 N. Y. 60. The fact that the owner was frequently about the place and made no objection to the work as it progressed, but never gave affirmative consent to the work, and expressed to the contractor the approval or adoption of it while it progressed, did not constitute a consent to the work within the meaning of such law. *National Wall-Paper v. Sire*, 55 N. Y. Supp. 1009, 1010, 37 App. Div. 405.

#### Presence implied.

A statement in a justice's docket that a certain cause was adjourned by consent is a sufficient docket entry to show that his jurisdiction was not defeated by the adjournment being ordered in the absence of a party hereto, as the presumption will not be indulged that the parties were not present when they consented. *Hardenburgh v. Fish*, 130 N. Y. Supp. 415, 417, 61 App. Div. 333.

#### Ratification.

The consent of a borough, if necessary to enable a street railway company to change from horse power to an electric trolley system, may be by ratification as well as by previous permission. *Potter v. Scranton Traction Co.*, 35 Atl. 188, 189, 176 Pa. 271.

Consent is had and obtained, as required by Act Cong. Jan. 20, 1813, for the enlistment of a minor child, when given after the enlistment. *Commonwealth v. Camac* (Pa.) 10 Serg. & R. 87, 88.

"Consent," as used in Rev. St. Ill. 1874, c. 1094, § 9, allowing a change of venue by consent of the parties, means consent existing at the time the motion for change of venue is made, and a consent withdrawn before the making of the motion is not consent within the meaning of the statute.

*Schmidt v. Mitchell*, 84 Ill. 195, 196, 25 Am. Rep. 446.

#### As shall.

Act May 21, 1889, providing that a corporation organized for floating logs shall not be obliged to operate or furnish the use of its improvements unless the owners of such logs consent to pay the tolls provided for, does not mean that the owner must give his express promise to pay before incurring any liability. The word "consent" has no other meaning than "shall." *West Branch Logging Co. v. Strong-Deemer Co.*, 46 Atl. 290, 291, 196 Pa. 51.

#### Submission distinguished.

There is a difference between "consent" and "submission." Every consent involves a submission, but it by no means follows that a mere submission involves consent. *Regina v. Day*, 9 Car. & P. 722; *State v. Cross*, 12 Iowa, 66, 70, 79 Am. Dec. 519.

The mere submission of a child to an act of sexual intercourse can by no means be taken to be such consent as to justify the person in point of law. *State v. Cross*, 12 Iowa, 66, 70, 79 Am. Dec. 519.

#### CONSENT DECREE.

"A consent decree is the mere agreement of the parties under the sanction of the court, and is to be interpreted as an agreement and release by a party of his legal rights, not to be rashly deduced from equivocal terms." *Allen v. Richardson* (S. C.) 9 Rich. Eq. 53, 56; *Kelly v. Town of Milan* (U. S.) 21 Fed. 842, 865.

A consent decree is not, in a strict sense, a judicial sentence. It is in the nature of a solemn contract, and is in effect an admission by the parties that the decree is a just determination of their rights upon the real facts of the case, had such been proved. As a result, such a decree is so binding as to be absolutely conclusive upon the consenting parties, and it can neither be amended or in any way varied without a like consent, nor can it be reheard, appealed from, or reviewed upon a writ of error. *Schmidt v. Oregon Gold Min. Co.*, 40 Pac. 1014, 28 Or. 9, 52 Am. St. Rep. 759.

#### CONSENT JUDGMENT.

A consent judgment is where the parties agree upon the terms of the judgment—that is, as to what shall be put in the judgment; but the agreement of attorneys to an order authorizing an award of arbitrators to be filed in another county than that in which the cause was tried is not such judgment. *Henry v. Hillard*, 27 S. E. 130, 132, 120 N. C. 479.

### CONSENTABLE LINE.

A consentable line is the boundary line fixed by adjoining landowners, who, being duly apprised of their rights, establish such line as a permanent boundary and to settle a dispute in relation thereto. *Brown v. Caldwell* (Pa.) 10 Serg. & R. 114, 115, 13 Am. Dec. 660.

### CONSENT OF OWNER.

As used in Pub. St. c. 181, § 1, giving a lien for labor or materials furnished and used in the erection of a building by virtue of an agreement with or by the "consent of the owner," does not necessarily mean a consent directly and personally given by the owner of the property himself, but includes the direction or consent of one to whom the owner has delegated authority concerning the subject-matter, so that where one, having a contract for a building, sublet the plumbing contract, the materials and labor furnished under the latter contract were furnished by "consent of the owner" within the meaning of the statute. *Moore v. Erickson*, 32 N. E. 1031, 1032, 158 Mass. 71.

Where a lease provides that the lessee may at his own expense alter and repair the building leased, one who makes such alterations under a contract with the lessee does the work with the "consent of the owner," within Laws 1885, c. 342, providing for a mechanic's lien for services performed or materials furnished with the consent of the owner. *Mosher v. Lewis*, 81 N. Y. Supp. 433, 435, 10 Misc. Rep. 373.

### CONSEQUENCES.

See "In Consequence of"; "Natural Consequences"; "Probable Consequence."

An exception in an insurance policy that the company should be free of all claim for loss or damage occasioned by a derangement or breaking of the engine or machinery, or any "consequence" resulting therefrom, meant immediate or proximate, and not a remote consequence. *Orient Mut. Ins. Co. v. Adams*, 8 Sup. Ct. 68, 71, 123 U. S. 67, 31 L. Ed. 63.

"Consequences resulting therefrom," as used in a policy of marine insurance providing that the company shall not be liable "for any damage or loss received from the bursting of boilers, or from any consequences resulting therefrom," means any result of which the bursting of the boiler was the approximate cause. *Roe v. Columbus Ins. Co.*, 17 Mo. 301, 305.

### CONSEQUENTIAL CONTEMPT.

The term "consequential contempt" of court is the ancient name of what is now

known as "constructive contempt." *Ex parte Wright*, 65 Ind. 504, 508.

### CONSEQUENTIAL DAMAGES.

"Consequential damages" are such as are the necessary and connected effect of the tortious act, though to some extent depending upon other circumstances. *Civ. Code Ga.* 1895, § 3911.

"Consequential damages" are those that follow naturally, but indirectly, from a wrong act. *Pearson v. Spartanburg County*, 29 S. E. 193, 194, 51 S. C. 490.

"Consequential damage" is used to mean a diversity of things. "It means both damage which is so remote as not to be actionable, and damage which is actionable. Sometimes it is used to denote damage which, though actionable, does not follow immediately in point of time after the doing of the act complained of. This has been aptly called 'consequential damage to the actionable degree.' It is thus used to signify damage which is recoverable at common law in an action of case, as contradistinguished from an action of trespass. On the other hand, it is used to denote damage which is so remote a consequence of an act that the law furnishes no remedy to recover it. The terms 'remote damages' and 'consequential damages' are not necessarily synonymous, or to be indifferently used. All remote damages are consequential, but all consequential damages are by no means remote." *Eaton v. Boston, C. & M. R. R.*, 51 N. H. 504, 511, 12 Am. Rep. 147.

### CONSERVATOR.

In Connecticut the county courts appoint a committee of an idiot under the denomination of a "conservator" to take the oversight of his estate for his support. *Treat v. Peck*, 5 Conn. 280, 284.

### CONSERVATOR OF THE PEACE.

"Conservator of the peace" was the name of a common-law officer, which, prior to St. 1 Ed. iii, c. 16, authorizing the appointment of justices of the peace, were elected by the people. They were common-law officers, and their duties as such were to prevent and arrest for breaches of the peace in their presence, but not to arraign and try the offender. *Smith v. Abbott*, 17 N. J. Law (2 Har.) 358, 366; *In re Barker*, 56 Vt. 14, 20.

A conservator of the peace is an officer authorized to preserve or maintain the public peace, so that one who is by a statute expressly designated as "a conservator of the peace" also comes within the description of a "peace officer." In Texas the statute imposing a penalty for carrying a pistol

udes from its operation all peace officers, and Const. art. 4, § 15, provides that county judges shall be conservators of the peace. Under these statutes it was held that county judge was entitled to carry a pistol the term "conservator of the peace" being synonymous with "peace officer." *Jones v. State* (Tex.) 65 S. W. 92.

## CONSIDER.

See "It is Considered."

To "consider" means to think with care on a matter. *Lake v. Ocean City*, 41 Atl. 428, 62 N. J. Law, 160.

As used in a question to a witness, "Do farmers consider corn mature when it is to cut up?" the word "consider" is synonymous with "think" or "believe." *Richards v. Knight*, 78 Iowa, 69, 71, 42 N. W. 584, R. A. 53.

"Consider" means, primarily, to fix the mind on with a view to a careful examination; to think on with care; to ponder; to meditate on; and is so used in Const. Ohio art. 5, § 20, providing that no bill shall be "considered" or become a law unless referred to a committee, returned therefrom, and printed for the use of the members; and the provision is therefore sufficiently complied with by printing the bill before it is taken up as a subject of deliberation for debate or amendment. *Massachusetts Mut. Life Ins. Co. v. Colorado Loan Trust Co.*, 36 Pac. 793, 794, 20 Col. 1.

The words "considers himself aggrieved" as used in the statute of Wisconsin authorizing an appeal by any person who shall consider himself aggrieved by any order in relation to laying out, discontinuing, etc., a highway, is practically synonymous with "receives himself aggrieved" as used in the New York statute. The word "consider" means to think, regard in a certain aspect, rest upon, hold, or assume, while "conceive" means to believe, suppose, form a notion, or think; and hence the construction of the statute will be governed by that of the New York statute from which it is derived, and under such rule any freeholder may appeal from such order, and need not own land affected by a highway, nor have any such interest therein. *State v. Wheeler*, 72 N. W. 226, 97 Wis. 96.

Under Code S. C. § 57, providing that any person interested in any final order, sentence, or decree of any probate court, and considering himself injured thereby, may appeal therefrom, only a person who is a party to the proceedings in a court of probate can appeal, for no one can consider himself injured by any final order or decree made in a proceeding to which he is not a party. *Witte v. Clarke*, 17 S. C. 313, 323.

"The word 'consider' is often used to express an idea which exists in the mind with perfect distinctness, but it does not always convey to the understanding of the person to whom it is addressed one which is very precise. \* \* \* A person, to secure his property so that it shall not be taken in payment of his debts, may by solemn instruments transfer it to a friend, expecting to have all the essential use as he had before. If he supposes that his property has been legally transferred, he may with propriety say that he 'considers' it the property of another, although bona fide it is otherwise." *Crooker v. Trevett*, 28 Me. 271, 274.

### As adjudge.

In common parlance "consideration" means deliberation, thought, but in legal phraseology, when the word is used in speaking of the "consideration of the court," it means judgment. It is used in the latter sense in a statute providing that every purchase made in a certain manner shall be "considered" fraudulent and void, and the phrase "it is considered by the court" is equivalent to the phrase that "it is adjudged by the court." *Terrill v. Auchauer*, 14 Ohio St. 80, 85.

### As declare as a fact.

In an agreement for the occupation of land belonging to defendant upon certain terms specified, providing that when plaintiff came into possession defendant should furnish all the hay the stock required, and when the year expired plaintiff should leave enough hay to maintain the stock until grass came, or, if there was not enough, defendant should furnish it and plaintiff should pay a certain sum for it, the hay and straw to be considered as belonging to defendant from the beginning to the end of the year, and if there was any surplus of feed upon the farm it should be considered as belonging to defendant, "considered" rendered the expression equivalent to a declaration that the ownership of the hay and straw should be that of the defendant. *Vedder v. Davis*, 1 N. Y. Supp. 886, 887, 49 Hun, 611.

"Considered sound," as used in a bill of sale stating that plaintiff bought of defendant one bay horse considered sound, is not an assertion or undertaking that the horse was sound, so as to constitute a warranty. *Wason v. Rowe*, 16 Vt. 525, 528.

### As be treated as.

Rev. St. Me. c. 91, § 2, providing that a chattel mortgage shall be "considered" as recorded when received, means that after the delivery and entry the effect shall be the same as if actually spread upon the records. This provision, however, applies only when the mortgage is left with the clerk until recorded. *Jones v. Parker*, 73 Me. 248, 251.

In an act providing that persons who have resided in any township for a certain term shall be considered as legally settled in such township, the word "considered" is not used in its technical definition as to fix the mind on, with a view to a careful examination; to revolve; to think over; to ponder. The Legislature is not required to use words in law in their stricter and more accurate sense. They are supposed to use words as they are commonly used, and the act speaks to those whose duty it is to pass judgment on the question of settlement, and in declaring what shall be the determination on certain facts found it cannot be amiss to do so in language such as courts of record uniformly adopt in recording their most solemn judgments. "Ita consideratum est per curiam" serves to conclusively determine issues of law and fact. *McLorinan v. Bridgewater Tp.*, 49 N. J. Law (20 Vroom) 614, 616, 10 Atl. 187.

### CONSIDERABLE TIME.

In an instruction in an injury case against the city declaring that if the city permitted to be left for a "considerable length of time" a cut in the street, and permitted to be left for a "considerable time" a curbstone in the crossing, and that the cut and stone rendered the said work unsafe and dangerous, and the plaintiff was injured thereby, etc., the defendant was liable, etc., the phrase "a considerable length of time" was so indefinite as to form no proper test for the guidance of the jury, inasmuch as the period of 10 days and 2 months might be, in the estimation of the jury, a "considerable length of time," and, though whether the time occupied was reasonable or not was for the jury to determine, the test was the reasonableness of the time occupied, and not a "considerable length of time." *City of Lincoln v. Calvert*, 58 N. W. 115, 117, 39 Neb. 305.

Within the meaning of the rule that, to bar a right to enter lands as against a claimant thereof under erroneous boundary lines, the erroneous lines must have been agreed on between the parties claiming the land on both sides, and afterwards acquiesced in for a considerable time, what this period is has not been limited or defined, but is vague and uncertain, and must necessarily depend on the particular circumstances of each case. It has often been said that this acquiescence must have continued for a period of time scarcely less than that prescribed by the statute of limitations. *Beardsley v. Crane*, 54 N. W. 740, 742, 52 Minn. 537.

### CONSIDERABLE PROVOCATION.

The term "considerable," although generally used by text-writers in describing that condition which will reduce a homicide

from murder to manslaughter, is at best inexact and indefinite, and, unless explained by the court, well calculated to confuse or mislead the jury; for what one jurymen, in the absence of instructions on the subject, might regard considerable, would in the estimation of another fall short of that degree or character of provocation that would meet the requirement of the law. To make the best or most of the word "considerable," it certainly never was intended to mean more or less than legal provocation; and this court has expressly held that the trial court should not leave the jury to determine for themselves what would constitute legal provocation. *McClurg v. Commonwealth*, 17 Ky. Law Rep. 1339, 1341, 86 S. W. 14 (citing *Donnellan v. Commonwealth*, 70 Ky. [7 Bush] 676, 677).

The "considerable provocation" which may reduce murder to manslaughter must be such as was ordinarily calculated to excite the passions beyond control. *Lewis v. Commonwealth*, 19 S. W. 664, 665, 93 Ky. 238; *Strutton v. Commonwealth (Ky.)* 62 S. W. 875, 877, 23 Ky. Law Rep. 307.

With reference to the "considerable provocation" which will reduce murder to manslaughter, if the conduct of the persons slain would be likely to cause a reasonable person to act from mere passion, and without the exercise of reason, it constitutes an adequate cause, and what is known in law as a "considerable provocation." *People v. Olsen*, 11 Pac. 577, 4 Utah, 413.

### CONSIDERATION.

See "Additional Consideration"; "Collateral Consideration"; "Failure of Consideration"; "Good Consideration"; "In Consideration"; "Legal Consideration"; "Moral Consideration"; "Nominal Consideration"; "Pecuniary Consideration"; "Sufficient Consideration"; "Take into Consideration"; "Valid Consideration"; "Valuable Consideration."

A "consideration" for a promise "is where there is a benefit to the party promising, or a loss to the person to whom the promise is made." *Frear v. Hardenbergh (N. Y.)* 5 Johns. 272, 277, 4 Am. Dec. 356; *Cook v. Bradley*, 7 Conn. 57, 18 Am. Dec. 79; *Kemp v. National Bank of the Republic (U. S.)* 109 Fed. 48, 52, 48 C. C. A. 213. A "consideration" consists of some benefit or advantage accruing to the promisor, or of some loss or disadvantage incurred by the promisee. A consideration is an essential ingredient to the legal existence of every simple contract. *Eastman v. Miller*, 85 N. W. 635, 636, 113 Iowa, 404; *Conover v. Stillwell*, 34 N. J. Law (5 Vroom) 54; *Headley v. Leavitt (N. J.)* 55 Atl. 731, 734; *Day v. Gardner*, 7 Atl.



366, 42 N. J. Eq. (15 Stew.) 199; Powell v. Brown (N. Y.) 3 Johns. 100, 104; Ryan v. Hamilton (Ill.) 68 N. E. 781, 785; Overstreet v. Phillips, 11 Ky. (1 Litt.) 120, 123.

A "consideration" is defined to be a use, or occasion meritorious, that requires mutual recompense. *Sterling v. Sinnickson*, 5 N. J. Law (2 Southard) 756, 760.

A "valuable consideration," in a legal sense, may consist either in some right, interest, profit, or benefit accruing to one party, some forbearance, loss, or responsibility incurred, suffered, or undertaken by the other. *Mark's Church v. Teed*, 120 N. Y. 583, N. E. 1014, 1015 (citing *Currie v. Misa*, R. 10 Exch. 162; *Chit. Cont.* [9th Am. Ed.] 2 Kent, Comm. 465); *Larned v. City of Albuquerque*, 53 N. W. 105, 109, 86 Iowa, 166; *Emp. v. National Bank of the Republic* (U. S.) 109 Fed. 48, 52, 48 C. C. A. 213; *Ballard v. Burton*, 24 Atl. 769, 771, 64 Vt. 387, 16 L. A. 664.

A consideration emanating from some injury or inconvenience to the one party, or some benefit to the other, is a "valuable consideration." *Day v. Gardner*, 7 Atl. 365, 366, N. J. Eq. (5 Stew.) 199 (citing *Conover v. Ellwell*, 34 N. J. Law [5 Vroom] 54); *Trapgen's Ex'r v. Voorhees*, 12 Atl. 895, 901, N. J. Eq. (17 Stew.) 21.

A "consideration" is any benefit to the promisor, or any loss, trouble, or inconvenience to or charge upon the person to whom the promise is made. *Chicora Fertilizer Co. v. Dunan*, 46 Atl. 347, 350, 91 Md. 144, 50 R. A. 401; *Ayres v. C., R. I. & P. R. Co.*, Iowa, 478, 3 N. W. 522, 523; *Eastman v. Miller*, 85 N. W. 635, 636, 113 Iowa, 404; *Sher v. Bartlett* (Me.) 8 Greenl. 122, 123, Am. Dec. 225.

Consideration "is something of value in the eye of the law, moving from one person to another. It may be of some benefit to the latter or some detriment to the former." *New York & M. Gold Min. Co. v. Martin*, Minn. 417, 421 (Gil. 386, 388); *Thomas v. Thomas*, 2 Q. B. 851, 859; *Kemp v. National Bank of the Republic* (U. S.) 109 Fed. 48, 52, C. C. A. 213; *Ten Eyck v. Sleeper*, 67 N. J. 1026, 1027, 65 Minn. 413. Thus, where the lessee of premises is insolvent and would be unable to pay the rent required in his lease, an agreement on the part of the lessor to accept a less sum as rent, which the lessee will be able to pay, is based on a sufficient consideration. *Ten Eyck v. Sleeper*, 67 N. J. 1026, 1027, 65 Minn. 413; *Kidder v. Wake*, 45 N. H. 530, 532. There must be something given in exchange, something which is mutual, which is the inducement to the contract; and there must be a thing which is lawful and competent in value to sustain the assumption. It was an early principle of the common law that a mere voluntary act of courtesy would not uphold

an assumpsit, but a courtesy shown by a previous request would support it. *Kansas Mfg. Co. v. Gandy*, 11 Neb. 448, 450, 9 N. W. 569, 570, 38 Am. Rep. 370.

"Consideration" may be described generally as mere matter accepted or agreed on as a return or equivalent for a promise made, showing that the promise is not made gratuitously. *Donahoe v. Rich*, 28 N. E. 1001, 1003, 2 Ind. App. 540 (citing *Bish. Cont.* [Enlarged Ed.] p. 39, § 39).

The "consideration for a contract" is "the material cause of the contract, without which it will not be effectual or binding." *Streshley v. Powell*, 51 Ky. (12 B. Mon.) 178, 180 (citing *Tomlin's Law Dict.* p. 393).

"The 'consideration,' in the legal sense of the word, of a contract, is the quid quo, that which the party to whom a promise is made does or agrees to do in exchange for the promise. In a contract of insurance the promise of the insurer is to pay a certain amount of money upon certain conditions, and the 'consideration' on the part of the assured is his payment of the whole premium at the inception of the contract, or his payment of part then, and his agreement to pay the rest at certain periods while it continues in force." *Phoenix Mut. Life Ins. Co. v. Raddin*, 7 Sup. Ct. 500, 506, 120 U. S. 183, 30 L. Ed. 644.

The term "consideration," as used in the law of contracts, means "some benefit or advantage accruing to the party promising." *Forbis v. Inman, Paulson & Co.*, 31 Pac. 204, 205, 23 Or. 68 (citing *Buchanan v. International Bank*, 78 Ill. 500).

One of the broadest and perhaps best definitions of the "consideration" for a contract is the reason which moves the contracting party to enter into an agreement. *Chitty* speaks of the consideration as the "motive or inducement to make the promise." 1 Pars. Cont. 355, says "the consideration is the cause of the contract." This reason or motive, or inducement or cause, must, it is agreed on all hands, be free from illegality in the case of a contract. *Roberts v. City of New York* (N. Y.) 5 Abb. Prac. 41, 49.

Probably no rule of law has given rise to a greater multitude of cases and a greater diversity of decisions than that which requires that a simple contract cannot be supported without a sufficient consideration. Many judges, in giving opinions, and many authorized text-books, have endeavored to give a correct definition of such a consideration; but it is believed that it would be in vain to search the most complete law library for one that would be complete and logically accurate. We can deduce the rule that if a man by a promise induces the promisee or some other person on account of or for the benefit of the promisee, to do some act, or



part with some chattel, title, interest, privilege, or right, which the law regards as of some value, there is a sufficient consideration for the promise. To ascertain what the consideration of a promise is, therefore, is to discover what the promisee or such other person did or parted with on the strength of the promise. *Rice v. Almy*, 32 Conn. 297, 303.

#### **Amount of value.**

It is said that it is not essential that the consideration should be adequate in point of actual value; that it is sufficient that a slight benefit be conferred on the defendant, or at his request on a third person, at law; and that mere folly and weakness, or want of judgment, will not defeat a contract, even in equity, when the folly is not so extremely gross as that, with other facts in corroboration, it does not establish a case for relief on the ground of fraud. *Whitney v. Stearns*, 16 Me. (4 Shep.) 394, 396.

It is not always necessary that consideration for a promise should be of some value to the promisor; damage or inconvenience to the promisee is sufficient consideration, and, where the court can see that there may have been some such inconvenience, it will uphold the contract. *Williams v. Jensen*, 75 Mo. 681, 685.

A sufficient consideration for a promise arises wherever, by the act of the promisee, a benefit results to the promisor, or, at his request, to a third person, or if a promisee sustains any loss or inconvenience, or subjects himself to any charge or obligation, at the instance of the promisor, although such promisor obtains no advantage therefrom. *Wilson v. Baptist Education Soc. (N. Y.)* 10 Barb. 308, 313.

Any benefit accruing to him who makes the promise, or any loss, trouble, or discharge undergone by or charge imposed upon him to whom the promise is made, is a sufficient consideration to sustain the promise; and hence, in the absence of fraud, mere inadequacy of consideration is no ground for avoiding a contract. *Appeal of Clark*, 19 Atl. 332, 333, 57 Conn. 565 (citing *Smith's Lectures on Contracts*). "The quantum of benefit on the one hand, or the loss on the other, is immaterial." *Cook v. Bradley*, 7 Conn. 57, 62, 18 Am. Dec. 79.

Any act done by the promisee at the request of the promisor, however trifling the loss to himself or the benefit to the promisor, is a sufficient consideration for a promise made without fraud and with full knowledge of all the circumstances. *Doyle v. Dixon*, 97 Mass. 208, 213, 93 Am. Dec. 80; *Ballard v. Burton*, 24 Atl. 769, 771, 64 Vt. 387, 16 L. R. A. 664. A very slight advantage to one party, or a trifling inconvenience to the other, is a sufficient consideration to

support a contract when made by a person of good capacity who is not at the time under the influence of any fraud, imposition, or mistake. *Traphagen's Ex'r v. Voorhees*, 12 Atl. 895, 901, 44 N. J. Eq. (17 Stew.) 21 (citing *Harlan v. Harlan*, 20 Pa. [8 Harris] 303). In respect to the extent of the loss, trouble, or inconvenience to the promisee, it is immaterial that it is of the most trifling description, provided it be not utterly worthless in fact and law. *Clark v. Sigourney*, 17 Conn. 511, 517.

#### **Benefit to promisor.**

"A consideration has been well defined as 'consisting of any act of plaintiff from which the defendant or a stranger derives a benefit or advantage.' \* \* \* It is not necessary that a benefit should accrue to the person making the promise; it is sufficient that something valuable flows from the person to whom it is made, or that he suffer some prejudice or inconvenience, and that the promise is the inducement to the transaction." 5 *Lawson, Rights, Rem. & Pr.* 2244. An order for the payment of money, given by a debtor to his creditor, and accepted by the drawee, is a sufficient consideration for an agreement by the creditor to forbear suing on the original debt for a specified time. *Staver v. Missimer*, 6 Wash. 173, 175, 32 Pac. 995, 996, 36 Am. St. Rep. 142.

Consideration may arise or be created by doing or permitting something to be done to the prejudice or loss of one of the parties. So that it is not absolutely necessary that the consideration for a contract import some gain to him that makes the contract, but it is sufficient that the party in whose favor the contract is made foregoes some advantage or benefit which otherwise he might have taken or had, or suffered some loss in consequence of placing his confidence in another's understanding. *Wooldridge v. Cates*, 25 Ky. (2 J. J. Marsh.) 221, 222 (citing *Pow. Cont.* 344).

To constitute a consideration for a contract or promise, it is not absolutely necessary that a benefit should accrue to the person making the promise. It is sufficient that something valuable flows from the person to whom it is made, and that the promise is the inducement to the transaction. *Lee Silver Min. Co. v. Omaha & Grant Smelting & Refining Co.*, 26 Pac. 326, 331, 16 Colo. 118.

A consideration to a third party may be an inducement to a person to give his note, and in such case the promise is just as binding as though the promisor had received the benefit. Where, at the time of dedicating a church, A. promised verbally to pay \$50 towards liquidating the indebtedness of the society and to enable it to complete its church, and thereafter, in lieu of his promise to contribute money, he gave his note for \$50, payable to B., a trustee of the society,

had advanced money for the church, B. is entitled to recover on the note in his own name. *Wheeler v. Toof*, 2 Mich. N. P. 48.

Consideration is sufficient if injurious to promisee, whether beneficial or not to the promisor. Any damage to another, or suspension or forbearance of his right, is a consideration for an undertaking, and will make it binding, though no actual benefit accrues to the party undertaking. *Farmer v. Swart*, 2 N. H. 97, 100; *Townsley v. Sumner*, 27 U. S. (2 Pet.) 170, 181, 7 L. Ed. 386.

Any act done by the promisee, at the request of the promisor, by which the former obtains any loss, trouble, or inconvenience, constitutes a sufficient consideration for a promise, though the latter obtains no advantage therefrom. *Clark v. Sigourney*, 17 Conn. 517.

"Any damage or suspension or forbearance of a right will be sufficient to sustain a promise. 2 Kent's Comm. (12th Ed.) p. 465. *Burr v. Wilcox*, 95 Mass. (13 Allen) 273. Mr. Justice, in defining 'consideration,' says any act done at the defendant's request, and for his convenience or to the inconvenience of the plaintiff, would be sufficient. Pollock, in work on Contracts, p. 166, says 'consideration' means, not so much that one party is profiting, as that the other abandons a legal right in the present. In *Boyd v. Wainwright*, 71 Mass. (5 Gray) 554, Shaw, C. J., says an agreement therefor to forego one's legal right, or forbear collecting a debt or enforcing any other beneficial right, is a good consideration for an express promise made in writing. Such agreement may be express or implied by law." *Ballard v. Burton*, 24 Atl. 771, 64 Vt. 387, 16 L. R. A. 664.

#### Benefit to third person.

To constitute consideration, it is not absolutely necessary that a benefit should accrue to the person making the promise; it is sufficient that something valuable flows from the person to whom it is made, and that the promise is the inducement to the transaction. *Violet v. Patton*, 9 U. S. (5 Cranch) 142, 150, 3 L. Ed. 61.

#### Compensation or price.

The consideration of a contract is said by Blackstone (2 Comm. p. 444) "to be the price or motive of the contract." Justice v. *Ham's Adm'rs v. Lawrence*, 11 N. J. Law (1st.) 322, 325.

War Revenue Stamp Act 1898, Schedule requiring stamps on deeds of realty in proportion to the "consideration" or value of interest transferred, where it is conveyed subject to incumbrances, means the consideration for the conveyance, which is the price

bid. *Central Trust Co. v. Columbus, H. V. & T. R. Co.* (U. S.) 92 Fed. 919, 920.

"Consideration," as used in a statute requiring the consideration of every mortgage to be expressed therein, means something of value in the eye of the law, something in the way of price and compensation, which must be of value to the obligor or to the detriment of the obligee. *Ford v. Burks*, 37 Ark. 91, 94.

#### As demand.

Under Act 1858, § 2918, providing for a set-off by defendant of any matter arising "out of plaintiff's demand," or "out of the original consideration of any written instrument," it is held that these phrases do not mean all rights that may be asserted, of whatsoever nature, by either party, to the property, or concerning the property, which was the subject of the dealing of the parties. In the first expression quoted, the word "demand" means the assertion of a right to recover a sum of money from the defendant, and subsequently the same ideas are conveyed by the word "consideration" in the second expression. *Blair v. A. Johnson & Sons* (Tenn.) 76 S. W. 912, 914.

#### Doing what one is bound to do.

A promise to do what a person is bound to do by law is not a good consideration for another undertaking. *Eastman v. Miller*, 85 N. W. 635, 636, 113 Iowa, 404 (citing *Ayres v. C. R. L. & P. R. Co.*, 52 Iowa, 478, 8 N. W. 522).

The performance of an act which the party is under legal obligation to perform does not constitute a consideration for a new contract. Thus, where plaintiff contracted to buy defendant's house, and afterward desired to have his wife substituted as grantee, but refused to accept a conveyance at all unless defendant would guaranty him a water-tight cellar, an agreement by defendant to do so in consideration of the wife accepting the conveyance was invalid for want of consideration. *Jughardt v. Reynolds*, 74 N. Y. Supp. 152, 154, 68 App. Div. 171.

#### Fortuitous or accidental result.

Consideration, like every other part of a contract, must be the result of agreement. The parties must understand and be influenced to the particular action by something of value, or convenience and inconvenience, recognized by all of them as the moving cause. That which is a mere fortuitous result, flowing accidentally from an arrangement, but in no degree prompting the actors to it, is not to be esteemed a legal consideration. *Kirkpatrick v. Muirhead*, 16 Pa. (4 Har.) 126. In order that an extension of time shall be a good and valid consideration, it must be contracted for. In *re Dutton's Estate*, 37 Atl. 582, 586, 181 Pa. 426.

**Illegal acts.**

Consideration is the inducement to a contract. "Simple contracts require a consideration to be proven or expressed; but every bond imports in itself a sufficient consideration, though none be mentioned; but if it were really given on an illegal consideration, the obligor may plead special matter, and thus avoid the bond." *Grubb v. Willis* (Pa.) 11 Serg. & R. 107, 108.

**Love and affection.**

A deed cannot operate as a bargain and sale unless it has a pecuniary consideration, nor as a covenant to stand seised to uses unless the consideration be love and affection for a near relation or marriage. Affection for an illegitimate child is not sufficient. *Blount v. Blount*, 4 N. C. 389, 391.

**Mere expectation or possibility.**

"Consideration," as an element of a contract, is that which is given or suffered in return for the promise. It may be either gain to the promisor or loss to the promisee, as forbearance to sue on a just debt. Mere possibility, however, of loss, or that the promisor might be injured, is not sufficient to constitute a consideration. The injury depended on must appear to have happened in consequence of an agreement clearly understood. *Lemaster v. Burkhart*, 5 Ky. (2 Bibb) 25, 30.

A "consideration for a contract" is the price voluntarily paid for a promisor's undertaking. "An expectation of results often leads to the formation of a contract, but neither the expectation nor the result is the cause or meritorious occasion requiring a mutual recompense in fact or in law." *Philpot v. Gruninger*, 81 U. S. (14 Wall.) 570, 577, 20 L. Ed. 743.

**Moral obligation.**

A moral obligation is available as a consideration for an express promise or contract in those cases, and only those, where a prior legal obligation has existed, which by reason of some statute, as the statute of limitations, or a stubborn rule of law, such obligation cannot now be enforced. *Cook v. Bradley*, 7 Conn. 57, 63, 18 Am. Dec. 79.

A moral obligation to pay a debt is a sufficient consideration to uphold a promise to pay it. So where a defendant, being in the custody of the sheriff under execution, escaped, and the sheriff paid the judgment, a promise made by the defendant to repay the sheriff the amount so paid by him was based on a sufficient consideration, both on the ground of moral obligation to pay, and also because, by such payment by the sheriff, defendant was exonerated from his liability to the judgment creditor. *Doty v. Wilson* (N. Y.) 14 Johns. 378, 381.

Any legal or equitable duty is sufficient for an actual promise to pay, though no court of law or equity could enforce a moral obligation. The honesty and rectitude of the thing is a sufficient consideration. *Shenk v. Mingle* (Pa.) 13 Serg. & R. 29, 33 (citing *Hawkes v. Saunders*, Cowp. 290).

**Pre-existing or debt discharged in bankruptcy.**

"Consideration" is defined by the negotiable instruments law, § 51, as follows: "Consideration. What constitutes—Value is any consideration sufficient to support a simple contract. (a) An antecedent or pre-existing debt constitutes value; and is deemed such whether the instrument is payable on demand or at a future time." *Brewster v. Shrader*, 57 N. Y. Supp. 606, 608, 26 Misc. Rep. 480.

Discharge under the insolvent act does not make the original contract void. Where a debt is barred by a certificate of bankrupt, a promise made afterwards by the bankrupt will support an action, and it is sufficient in such case to declare upon the original consideration. Such promise could only revive a precedent good consideration, the remedy having been suspended by the discharge. The new promise is sufficiently laid by the words "ratified, renewed, and confirmed." The words "renewed the said promises" are peculiarly appropriate and amply sufficient. *Shippey v. Henderson* (N. Y.) 14 Johns. 178, 180, 7 Am. Dec. 458.

**As review.**

The consideration mentioned in rule 18 of the land office, providing that applications for change of entry or settlement must be forwarded to the commissioner of the general land office for consideration, is clearly not of the character of a review of the decision already made by the local land officers, but is in the nature of an original consideration of the subject by the general land office, to which office the final decision belongs. *Cosmos Exploration Co. v. Gray Eagle Oil Co.*, 23 Sup. Ct. 692, 696, 190 U. S. 301, 47 L. Ed. 1064.

**Value received.**

Where the plaintiff, who had recovered a judgment in a justice court and taken out execution, directed the constable to take security from the defendant rather than carry him to jail, and the constable took as security the undertaking of a third person, indorsed on the execution, by which he promised to pay the debt and costs in the life of the execution "for value received," such undertaking was based on sufficient consideration. The words "value received" are a sufficient consideration, at least prima facie, and here was a good consideration in fact. *Hinman v. Moulton* (N. Y.) 14 Johns. 466, 467.

**As the whole consideration.**

Where a New York statute provides that, where a grant is made to one person and the consideration is paid by another, no use or trust shall result to the latter, and another section provides that the former section shall not extend to cases where the alienee named in the conveyance shall have taken the same in his name without the consent or knowledge of the person paying the consideration, the word "consideration" will be construed to mean the whole consideration, and not a part of it; and hence, where a wife paid about one-tenth of the consideration for a conveyance to her husband, which he agreed to take in her name, such payment did not vest in her any estate in the land. *Schierloh v. Schierloh*, 42 N. E. 409, 410, 148 N. Y. 103.

**CONSIDERATUM EST PER CURIAM.**

A judgment, though pronounced by the judges, is not their determination and sentence, but the sentence and determination of the law, which depends, not upon the arbitrary opinion of the judge, but upon the settled and invariable principles of justice, and is the remedy prescribed by law for the redress of injuries. And therefore the style of a judgment is not "that it is ordered or resolved by the judges"—for then the judgment might be their own—but "it is considered," ("consideratum est per curiam"), which implies that the judgment is not their own, but the act of the law pronounced and declared by the court upon determination and inquiry. Accordingly, where a judgment was entered below, "Ordered by the court that the said defendant," etc., there was no judgment, and no appeal would lie. *Baker v. State*, 3 Ark. (3 Pike) 491, 492.

**CONSIGN.**

"To 'consign,' in the mercantile law, is ordinarily to send or transmit the goods to a merchant or factor for sale." *Powell v. Wallace*, 25 Pac. 42, 43, 44 Kan. 656.

In mercantile law, to "consign" is ordinarily to send or transmit goods to a merchant or factor for sale. The original meaning of the word "consign," which is of French origin, is to deliver or transfer, as a charge or trust. When used in connection with a vessel, it generally refers to the goods which are shipped by her, for the vessel itself is in the charge of the master. *Gillespie v. Winberg* (N. Y.) 4 Daly, 318, 320.

The words "consign" and "consigned," employed in letters relating to the shipments of goods by the consignor to another for the purpose of sale, are used in their commercial sense, and mean that the property was in-

trusted or committed to the other for care or sale by the one, or the purchase by the other. *Sturm v. Boker*, 14 Sup. Ct. 99, 103, 150 U. S. 312, 37 L. Ed. 1093.

The term "consign," as used in a contract by which a company agreed to supply the plaintiff on his requisition with cash and raw material in advance, to be charged to him against manufactured goods consigned to them for sale, was to be construed in its obvious and common meaning, implying title in the consignor. *Dittmar v. Norman*, 118 Mass. 319, 824.

The word "consigned," in a commercial sense, carries a decided implication that the property consigned is not the property of the consignee. The invoice carries no implication of ownership, it being well understood that an invoice usually accompanies goods that are consigned to a factor for sale, as well as in case of purchase. *Rolker v. Great Western Ins. Co.* (N. Y.) 4 Abb. Dec. 76, 83.

To "consign" is to deposit with another, to be sold, disposed of, or cared for, as merchandise or movable property. *Stand. Dict.* To "consign," in mercantile law, is to send goods to an agent, commission merchant, correspondent, or factor to be sold, stored, etc. *F. F. Ide Mfg. Co. v. Sager Mfg. Co.*, 82 Ill. App. 685, 687 (quoting *Rapalje & L. L. Dict.*; *Standard Dict.*).

**CONSIGNEE SIX MO.**

A bill of goods sold, in which the words "consigned six mo." stand by themselves, conveys no distinct idea to a stranger to the dealings between the parties, but evidence is admissible to show that it meant that the goods could be returned if not sold within six months. *George v. Joy*, 19 N. H. 544, 547.

**CONSIGNEE.**

The person to whom freight is to be delivered is called the "consignee." *Civ. Code Cal.* 1903, § 2110; *Civ. Code Mont.* 1895, § 2800; *Rev. St. Okl.* 1903, § 662; *Rev. Codes N. D.* 1899, § 4186; *Civ. Code S. D.* 1903, § 1539.

"Consignee," in its ordinary mercantile sense, means the person to whom a shipment of merchandise is addressed. *Gillespie v. Winberg* (N. Y.) 4 Daly, 318, 320.

A "consignee" is a person to whom merchandise or personal property of any kind is transmitted for the purposes of sale. *Commonwealth v. Harris*, 32 Atl. 92, 93, 168 Pa. 619; *Powell v. Wallace*, 25 Pac. 42, 43, 44 Kan. 656.

The term "consignee" means a purchaser of goods to whom they are shipped. *Memphis & L. R. R. Co. v. Freed*, 38 Ark. 614, 622.

**As bailee, factor, or owner.**

A consignee differs from an ordinary bailee mainly in that he is authorized to sell in the ordinary course of business, but if he sells out of the ordinary course of business he abuses his powers, and against this abuse the consignor is protected like any other bailor. *Romeo v. Martucci*, 45 Atl. 1, 3, 72 Conn. 504, 47 L. R. A. 601, 77 Am. St. Rep. 327.

A consignee of goods is a factor, within the meaning of the embezzlement statutes. *Thompson v. Beacon Valley Rubber Co.*, 16 Atl. 554, 558, 56 Conn. 493.

The term "consignee" is one to whom goods are consigned. The term is nearly synonymous with "factor"—"a person to whom goods are sent for sale or safe-keeping." The term is not synonymous with "owner," though the owner of goods may often be the consignee thereof. *Lyon v. Alvord*, 18 Conn. 66, 80.

The consignee of imported goods is the "owner" thereof, for the purpose of a collection of the duties thereon under section 3058, Rev. St., as amended by Act Feb. 23, 1887, c. 221, 24 Stat. 415 [U. S. Comp. St. 1901, p. 2005], although the consignor, or any other party who, at the request or with the consent of the consignee, procured the importation, has failed to obey the consignee's instructions as to the payment of the duties thereon, or to comply with the terms of the contract between them in regard to the purchase and consignment of the goods. *United States v. Bishop* (U. S.) 125 Fed. 181, 183, 60 C. C. A. 123.

**CONSIGNEE'S RISK.**

See "At Owner's Risk."

**CONSIGNMENT.**

As convey, see "Convey."

"Consignment" imports a sending to, or transferring or delivering of, property by one into the possession of another. *Block v. Columbian Ins. Co.*, 42 N. Y. 893, 403 (affirming 26 N. Y. Super. Ct. [3 Rob.] 296).

A consignment of goods for sale is ordinarily a bailment. The word "consignment" does not imply a sale. The very term imports an agency, and that the title is in the consignor. *Harris v. Coe*, 41 Atl. 552, 554, 71 Conn. 157 (citing *Benj. Sales* [6th Ed.] 7; *Sturm v. Boker*, 150 U. S. 312, 326, 14 Sup. Ct. 99, 37 L. Ed. 1093; *Rolker v. Ins. Co.*, 42 N. Y. 23; *Powell v. Wallace*, 44 Kan. 656, 659, 25 Pac. 42).

In a writing on a printed letter head describing the writer as a commission merchant, suggesting a consignment, and offering to handle grapes on commission or buy

outright, "consignment" should be construed in the sense of shipment, and not as a consignment to a factor. *Commonwealth v. Harris*, 32 Atl. 92, 93, 168 Pa. 619.

**CONSIGNOR.**

The person who delivers the freight to the carrier is called the "consignor." Civ. Code Cal. 1903, § 2110; Civ. Code Mont. 1895, § 2800; Rev. St. Okl. 1903, § 662; Rev. Codes N. D. 1899, § 4186; Civ. Code S. D. 1903, § 1539.

"Consignor," in the original mercantile acceptance of the word, signifies a shipper of merchandise. *Gillespie v. Winberg* (N. Y.) 4 Daly, 318, 320; *Hardy v. Munroe*, 127 Mass. 64.

"Consignor" is a term used to mean a vendor who ships goods. *Memphis & L. R. Co. v. Freed*, 38 Ark. 614, 622.

**CONSIST OF.**

"The words 'consisting of' are not synonymous with the word 'including,' but, where something is described as consisting of certain other things, it always implies that there may be others which are not mentioned." *Farish v. Cook*, 6 Mo. App. 323, 331.

**CONSISTENT.**

"Consistent" means not contradictory; compliable; accordant. *O'Malley v. Luzerne County* (Pa.) 3 Kulp, 41, 46.

"Consistent" means compatible; congruous; standing together in agreement. The test on the question of inconsistency between the charter of a railroad company and the general law relating to condemnation of lands for a right of way is this: Can the requirements of both the charter and the general act be followed out and complied with in one case? *Vischer v. Hudson River R. Co.* (N. Y.) 15 Barb. 37, 44.

A charge to a jury, reciting that reasonable care to prevent injury to passengers on an elevator is the highest degree of care "consistent with the possibility of injury," means that the care must be commensurate with or in proportion to the possibility of injury presented by the particular situation. *Mitchell v. Marker* (U. S.) 62 Fed. 139, 142, 10 C. C. A. 306, 25 L. R. A. 83.

**CONSISTENT DEFENSES.**

The expression "consistent defenses," as used in a statute providing that defendant may set forth by answer as many defenses as he may have, and that different "consistent defenses" may be separately stated in the same answer, means defenses which

are not inconsistent with each other in fact, without reference to technical conclusions or implications of law which may be drawn or arise therefrom, and that in determining this right two statements or defenses should never be held to be inconsistent if both of them may be true. *Lake Shore & M. S. Ry. Co. v. Warren*, 6 Pac. 724, 725, 3 Wyo. 184.

In discussing the allowance of pleas apparently inconsistent, but where no statement made is inconsistent with another express statement made in the pleas, the court said: "If we were to limit our statutory allowance of consistent defense by the strict logic of the old special pleas in bar, all special defenses would be cut off when the cause of action was denied, for such special defenses are technically supposed to confess and avoid, though in fact they may not confess at all. Such an interpretation of the statutes should not be adopted if there is any other that will give the party his clear right to several defenses. A special defense is not necessarily inconsistent with denial. For instance, suppose A. sues B. on a note. B. denies its execution in the nature of a special non est factum under the old system, and afterwards alleges payment or release. He did not thereby deny the existence of the paper, and an averment of payment or any other matter of discharge is not necessarily inconsistent in fact with original non-liability, for men sometimes adjust demands for which they are not liable. If, notwithstanding, the demand is put in suit, it would be unjust to deprive a defendant of every lawful defense. The right of a full defense will be secured if the consistency required be one of fact merely, and if two or more defenses are held to be inconsistent only when the proof of one disproves the other." *Nelson v. Brodhack*, 44 Mo. 596, 100 Am. Dec. 328 (cited in *Smith v. Doherty*, 60 S. W. 380, 381, 109 Ky. 616).

## CONSOCIATIO.

"Grotius calls a corporation 'consociatio,' which signifies association. He applies the term to a people, which is properly considered a corporation in respect to its power of individual action and ownership." *Thomas v. Dakin* (N. Y.) 22 Wend. 9, 104.

## CONSOLIDATE—CONSOLIDATION.

To "consolidate" means something more than rearrange or redivide. In a general sense, it means to unite into one mass or body, as to consolidate the forces of an army or various funds. In parliamentary usage, to "consolidate" two bills is to unite them into one. In law, to "consolidate benefices" is to combine them into one. *Independent Dist. of Fairview v. Durland*, 45 Iowa, 53, 56.

### Of actions.

"Consolidation" is the uniting in one suit of two or more actions separately begun. "All courts feel a strong desire to prevent the accumulation of cases and the bringing of useless suits, and it is to further this object that consolidation is effected. In ordinary cases, when actions might have been comprised in same writ, it is the duty of the court, on motion of either party, on payment of the costs which have then accrued, to order a consolidation, unless the party shows that the same defense does not apply in all cases." *Powell v. Gray*, 1 Ala. 77, 79.

Where several actions or suits depend on the same questions and substantially the same evidence, a rule may be had that the causes be consolidated, and that all the causes abide the event and final determination of the one which the plaintiff may elect to notice for trial, and whatever judgment may be finally rendered in the cause thus noticed for trial will be entered in all the other causes as a final determination of them. *Jackson v. Chamberlin* (N. Y.) 5 Cow. 282.

Consolidation of actions will be ordered where separate suits are brought on notes and contracts made by the same person at the same time, and where the defense is or must be the same in law. *Thompson v. Shepherd* (N. Y.) 9 Johns. 262.

### Of corporations.

When the rights, franchises, and effects of two or more corporations are by legal authority and agreement of the parties combined and united into one whole and committed to a single corporation, the stockholders of which are composed of those (so far as they choose to become such) of the companies thus agreeing, this is, in law and according to common understanding, a "consolidation" of such companies, whether such single corporation, called the "consolidated company," be a new one then created, or one of the original companies continuing in existence with only larger rights, capacities, and property. *Meyer v. Johnston*, 64 Ala. 603, 656.

Mr. Beach says: "The word 'consolidation' is used to denote any conjunction or union of the stock, property, or franchises of two or more corporations, whereby the conduct of their affairs is permanently or for a long period of time placed under one management, whether the agreement between them be by lease, sale, or other form of contract, and whether its effect be the dissolution of either of the companies, or whether one of them be dissolved and its existence be merged in the corporate being of the other, or whether it result in the dissolution of both companies, and the creation of a new corporation out of such portions of

the original companies as enter into the new." 1 Beach, Priv. Corp. § 326. Where a street railway company transfers all its property and business to another company, in consideration of stock and bonds of the latter issued to the stockholders and bondholders of the former to replace its stock and bonds which were surrendered and canceled, no money being paid, such transaction, as to the creditors of the former company, should be considered a consolidation of the companies, by which the latter becomes liable for the debts of the former. Such transaction is termed in England an "amalgamation." *Shadford v. Detroit, Y. & A. A. Ry.*, 89 N. W. 960, 962, 180 Mich. 300.

The term, where such phrase as "consolidation by merger" occurs, has, as it seems to us, been carelessly confounded with the term "amalgamation" as used in England. "Amalgamation," in the English sense, probably means about what "merger" does with us, but it is not "consolidation" in any proper sense of the term. It is in the interest of clearness of definition that "consolidation" should be limited to signify such union of two or more corporations as necessarily results in the creation of a third new corporation. Thus, in Brice's *Ultra Vires*, in a learned note, p. 538, it is said the term "amalgamation" is seldom applied to corporations in this country. That which takes its place as much as any is "consolidation." "Consolidation" would be inapplicable to a union of two or more companies in such way that one of the original corporations was continued in existence, while the others were merged or absorbed in it. The absorption of one corporation by another would, according to some of the decisions, be an "amalgamation" in England, but it would not be a "consolidation" here. The legal effect of a consolidation is to extinguish the constituent companies, and create a new corporation with proper liabilities and stockholders derived from those then passing out of existence. *Adams v. Yazoo & M. V. R. Co.*, 24 South. 200, 211, 77 Miss. 194, 60 L. R. A. 33 (citing *McMahan v. Morrison*, 16 Ind. 172, 79 Am. Dec. 418; *Lauman v. Lebanon Val. R. Co.* 30 Pa. [6 Casey] 42, 72 Am. Dec. 685; *Clearwater v. Meredith*, 68 U. S. [1 Wall.] 25, 17 L. Ed. 604; *Atlantic & Gulf R. Co. v. Georgia*, 98 U. S. 359, 361, 25 L. Ed. 185; *Keokuk & W. R. Co. v. Missouri*, 152 U. S. 301, 308, 14 Sup. Ct. 592, 38 L. Ed. 450; *St. Louis, I. M. & S. R. Co. v. Berry*, 113 U. S. 465, 466, 5 Sup. Ct. 529, 28 L. Ed. 1055).

The term "consolidation" is an elastic one, and may include a union of two or more corporations into a new one with a different name, with or without extinguishing the constituent corporations; or the merging of two or more corporations into one

existing corporation under the name of the latter. *Pingree v. Michigan Cent. R. Co.*, 76 N. W. 635, 643, 118 Mich. 314, 338, 53 L. R. A. 274 (citing *Elllott, R. R. § 335*).

Consolidation of the stock of two companies results in the creation of a new corporation, rather than in the merger of the two corporations; and under Acts 1882, c. 932, § 25, whereby a railroad company is authorized to "consolidate" with any other railroad company, a "merger" of the two companies is not authorized. *Adams v. Yazoo & M. V. R. Co.*, 24 South. 200, 205, 77 Miss. 194, 60 L. R. A. 33.

The word "consolidation" is used to denote any conjunction or union of the stock, property, or franchises of two or more corporations, whereby the conduct of their affairs is permanently or for a long period of time placed under one management, whether the agreement between them be by lease, sale, or other form of contract, and whether it is effected by the dissolution of either of the companies, or whether one of them be dissolved and its existence merged in the corporate being of the other, or whether it result in the dissolution of both companies and the creation of a new corporation out of such portions of the original companies as enter into the new. *People v. People's Gaslight & Coke Co.* (Ill.) 68 N. E. 950, 953.

"Consolidation" of corporations, as generally understood, means something more than the mere subscribing by one company for stock in another. It implies a blending of all assets under a common control, and the assuming by the joint responsibility of all the liabilities of each; the creation of a new corporate body which displaces and destroys an individual existence of its predecessors. *Buford v. Keokuk Northern Line Packet Co.*, 3 Mo. App. 159, 171.

Corporations can only consolidate when authorized by law, and then in the manner provided by law, and where there is no law in the territory, when certain transactions occurred, authorizing the consolidation of corporations, the fact that any of the parties may have designated the acts done as a "consolidation" could have no legal effect. One corporation may, in contemplation of closing up its business, sell its assets, property, and business to another corporation, and make arrangement for the liquidation of its liabilities, but this does not constitute a "consolidation." *Overstreet v. Citizens' Bank*, 72 Pac. 379, 383, 12 Okl. 383.

#### Of Laws.

"Consolidate," as used in the title of Laws 1893, Act No. 118, to consolidate the laws relative to penal institutions and the government and discipline thereof, and to repeal all acts inconsistent therewith, implied an intention on the part of the Legis-

lature to include the entire control over the subject, and, the provisions of the act being intended to cover the entire management of such penal institutions, the same did not violate Const. art. 4, § 25, providing that the act consolidated and the sections altered or amended shall be re-enacted and published at length. *Ellis v. Parsell*, 58 N. W. 839, 840, 100 Mich. 170.

The use of the word "consolidate" in the act of 1897 entitled "An act to revise, amend, and consolidate the laws for the incorporation of the ecclesiastical bodies," indicates very clearly that the purpose of the Legislature was to collect in one act the law relating to the subject. *Graham v. Muskegon County Clerk*, 118 Mich. 571, 572, 74 N. W. 729, 730 (citing Attorney General v. Parsell, 100 Mich. 170, 58 N. W. 839).

#### Of railroads.

"Consolidation," as used in Const. Ill. art. 11, § 11, forbidding the consolidation of parallel railroads, is used in the sense of "joined" or "united," so that a lease of the parallel and competing railroad for 10 years is a consolidation. *East St. Louis Connecting R. Co. v. Jarvis* (U. S.) 92 Fed. 735, 743, 34 C. C. A. 639.

Act Mo. March 23, 1868, authorizing the "consolidation" of railroad companies under certain conditions, did not mean a sale by one company to another. Consolidation is not sale, and, when two companies are authorized to consolidate their roads, it is to be presumed that the franchises and privileges of each continue to exist in respect to the several roads so consolidated. *Green County v. Conners*, 3 Sup. Ct. 69, 70, 109 U. S. 104, 27 L. Ed. 872.

The word "consolidate" in Const. art. 11, § 3, providing that no railway company or telegraph company shall consolidate its property, franchises, or earnings in whole or in part with any other railroad corporation or telegraph company owning a parallel or competing line, is used in the sense of "join" or "unite." It is an absolute prohibition against a railroad corporation consolidating its stock, property, franchises, or earnings in whole or in part with any other railroad corporation owning a parallel or competing line, and the law cannot be evaded by substituting a lease of such a line by a deed or conveyance. *State v. Atchison & N. R. Co.*, 38 N. W. 43, 51, 24 Neb. 143, 8 Am. St. Rep. 464.

#### CONSOLS.

Green and brown consols are those bonds of the state of South Carolina which were issued in 1877 and 1879, which were colored, respectively, green and brown. *Whaley v. Gaillard*, 21 S. C. 500, 568.

#### CONSONANT.

A "consonant" is a letter of the alphabet which can only be sounded with the aid of a vowel, and cannot be held to be a name by itself. *Kinnerly v. Knott*, 7 C. B. 980, 987.

#### CONSORTIUM.

As property, see "Property."

As separate property of wife, see "Separate Property."

The husband's interest in the society of his wife is expressed by the word "consortium"—the right to the conjugal fellowship of the wife, and her company, co-operation, and aid in every conjugal relation. *Higouette v. Paulet*, 134 Mass. 123, 124, 45 Am. Rep. 307; *Jacobsen v. Siddal*, 7 Pac. 108, 119, 12 Or. 280, 53 Am. Rep. 360; *Crowell v. Truesdell*, 73 N. Y. Supp. 1013, 67 App. Div. 502; *Long v. Booe*, 17 South. 716, 719, 106 Ala. 570.

The gist of the action for alienating the affections of a wife is not the loss of assistance, but the loss of the "consortium" of the wife or the husband, under which term is usually included the person's affection, society, or aid. *Lockwood v. Lockwood*, 70 N. W. 784, 785, 67 Minn. 476; *Betsar v. Betsar*, 58 N. E. 249, 250, 186 Ill. 537; *Reading v. Gazzam*, 49 Atl. 889, 200 Pa. 70; *Seaver v. Adams*, 19 Atl. 776, 66 N. H. 142, 49 Am. St. Rep. 597.

The word "consortium" includes those duties and obligations which by marriage both husband and wife take upon themselves toward each other in sickness and health, which it cannot be supposed that the Legislature has intended wholly to uproot. A married woman may now perform any labor or services on her sole separate account, as her husband may; nevertheless each owes certain duties to the other which are not annulled by the statutes. *Kelley v. New York, N. H. & H. R. Co.*, 46 N. E. 1063, 168 Mass. 308, 38 L. R. A. 631, 60 Am. St. Rep. 397 (citing *Mewhirer v. Hatten*, 42 Iowa, 288, 20 Am. Rep. 618).

In an action by a husband for injury to a wife, it was said that the measure of recovery is the wrong done to his rights; that it closely resembles the action of a father for the injury to or disablement of his child, or the master for his servant. The measure of recovery differs just as the rights invaded differ. The wife owes a broader and a higher duty, of which physical labor may or may not be a part, according to circumstances. Her duty is called by the common-law writers "consortium," which means conjugal society and assistance. *Selleck v. City of Janesville*, 80 N. W. 944, 946, 104 Wis. 570, 47 L. R. A. 691, 76 Am. St. Rep. 892.



## CONSORTSHIP.

An agreement or stipulation of "consortship" is a contract capable of being enforced in the admiralty against property or proceeds in the custody of the court. It is a maritime contract for services to be rendered on the sea, and an apportionment of the salvage earned therein. It seems to be a not uncommon course among the owners of a certain class of vessels commonly called "wreckers" on the Florida coast, with a view to prevent mischievous competitions and collisions in the performance of salvage services, to enter into stipulations with each other that the vessels owned by them respectively shall act as consorts with each other in salvage services, and share mutually with each other in the moneys awarded as salvage, whether earned by one vessel or by both. *Andrews v. Wall*, 44 U. S. (3 How.) 568, 571, 11 L. Ed. 729.

## CONSPICUOUS.

"Conspicuous," as used in a rule of a railroad company requiring a backing engine or train to have a conspicuous light on the engine or rear car, means such light as will show the direction in which the car is moving. *Chicago, M. & St. P. R. Co. v. Walsh*, 41 N. E. 900, 901, 157 Ill. 672.

## CONSPICUOUS PLACE.

By the use of the word "conspicuous," as used in the statute requiring town meetings to be notified by posting an attested copy of the warrant in "some public and conspicuous place in said town," etc., it was intended to prevent the possibility of calling a town meeting in a secret manner by posting a notice in a public place, and yet in such a position that but few, if any, persons would be likely to notice it. *Wardens of Christ's Church v. Woodward*, 26 Me. (13 Shep.) 172, 179.

Dropping a notice of appeal into the office of the attorney for the adverse party through a letter slot in the office door is leaving it in a "conspicuous place," within the meaning of Code Civ. Proc. § 797, subd. 3, permitting the service of a paper on an attorney, if there is no person in charge of his office, and the service is made between 6 a. m. and 9 p. m., by leaving it in a conspicuous place in his office. *Livingston v. New York El. R. Co.*, 13 N. Y. Supp. 706, 707, 18 Civ. Proc. R. 369.

"Conspicuous place," as used in Code Civ. Proc. § 1011, providing for the service of papers on attorneys by leaving them in a conspicuous place in the office in the absence of the attorney, should be construed to include a place designated by the attorney for the deposit of letters and papers in his

absence. *January v. Superior Court*, 15 Pac. 108, 73 Cal. 537.

The phrase "conspicuous places," in Act June 7, 1897, c. 4, § 2, 30 Stat. 102 (2 Supp. Rev. St. 1892-97, p. 626 [U. S. Comp. St. 1901, p. 2884]), providing for the furnishing of the inspectors' rules to ferryboats and steam vessels, and for posting them in conspicuous places, means that they should be posted where they can easily be read. *In re Rapid Transit Ferry Co.* (U. S.) 124 Fed. 786, 796.

Rev. St. 1898, § 1180, requiring the county treasurer, at least four weeks before the date of the sale of property for delinquent taxes, to cause to be posted up copies of such statement and notice in some conspicuous place in his office, is satisfied by the county treasurer posting such notice on the inside door of the county treasurer's office. The words "conspicuous place" should be given their natural meaning, and they naturally indicate an inner door into the treasurer's office, and hence necessarily a conspicuous place in the office. *Allen v. Allen*, 91 N. W. 218, 220, 114 Wis. 615.

Whether a paper is left, in serving it, in a conspicuous place in the office of an attorney, is a matter upon which the minds of men may differ, and must be determined by the court, in the exercise of its judicial functions, rather than by the party making the affidavit. *Elder v. Frevert*, 3 Pac. 237, 239, 18 Nev. 278, 280.

## CONSPIRACY.

See "Civil Conspiracy"; "Criminal Conspiracy"; "Unlawful Conspiracy."

"Conspiracy" is said to be an offense known to the ancient common law, antedating the statute of Edward I; the most widely recognized definition of which declares a criminal conspiracy to consist of a combination between two or more persons for the purpose of accomplishing a criminal or unlawful act, or an object neither criminal nor unlawful by unlawful means, or, as it has been more concisely expressed, the combination of two or more persons to do something unlawful, either as a means or as an ultimate end. *State v. Sutz*, 30 South. 298, 299, 106 La. 182; *Wright v. United States* (U. S.) 108 Fed. 805, 808, 48 C. C. A. 37; *The Mussel Slough Case* (U. S.) 5 Fed. 680, 683; *In re Wolf* (U. S.) 27 Fed. 606, 610; *United States v. Addyston Pipe & Steel Co.* (U. S.) 85 Fed. 271, 293, 29 C. C. A. 141, 162, 46 L. R. A. 122; *United States v. Sacia* (U. S.) 2 Fed. 754, 757; *United States v. Benson* (U. S.) 70 Fed. 591, 594, 17 C. C. A. 293; *United States v. Wooten* (U. S.) 29 Fed. 702, 708; *United States v. Lancaster* (U. S.) 44 Fed. 896, 899, 10 L. R. A. 333; *United States v. Watson* (U. S.) 17 Fed. 145, 147; *Thomas v. Cincinnati, N. O. & T. P. R. Co.* (U. S.) 62 Fed. 803, 818; *United*

States v. Howell (U. S.) 56 Fed. 21, 32 (citing United States v. Babcock [U. S.] 24 Fed. Cas. 913); United States v. Hirsch, 100 U. S. 33, 34, 25 L. Ed. 539; People v. Daniels, 38 Pac. 720, 721, 105 Cal. 262; People v. Duke, 44 N. Y. Supp. 336, 338, 19 Misc. Rep. 292; Buffalo Lubricating Oil Co. v. Everest (N. Y.) 80 Hun, 586, 588; The Anarchists' Case, 12 N. E. 865, 122 Ill. 1, 3 Am. St. Rep. 320; People v. Flack, 10 N. Y. Supp. 475, 478, 57 Hun, 83; Heughes v. Board of Education of City of Rochester, 55 N. Y. Supp. 799, 801, 37 App. Div. 180; Lambert v. People (N. Y.) 9 Cow. 578, 598; State ex inf. Crow v. Firemen's Fund Ins. Co., 52 S. W. 595, 607, 152 Mo. 1, 45 L. R. A. 363; Ross v. Cleveland & A. Mineral Land Co., 62 S. W. 984, 987, 162 Mo. 317; State v. Davies, 80 Mc. App. 239, 245 (citing Commonwealth v. Hunt, 45 Mass. [4 Metc.] 111, 38 Am. Dec. 846); Mulcahy v. Reg., L. R. 3 E. L. 306, 817; Walsh v. Association of Master Plumbers of St. Louis, 71 S. W. 455, 459, 97 Mc. App. 280; State v. Kennedy, 75 S. W. 979, 984, 177 Mo. 98; Owen v. State, 5 Tenn. (10 Lea) 1, 3; Breitenberger v. Schmidt, 38 Ill. App. 168, 177; Heaps v. Dunham, 95 Ill. 583, 586; Prussing v. Jackson, 85 Ill. App. 324, 333; People v. Richards, 7 Pac. 828, 830, 67 Cal. 412, 56 Am. Rep. 716; Sparks v. Commonwealth, 20 S. W. 167, 168, 89 Ky. 644; Commonwealth v. Waterman, 122 Mass. 43, 57; Commonwealth v. Kingsbury, 5 Mass. 106, 108; Martens v. Reilly, 84 N. W. 840, 843, 109 Wis. 464; Brown v. Jacobs' Pharmacy Co., 41 S. E. 553, 554, 115 Ga. 429, 57 L. R. A. 547, 90 Am. St. Rep. 126; Commonwealth v. Bliss (Pa.) 12 Phila. 580; Longshore Printing & Pub. Co. v. Howell, 38 Pac. 547, 552, 26 Or. 527, 28 L. R. A. 464, 46 Am. St. Rep. 640; State v. Crowley, 41 Wis. 271, 272, 284, 22 Am. Rep. 719; Ellzey v. State, 57 Miss. 827, 829; State v. Jackson, 7 S. C. (7 Rich.) 283, 287, 24 Am. Rep. 476; Clinton v. Estes, 20 Ark. 216, 217, 224; Regina v. Vincent, 9 Car. & P. 91.

A conspiracy is a combination formed by two or more persons to effect an unlawful end, said persons acting under a common purpose to accomplish the end desired. United States v. Benson (U. S.) 70 Fed. 591, 594, 17 C. C. A. 293; United States v. Babcock (U. S.) 24 Fed. Cas. 913, 915; United States v. Newton (U. S.) 52 Fed. 275, 281.

A conspiracy is a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means. Pettibone v. United States, 13 Sup. Ct. 542, 545, 148 U. S. 197, 37 L. Ed. 419; United States v. Weber (U. S.) 114 Fed. 950, 953; Drake v. Stewart (U. S.) 76 Fed. 140, 142, 20 C. C. A. 104; State v. Mayberry, 48 Me. 218, 235; Commonwealth v. Hunt, 45 Mass. (4 Metc.)

111, 123, 38 Am. Dec. 846. The term "criminal and unlawful" is used because it is manifest that many acts are unlawful which are not punishable by indictment or other public prosecution, and yet there is no doubt that a combination by members to do them would be an unlawful conspiracy, and punishable by indictment. Of this character was a conspiracy to cheat by false pretenses without false tokens, when a cheat by false pretense if only by a single person was not a punishable offense. So a combination to destroy the reputation of an individual by verbal calumny, which is not indictable. Commonwealth v. Hunt, 45 Mass. (4 Metc.) 111, 123, 38 Am. Dec. 846.

A "conspiracy" is a combination of men for an evil purpose; an agreement between two or more persons to commit some crime in concert; an agreement for the purpose of wrongfully prejudicing another or to pervert public justice. Girdner v. Walker, 48 Tenn. (1 Heisk.) 186, 190.

"A conspiracy is a corrupt agreeing together of two or more persons to do by concerted action something unlawful either as a means or an end. The word 'corrupt,' in the sense used, means unlawful. The intentment of this definition is that to conspire to do an unlawful act or to conspire to accomplish a result which may in itself be lawful, but to do it in an unlawful manner, or an unlawful agreement to accomplish an unlawful result, is a conspiracy." United States v. Johnson (U. S.) 26 Fed. 682, 683. The unlawful thing must be such as would be indictable if performed by one alone, or, not being such, be of a nature particularly adapted to injure the public or some individual by reason of the combination. Aetna Ins. Co. v. Commonwealth, 21 Ky. Law Rep. 503, 506, 507, 51 S. W. 624, 627, 45 L. R. A. 355 (citing 2 Bishop, Cr. Law, § 172).

"Conspiracy consists in a combination of two or more persons to effect an illegal purpose by legal or illegal means, or to effect a legal purpose by illegal means. \* \* \* The law punishes the mere agreement to effect an illegal purpose or to use illegal means." Boutwell v. Marr, 42 Atl. 607, 609, 71 Vt. 1, 43 L. R. A. 803, 76 Am. St. Rep. 746.

A conspiracy is a confederacy to do an unlawful act, or a lawful act by unlawful means, whether to the prejudice of an individual or the public. United States v. Weber (U. S.) 114 Fed. 950, 953 (citing Commonwealth v. Shelton, 11 Va. Law J. 324); Commonwealth v. McKisson (Pa.) 8 Serg. & R. 420, 422, 11 Am. Dec. 630; Arthur v. Oakes (U. S.) 68 Fed. 310, 321, 11 C. C. A. 209, 25 L. R. A. 414.

A conspiracy is an agreement to do a wrong or to do a criminal act. United States v. Boyd (U. S.) 45 Fed. 851, 860.

The most satisfactory definition of "conspiracy" to be found in any of the adjudicated cases is perhaps that given by Shaw, J., in *Commonwealth v. Hunt*, 45 Mass. (4 Metc.) 111, 38 Am. Dec. 346, in which he says: "Without attempting to review and reconcile all the cases, we are of the opinion that as a general description, though perhaps not a precise or accurate definition, a conspiracy must be a combination of two or more persons by some concerted action to accomplish some criminal or unlawful purpose, or to accomplish some purpose not in itself criminal, by criminal or unlawful means. We use the terms 'criminal' or 'unlawful' because it is manifest that many acts are unlawful which are not punishable by indictment or other public prosecution, and yet there is no doubt, we think, that a combination by numbers to do them would be an unlawful conspiracy, and punishable by indictment." He further adds: "But yet it is clear that it is not every combination to do unlawful acts to the prejudice of another which is punishable as conspiracy." *Hart v. Hicks*, 129 Mo. 99, 105, 318, 31 S. W. 351, 352.

Conspiracies are of two kinds: (1) Against the public, or such as endanger the public health, violate public morals, insult public justice, destroy the public peace, or affect public trade; (2) against individuals, such as have a tendency to injure them, in their persons, reputation, or property. *Clinton v. Estes*, 20 Ark. 216, 224.

The essentials of a conspiracy are (1) a combining of two or more minds; (2) the purpose of the combining. *Commonwealth v. Grinstead*, 55 S. W. 720, 725, 108 Ky. 59.

#### **Agreements in restraint of trade.**

A conspiracy consists in an agreement to do something; but in the sense of the law, and of the statute declaring every combination in the form of a trust or otherwise or conspiracy in restraining of trade or commerce illegal, it must be an agreement between two or more to do by concerted action something criminal or unlawful, or, it may be, to do something lawful by criminal or unlawful means. A conspiracy, therefore, is in itself unlawful; and, in so far as this statute is directed against conspiracies in restraint of trade among the several states, it is not necessary to look for the illegality of the offense in the kind of restraint proposed. Any proposed restraint of trade, though it be in itself innocent, if it is to be accomplished by conspiracy, is unlawful. *United States v. Debs* (U. S.) 64 Fed. 724, 748.

An agreement between pipe manufacturers in different states by which the territory in which they operated was divided into reserve cities and pay territory; the

reserve cities were allotted to particular members of the combination, free of competition from the others, though provision was made for pretended bids by the latter at prices previously arranged in the pay territory; all offers to purchase pipe were submitted to a committee, which determined the price, and then awarded the contract to that member of the combination which agreed to pay the largest bonus, to be divided among the others—was an unlawful combination. *United States v. Addyston Pipe & Steel Co.* (U. S.) 85 Fed. 271, 293, 29 C. C. A. 141, 46 L. R. A. 122.

An agreement between mercantile dealers to compel another dealing in similar goods to sell at prices fixed by it, or upon his refusal so to do to prevent those of whom its members are purchasing customers from selling goods to him, is contrary to public policy and void. *Brown v. Jacobs' Pharmacy Co.*, 41 S. E. 553, 554, 115 Ga. 429, 57 L. R. A. 547, 90 Am. St. Rep. 126.

#### **Boycott.**

A conspiracy is a combination of persons organized to interfere with the property rights of others, and includes a restraint upon the lawful prosecution of their industries, as well as an unlawful control over the use and employment by workmen of their labor for such time, purpose, and price as they chose. The term "conspiracy" includes what is ordinarily called "boycott." *State v. Stewart*, 9 Atl. 559, 566, 59 Vt. 273, 59 Am. Rep. 710.

A boycott to prevent the use of Pullman cars which were operated under a contract with a receiver of a railroad, and which would compel the receiver to break the contract, would be conspiracy, in that a breach of a contract is unlawful, and a combination for that purpose would be unlawful. *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.* (U. S.) 62 Fed. 808, 818.

#### **Common intent.**

A conspiracy to defraud on the part of two or more persons means a common purpose supported by a concerted action to defraud, that each has the intent to do it, and that it is common to each of them, and that each understands that the other has that purpose. *United States v. Frisbie* (U. S.) 28 Fed. 808, 809.

#### **As a distinct offense.**

The conspiracy is in and of itself a distinct substantive offense, complete when the corrupt agreement is entered into. *Thompson v. State*, 17 South. 512, 515, 106 Ala. 67.

Where a conspiracy has not been effected it is punishable as a distinct offense; "but a contrivance to commit a felony, and executing the contrivance, cannot be punished as an offense distinct from the felony, because the contrivance is a part of the felony when

committed pursuant to it." *Commonwealth v. Kingsbury*, 5 Mass. 106, 108.

A conspiracy is only a misdemeanor, and when its object is only to commit a misdemeanor it cannot be merged. *People v. Mather* (N. Y.) 4 Wend. 229, 265, 21 Am. Dec. 122.

A "conspiracy" to commit a misdemeanor is not merged in the commission of the misdemeanor. *State v. Murray*, 15 Me. (3 Shep.) 100, 103.

#### **Evil purpose or intent.**

A conspiracy is the entering into an agreement to do an unlawful act with an evil purpose, and with knowledge that the act is unlawful. The agreement must have been entered into with an evil purpose as distinguished from a purpose simply to do the act prohibited in ignorance of the prohibition. *People v. Flack*, 26 N. E. 267, 270, 125 N. Y. 324, 11 L. R. A. 807.

#### **Execution of unlawful agreement.**

The gist of the offense in conspiracy is the unlawful combination and agreement. It is unnecessary to constitute the offense that an overt act should be done in pursuance of such combination and agreement. *Alderman v. People*, 4 Mich. 414, 424, 9 Am. Dec. 321. The crime is effected the moment the confederation is completed though nothing be done pursuant to the conspiracy. *Commonwealth v. Bliss* (Pa.) 12 Phila. 580, 581. The agreement itself constitutes the offense, whether the act is done in furtherance of the object or not. *United States v. Watson* (U. S.) 17 Fed. 145, 147. The offense is complete when the unlawful "conspiracy," combination, or agreement is made, and a criminal act done in the pursuance of the conspiracy is not necessary to justify a conviction of the crime of conspiracy itself. *United States v. Lancaster* (U. S.) 44 Fed. 896, 899, 10 L. R. A. 333; *United States v. Barrett* (U. S.) 65 Fed. 62; *Thompson v. State* (Ala.) 17 South. 512, 515; *People v. Richards*, 1 Mich. (Man.) 216, 223, 51 Am. Dec. 75; *State v. Wilson*, 30 Conn. 500, 507; *Johnson v. State*, 3 Tex. App. 590, 591. Its legal character depends neither upon what actually follows it nor upon that which is intended to follow it. It is the same whether its object is accomplished or abandoned. It may be followed by one overt act or a series, but as an offense it is complete without them. *State v. Setter*, 57 Conn. 461, 18 Atl. 782, 14 Am. St. Rep. 121.

The gist of a conspiracy is the unlawful conspiracy to do an unlawful act, or even a lawful act for unlawful purposes. The offense is complete when the conspiracy is made, and any act done in pursuance of it is no constituent part of the offense, but merely an aggravation of it. *Commonwealth v. Judd*, 2 Mass. 320, 336, 3 Am. Dec. 54.

This rule of the common law is to prevent unlawful combinations. A solitary offender against law may be easily detected and punished; but combinations against law are always dangerous to the public peace and to private security. To guard against the union of numbers to effect an unlawful design is not easy, and to detect and punish them is often difficult. The unlawful confederacy is therefore punished to prevent the doing of any act in execution of it. Of this principle the adjudged cases leave no doubt. *Commonwealth v. Judd*, 2 Mass. 320, 337, 3 Am. Dec. 54.

It is complete when the combination is formed and an act is done to further it. *United States v. Wootten* (U. S.) 29 Fed. 702, 703.

Nor is the offense purged because subsequent events may render the consummation of the agreement impossible, or because the conspirators are entrapped in an attempt at its consummation. *Thompson v. State*, 17 South. 512, 515, 106 Ala. 67.

It is not necessary that the conspiracy be successful; it may fall short of the actual commission of the fraud intended. The conspirators may have been arrested or the conspiracy discovered, and its purpose thwarted, before the conspiracy has resulted in defrauding the government, and before the conspirators have reaped any pecuniary or other advantage from their conspiracy; yet if the conspiracy actually existed, and any party did any act towards effecting the object thereof, the offense is complete. *United States v. Newton* (U. S.) 52 Fed. 275, 281.

If the object to be attained by conspiracy be criminal or unlawful, the combination offends against the criminal law by criminal law rules without any overt act, and by statute when there is such overt act. If the means to be used are criminal or unlawful, the ultimate end to be attained need not be essentially wrong. In either case, if damage is produced to the person against whom the conspiracy is directed, an action to recover the same will accrue to him against all the guilty parties. *Martens v. Reilly*, 84 N. W. 840, 843, 109 Wis. 464.

By the common law a conspiracy was an indictable offense. It was an association of two or more persons to break the law, whether the association resulted in any act to be done by the conspirators or not. The gist of the offense was conspiring for an unlawful purpose, or to effect a lawful purpose by unlawful means. *City of St. Louis v. Fitz*, 53 Mo. 582, 584.

Inasmuch as there are no common-law offenses against the government of the United States, an act to be punished in the federal courts must be declared an offense by statute; and in an indictment for conspiracy

there it is necessary to show that something was done to carry into effect the unlawful agreement. There must be an agreement of two or more wills to carry into effect some unlawful purpose, and some act or acts done in pursuance of that agreement. *United States v. Barrett* (U. S.) 65 Fed. 62.

The gist of the offense of conspiracy is in the illegal combination and intent, and the statute of limitations begins to run from the time the conspiracy is formed. The crime may be complete though the intent was never accomplished. And though the statute offense requires an overt act to be done by one or more of the parties to the conspiracy, or some act to effect its object, yet this act, as in the common-law offense of conspiracy, is not regarded as an essential part of the offense itself. *United States v. Greene* (U. S.) 100 Fed. 941, 945.

A conspiracy is the combining of two or more to do an unlawful or injurious act. A simple conspiracy, however atrocious, unless it results in actual damage to the party, never was the subject of a civil action. *Dowdell v. Carpy*, 61 Pac. 948, 949, 129 Cal. 168 (citing *Herron v. Hughes*, 25 Cal. 555, 560).

To render a conspiracy indictable at common law no overt acts in carrying out the design of the conspirators were necessary. The conspiring was sufficient to authorize an indictment. But, if in carrying out the design of the conspirators overt acts were done causing legal damage, the person damaged had a right of action. *Brown v. Jacobs' Pharmacy Co.*, 41 S. E. 553, 554, 115 Ga. 429, 57 L. R. A. 547, 90 Am. St. Rep. 128.

In an action for libel the bill alleged the making of a corrupt agreement between the plaintiff and one P., for the purpose of procuring a collusive decree of divorce between P. and his wife, with a view to the marriage of plaintiff and P., but did not allege any act done in furtherance of such agreement. It is very questionable whether just such a charge as that amounts to a libel. Such a charge, not in writing, would not amount to verbal slander, as not charging any indictable offense. There must be some act done in furtherance of the corrupt agreement before the parties are liable to indictment as conspirators. *Torrey v. Field*, 10 Vt. 353-410.

#### Formal agreement.

To establish a conspiracy, it is not necessary that there should be "an explicit or formal agreement for an unlawful act between the parties, nor is it essential that direct and positive proof be made of an express agreement to do the act forbidden by law. In conspiracy cases it is frequently impossible to produce such proof, because conspiracies are not usually meditated and

planned in the presence of witnesses not parties thereto, nor in the terms of express stipulations. Hence a conspiracy may be proved by circumstances. The understanding, combination, or agreement between the parties in a given case to effect the unlawful purpose charged must be proved, because without corrupt agreement or understanding there is no conspiracy, but circumstantial evidence may be resorted to to show such agreement or conspiracy. *United States v. Nunnemacher* (U. S.) 27 Fed. Cas. 197, 201.

A conspiracy "is an agreement or understanding between two or more persons to do an unlawful act, or to use unlawful means to do an act which is lawful. It is not necessary that it should be proven by an express agreement or by direct evidence, but it may be proven, like any other fact, by circumstantial evidence; but it must exist between at least two persons, for in its very nature it cannot be committed by one person, nor will an action lie for simply conspiring to do an unlawful act; and, in order to furnish a basis for such an action, the unlawful act must be accomplished and done in pursuance of such conspiracy, and must have resulted in some grievance to the person complaining, or the person must have sustained actual damages done by reason thereof." *Ross v. Cleveland & A. Mineral Land Co.*, 62 S. W. 984, 987, 162 Mo. 317 (citing *Kimball v. Harmon*, 34 Md. 407, 6 Am. Rep. 340; 2 Hil Torts [4th Ed.] §§ 16, 17).

In order to establish a conspiracy, evidence must be produced from which a jury may reasonably infer the joint assent of the minds of two or more persons to the prosecution of the unlawful enterprise. *Drake v. Stewart* (U. S.) 76 Fed. 140, 142, 22 O. C. A. 104.

A conspiracy "is a criminal purpose to do an unlawful act, or to do a lawful act by criminal means, mutually assented to or agreed upon by two or more persons." *Commonwealth v. Eastman*, 55 Mass. (1 Cush.) 189, 223, 48 Am. Dec. 596.

A combination formed by two or more persons to effect an unlawful end is a "conspiracy"; said persons acting under a common purpose to accomplish the end designed. Any one who, after a conspiracy is formed and who knows of its existence, joins therein, becomes as much a party thereto from that time as if he had originally conspired. In order to establish a conspiracy it is necessary to prove a combination of two or more persons by concerted action to accomplish the criminal or unlawful purpose; but it is not necessary to constitute a conspiracy that two or more persons should meet together and enter into an explicit or formal agreement for an unlawful scheme, or that they should directly, by words or in writing, state what the unlawful scheme was to be, and the details of the plan or means

by which the unlawful combination was to be made effective. In other words, where an unlawful end is sought to be effected, and two or more persons, actuated by the common purpose of accomplishing that end, work together in any way in furtherance of the unlawful scheme, every one of said persons becomes a member of the conspiracy, although the part he was to take therein was a subordinate one, or was to be executed at a remote distance from the other conspirators. *United States v. Cassidy* (U. S.) 67 Fed. 698, 702.

The mere knowledge, acquiescence, or approval of an act without co-operation or agreement to co-operate is not enough to constitute the crime of conspiracy. *State v. King*, 74 N. W. 691, 692, 104 Iowa, 727.

#### Labor organizations.

In *State v. Stewart*, 59 Vt. 273, 286, 9 Atl. 559, 59 Am. Rep. 710, it was held that a combination of two or more persons to effect an illegal purpose, either by legal or illegal means, whether such purpose be illegal at common law or by statute, or to effect a legal purpose by unlawful means, whether such means be unlawful at common law or by statute, is a common-law conspiracy. So a combination or conspiracy to procure an employé or body of employés to quit service in violation of the contract of service would be unlawful. *Arthur v. Oakes* (U. S.) 63 Fed. 310, 321, 11 C. C. A. 209, 25 L. R. A. 414.

Where not under special contract for a definite time, a simultaneous severance of the relation between employer and employés, at the instance of the employés, and where there was no preconcerted action of such employés, was never considered unlawful. A strike is not unlawful per se. *Longshore Printing Co. v. Howell*, 38 Pac. 547, 552, 26 Or. 527, 28 L. R. A. 464, 46 Am. St. Rep. 640.

Where two or more men wrongfully and corruptly agree among themselves, either for the purpose of creating sympathy in a threatened strike or for any other purpose, to cause trains carrying mail or interstate commerce to be stopped or to discharge their employés, or refuse to employ new men, so as to stop such trains, they are guilty of conspiracy. *United States v. Debs* (U. S.) 63 Fed. 436.

The members of two labor organizations entered into a combination to compel a manufacturer of casks and barrels to discontinue the use of a machine for hooping the same. This object was to be accomplished by notifying the plaintiff's customers and other persons not to purchase machine hooped barrels, and by inducing the members of all labor organizations throughout the country, and persons who were in sympathy with them, not to purchase provisions or other commodities which were packed in machine hooped barrels. Held to constitute an unlawful "con-

spiracy." *Hopkins v. Oxley Stave Co.* (U. S.) 83 Fed. 912, 921, 28 C. C. A. 99.

If the object of a miners' union is unlawful, or the methods employed by it either to induce acquiescence to its ranks or to accomplish its ulterior purposes are illegal, it appears to be well settled that the persons who combine in such efforts are conspirators. *United States v. Weber* (U. S.) 114 Fed. 950, 953.

Where employés enter into a lawful combination to control, by artificial means, the supply of labor, preparatory to a demand for an advance in wages, a combination of employers to resist such artificial advance is lawful, since it is not made to lower the price of labor as regulated by supply and demand. *Cote v. Murphy*, 28 Atl. 190, 192, 159 Pa. 420, 23 L. R. A. 135, 39 Am. St. Rep. 686.

"Jacobs says this word was formerly used almost exclusively for an agreement of two or more persons falsely to indict one, or to procure him to be indicted, for felony. Now it is no less commonly used for the unlawful combination of workmen to raise their wages, or to refuse working, except on stipulated conditions." *Watson v. Harlem & New York Nav. Co.* (N. Y.) 52 How. Prac. 348, 353.

#### Prearrangement.

Conspiracy, or a common purpose to do an unlawful act, need not be shown by positive testimony, nor need it be shown that there was prearrangement to do the specific wrong complained of. *Collins v. State* (Ala.) 34 South. 993.

#### Principals.

Persons may be associated as principals of the first and second degrees in the commission of murder or other crime without being in the technical sense "conspirators," although conspiracy is generally one of the facts found in reaching the conclusion of guilt. *State v. Prater*, 43 S. E. 230, 235, 52 W. Va. 132.

#### Time of entering into.

"Conspiracy" is defined by Pen. Code, § 182, as follows: "If two or more persons conspire to commit any crime under such statute, no time at which the conspiracy must be entered into is fixed." So that, where laborers are charged with a conspiracy in attacking a nonunion laborer, it is not necessary that the jury should locate the conspiracy at the union meeting or at any particular time prior to the coming of the defendants to the building where the deceased was at work. *People v. Homes*, 50 Pac. 675, 680, 118 Cal. 444.

#### Two or more participants.

Co-operation is of the nature of the offense of conspiracy; it cannot be committed

by one person alone; and hence, as stated by Dr. Wharton (1 Whart. Cr. Law, § 431), a conspiracy must be by two persons at least. One cannot be convicted of it, unless he has been indicted with others or with persons to the jurors unknown. *People v. Richards*, 7 Pac. 828, 830, 67 Cal. 412, 56 Am. Rep. 716.

To constitute a conspiracy two or more persons must combine, and a husband and wife cannot be indicted for conspiracy, because they are but one person. *State v. Christianbury*, 44 N. C. 46, 48.

A conspiracy *ex vi termini* imports the participation of at least two persons, so that in an indictment the person or persons with whom the defendant conspires as well as the acts done must be stated. But a recognition for bail need only state the general nature of the charge, so that the statement that the defendant conspired to defeat the United States is a sufficient indictment for his crime. *United States v. Dunbar* (U. S.) 83 Fed. 151, 156, 27 C. C. A. 488.

Conspiracy to commit a crime is of itself criminal at common law. The fact that one of the conspirators could not himself commit the intended offense neither relieves him of guilt nor disables him from co-operating with another person who is able to commit it. So that a conspiracy to wrongfully injure another is actionable at common law if executed to the damage of another, whether that other would have a remedy if the act were committed by a single person or not, or whether one person could commit such injury alone. A combination of persons to injure another without any just cause, such as an injury that is not an incidental effect of the promotion of the legitimate interests of the members of a combine, is a conspiracy. *State v. Huegin*, 85 N. W. 1046, 1061, 1066, 110 Wis. 189.

The concurring will of at least two persons is as necessary to the offense as that of three to constitute a riot. *State v. Jackson*, 7 S. C. (7 Rich.) 283, 287, 24 Am. Rep. 476.

#### Unlawful purpose.

To constitute a conspiracy the purpose to be effected by it must be unlawful, either in respect of its nature or in respect of the means to be employed for its accomplishment. *People v. Willis*, 54 N. Y. Supp. 129, 133, 24 Misc. Rep. 537; *People v. Olson*, 15 N. Y. Supp. 778, 779; *Payne v. Western & Atlantic R. Co.*, 81 Tenn. (13 Lea) 507, 521, 49 Am. Rep. 666.

A conspiracy is punishable in this state only when the purpose to be accomplished thereby is in itself unlawful. Thus the statute defines the offense as follows: "If any two or more persons shall agree, conspire, or co-operate to do or aid in doing any other unlawful act," etc. 1 Mills' Ann. St. Colo. §

1294; *Connor v. People*, 18 Colo. 373, 33 Pac. 159, 25 L. R. A. 341, 36 Am. St. Rep. 295; *Miller v. People*, 45 Pac. 408, 409, 22 Colo. 580.

To constitute an indictable conspiracy there must be a combination of two or more persons to commit some act known as an offense at common law or declared such by statute. *Alderman v. People*, 4 Mich. 414, 424, 9 Am. Dec. 321.

A conspiracy is "a confederacy between two or more persons to injure an individual by an act unlawful or prejudicial to the community." *McIntyre v. Mancus* (N. Y.) 16 Johns. 592, 600.

"Conspiracy at common law is a confederacy of two or more persons wrongfully to prejudice another in his property, person, or character, or to injure public trade, or to affect public health, or to violate public policy, to obstruct public justice, or do any act in itself illegal." *Johnson v. State*, 26 N. J. Law (2 Dutch.) 313, 321.

To constitute a conspiracy there must be not only an agreement to co-operate to do a certain thing or act, but the act must be unlawful. *Connor v. People*, 18 Colo. 373, 33 Pac. 159, 36 Am. St. Rep. 295.

Mr. Eddy, in his work on Combinations, gives the following definition as comprehensive in its nature, and including both civil and criminal conspiracies: Conspiracy is the combination of two or more persons to do (a) something that is unlawful, oppressive, immoral; (b) something that is not unlawful, oppressive, or immoral by unlawful, oppressive, or immoral means; (c) something that is unlawful, oppressive, or immoral by unlawful, oppressive, or immoral means. Conspiracies are often spoken of as civil or criminal. The terms "criminal" and "civil" are used, respectively, to designate a conspiracy which is indictable, or a conspiracy which will furnish ground for a civil action. *Brown v. Jacobs' Pharmacy Co.*, 41 S. E. 553, 554, 115 Ga. 429, 57 L. R. A. 547, 90 Am. St. Rep. 126.

Bishop says that conspiracy is the corrupt agreeing together of two or more persons to do by concerted action something unlawful, either as a means or as an end. The unlawful act must either be such as would be indictable performed by one alone, or, not being such, be of a nature particularly adapted to injure the public or some individual by reason of the combination. It is connected with every form of wrongdoing cognizable by the law. *State v. Dyer*, 32 Atl. 814, 816, 67 Vt. 690 (citing 2 Blash. Cr. Proc. § 166).

In the case of *Comm. v. Carlisle, Bright. N. P. 40*, Chief Justice Gibson says there is a conspiracy in law whenever the act to be done has a necessary tendency to prejudice

the public or oppress individuals by unjustly subjecting them to the power of the confederators, and giving color to the purposes of the latter, whether of extortion or mischief. *Commonwealth v. Gallagher*, 4 Pa. Law J. 58, 64; *Cote v. Murphy* (Pa.) 28 Atl. 190, 192, 23 L. R. A. 135, 39 Am. St. Rep. 686; *Crump v. Commonwealth* (Va.) 6 S. E. 620, 625, 10 Am. St. Rep. 895.

"Conspiracy was anciently confined to imposing by combination a false crime on any person, or conspiring to convict an innocent person by perjury and a perversion of the law; but it is certain that modern cases have extended the doctrine far beyond that, and every conspiracy to do an unlawful act is indictable." A combination by two to cheat a third person by making him drunk and playing falsely at cards with him is indictable at common law. *State v. Younger*, 12 N. C. 357, 358, 17 Am. Dec. 571.

A conspiracy to defraud creditors is an offense against good morals, common honesty, and sound public policy, for it is a let and hindrance to the due course and execution of law and justice, and tends to overthrow all true and plain dealing and bargaining between man and man, without which no commonwealth or civil society can be maintained or continued. *Hawley v. Smeiding*, 42 Pac. 841, 842, 3 Kan. App. 159 (citing *Bump, Fraud. Conv.* 443; *Weatherbee v. Cockrell*, 44 Kan. 380, 382, 24 Pac. 417).

A conspiracy as an agreement or an undertaking or a combination entered into between two or more persons to accomplish an illegal result, i. e., the doing of something which is against the law of the government; entering into a combination to do something which is by law a crime against the United States. *United States v. Howell* (U. S.) 56 Fed. 21, 33.

### CONSPIRE.

To "conspire" is defined by Webster as to make an agreement, especially a secret agreement; to do some act, as to commit a treason, or a crime, or to do some unlawful deed; to plot together; to concur to one end; to agree. In the *Century Dictionary* it is defined to agree by oath, covenant, or otherwise to commit a reprehensible or illegal act; to engage in a conspiracy. Thus, as used in statutes of the United States, that if two or more persons conspire they shall be punishable, etc., it is used in the sense in which it is employed by English writers and speakers, so that it would have added nothing to the meaning of the act to have added the word "together" or the words "between themselves"; and hence an indictment charging that persons conspire to defraud the United States is sufficient without the use of the words "combine, confederate, or agree to-

gether." *Wright v. United States* (U. S.) 108 Fed. 805, 809, 48 O. C. A. 37.

"Conspire" is a word in common use, which necessarily carries with it the idea of agreement, concurrence, and combination; and when one person is charged with conspiring with another there are no words in the English language by which the idea of the action and co-operation of two minds could be more effectively conveyed, since one cannot agree or conspire with another who does not agree or conspire with him. *State v. Slutz*, 30 South. 298, 299, 106 La. 182.

### CONSTABLE.

See "State Constable."

As police officer, see "Police Officer."

As ministerial officer, see "Ministerial Office—Officer."

A constable is an officer charged with a duty to the public of the gravest and most delicate nature, in which the whole commonwealth is vitally interested. *Pearson v. Brunswick County Sup'rs*, 9 Va. 322, 334, 21 S. E. 483.

A constable is a known officer charged with the conservation of the peace, and whose business it is to arrest those who have violated it. *Commonwealth v. Deacon* (Pa.) 8 Serg. & R. 47, 49.

Constables are legal officers of the peace elected by cities and towns. Originally their duty was to keep the peace, and they have no authority to serve process in civil actions, except such as is conferred on them by statute. *Leavitt v. Leavitt*, 135 Mass. 191, 193.

Constables are in Michigan, and "always have been, the local peace officers of their vicinage, the ministerial officers of the judges of the peace, and the bailiffs of the court of record of criminal jurisdiction in the county." *Allor v. Wayne County*, 4 N. W. 492, 500, 43 Mich. 76.

In the construction of statutes the terms "sheriff," "coroner," "constable," "clerk," or other words used for an executive or ministerial officer may include any deputy or other person performing the duties of such officer, either generally or in special cases. *Hurd's Rev. St. Ill.* 1901, p. 1719, c. 131, § 1, subd. 8.

The term "constable" includes any person performing the duties of such officer, either generally or in special cases. *Shannon's Code Tenn.* 1896, § 66.

The words "coroner," "justice," and "constable" mean officers of the county in which the action is brought or is pending, or in which the proceeding is had, or to whom the process is directed. *Sand. & H. Dig. Ark.* 1893, § 7212.



**CONSTANTLY.**

Where an insurance policy provided that the insured premises should be "constantly worked," such phrase meant that the premises should be worked during the usual and customary working days and hours for the prosecution of the business for which they were employed. *Prieger v. Exchange Mut. Ins. Co.*, 6 Wis. 89, 104.

**CONSTITUENT.**

His constituents, see "His."

"Constituent element," as used in reference to the conviction or acquittal of one crime as a bar to another, the proof of one of which involved the proof of the other, or such that one is a part or "constituent element" of the other, signifies an essential and necessary ingredient. *State v. Magone*, 56 Pac. 648, 850, 33 Or. 570.

**CONSTITUTION.**

See "State Constitution"; "Written Constitution."

"A 'constitution' is, according to the American idea, the organization of the government, distributing its powers among bodies of magistracy, and declaring their rights, and the liberties reserved and maintained by the people." *French v. State*, 52 Miss. 759, 762.

A constitution is not the beginning of a country, nor the origin of appropriate rights. It is not the fountain of law, nor the incipient state of government. It grants no rights to the people, but it is the creature of their power, the instrument of their convenience. Designed for their protection in the enjoyment of the rights and powers they possessed before the constitution was made, it is but the framework of political government, and necessarily based on the pre-existing rights, habits, and modes of thought. *State v. County Treasurer*, 4 S. C. (4 Rich.) 520, 536.

When the people associate, and enter into a compact, for the purpose of establishing government, that compact, whatever may be its provisions, or in whatever language it may be written, is the constitution of the state, revocable only by the people, or in the manner they prescribe. It is by this instrument that government is instituted, its departments created, and the powers to be exercised by it conferred. *Bates v. Kimball* (Vt.) 2 D. Chlp. 77, 84.

"A constitution or foundation of government embraces and declares the principles, regulates the division and exercise of the governing power, directs to what officers or agencies it shall be confided, and limits and controls its exercise. In other words, it es-

tablishes the government, delegates, limits, and defines the manner in which the governing power of the state shall be exercised, and by overpowering necessity compels those who frame government to confer ample power on its agencies to enforce the protection and security for which government is instituted." *Wabash, St. L. & P. Ry. Co. v. People*, 105 Ill. 236, 240.

A constitution is that by which the powers of government are limited. It is to the governors, or rather to the departments of government, what a law is to individuals; nay, it is not only a rule of action to the branches of government, but it is that from which their existence flows, and by which the powers (or portions of the right to govern) which may have been committed to them are prescribed. It is their commission; nay, it is their creator. *Kamper v. Hawkins*, 1 Va. Cas. 20-24.

A constitution is defined by Judge Story to be a fundamental law or basis of government. It is established by the people, in their original sovereign capacity, to promote their own happiness, and permanently to secure their rights, property, independence, and common welfare. *McKoan v. Devries*, 3 Barb. 196, 198 (quoting 1 Story, Const. §§ 338, 339); *Church v. Kelsey*, 7 Sup. Ct. 897, 898, 121 U. S. 282, 30 L. Ed. 960.

A constitution is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The constitution is certain and fixed. It contains the permanent will of the people, and is the supreme law of the land. It is paramount to the legislature, and can be revoked or altered only by the authority that made it. *Vanhorne's Lessee v. Dorrance*, 2 U. S. (2 Dall.) 304, 308, 28 Fed. Cas. 1012, 1 L. Ed. 391.

A constitution is that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised, and its provisions are the rules of conduct for those branches of the government which exercise the sovereign power. *State v. Griswold*, 34 Atl. 1046, 1047, 67 Conn. 290, 33 L. R. A. 227.

"A constitution is an act of extraordinary legislation by which the people establish the structure and mechanism of their government, and in which they prescribe fundamental rules to regulate the motions of the several parts." *Eakin v. Raub* (Pa.) 12 Serg. & R. 330, 347.

"Every state constitution is a compact made by and between the citizens of a state to govern themselves in a certain manner, and the Constitution of the United States is likewise a compact made by the people of the United States to govern themselves, as to general objects, in a certain manner." Per

Jay, C. J., in *Chisholm v. Georgia* (Pa.) 2 Dall. 419, 471, 1 L. Ed. 440.

A constitution is the written charter enacted and adopted by the people of a state through a combination of representatives, or in any way the people may choose to act, by which a government for them is obtained and established, and by which the people give organic and corporate form to that ideal thing, a state, for all time to come, or during the life of the state. *Lynn v. Polk*, 76 Tenn. (8 Lea) 121, 165.

In our system of government, a written constitution is the highest expression of law; none other emanates directly from the sovereign people themselves. It is the deliberate and affirmative utterance of the sovereign majority. In *re Denny*, 59 N. E. 359, 360, 156 Ind. 104, 51 L. R. A. 722.

A constitution is an instrument of government, made and adopted by the people for practical purposes connected with the common business and wants of human life. In *re Silkman*, 84 N. Y. Supp. 1025, 1029, 88 App. Div. 102; *People v. New York Cent. R. Co.*, 24 N. Y. 485, 486.

The term "constitution" is used in several senses. In a broad sense of the term, we may speak of a constitution resting upon usage or acquiescence, as in England. But in this country, when we use the term, we refer exclusively to the sovereign acts of the people, acting by conventions or in other constitutional modes. *Horsman v. Allen*, 61 Pac. 796, 799, 129 Cal. 189 (citing *Cooley*, Const. Lim. pp. 5, 6).

In American constitutional law, the word "constitution" is used in a restricted sense, as implying a written instrument agreed on by the people of the Union, or of any one of the states, as the absolute rule of action and decision for all departments and officers of the government in respect to all of the points covered by it, which must control until it shall be changed by the authority which established it, and in opposition to which any act or regulation of any such department or officer, or even the people themselves, will be altogether void. *Cline v. State*, 36 Tex. Cr. R. 320, 350, 36 S. W. 1099, 1107, 37 S. W. 722, 61 Am. St. Rep. 850 (citing *Cooley*, Const. Lim. p. 5).

A constitution is but a higher form of statutory law, and it is entirely competent for the people, if they so desire, to incorporate into it self-executing enactments. *Willis v. Mabon*, 50 N. W. 1110, 1111, 48 Minn. 140, 16 L. R. A. 281, 31 Am. St. Rep. 626.

The constitution of a state is the supreme law of the land, under the Constitution of the United States, and is of binding force and obligation upon all dependents of the government, and assigns the sphere within

which each must act, and establishes bounds beyond which neither can go. *Rison v. Farr*, 24 Ark. 161, 166, 87 Am. Dec. 52.

#### As contract or law.

See "Contract"; "Law."

#### As fixed and permanent.

A constitution is the form of government created by the hand of the people, in which certain first principles of fundamental law are established. The constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land; it is paramount to the power of the legislature, and can be revoked or altered only by the authority that made it. *Vanborne's Lessee v. Dorrance*, 2 U. S. (2 Dall.) 304, 308, 28 Fed. Cas. 1012, 1 L. Ed. 391.

The term "constitution," as applied to government, is the form or government instituted by the people in their sovereign capacity, in which, first, the principal and fundamental laws are established. A constitution is the supreme, permanent, and fixed will of the people in their original, unlimited, and sovereign capacity, and in it are determined the conditions, rights, and duties of every individual of the community. *Pheobe v. Jay*, 1 Ill. (Breese) 268, 271.

The term "constitution" implies an instrument of a permanent and abiding nature, and, while it contains provision for revision, it indicates the will of the people that the underlying principles upon which it rests, as well as the substantial entirety of the instrument, shall be of a like permanent and abiding nature. *Livermore v. Waite*, 36 Pac. 424, 426, 102 Cal. 113, 25 L. R. A. 812.

#### As a limitation on legislative power.

"The constitution of a state is the supreme, organized, and written will of the people, acting in convention, and assigning to different departments of the government their respective powers. It may remove and control the action of these departments, or it may confer upon them any extent of power not incompatible with the federal compact. By an inspection and examination of the constitutions of our country, they will be found to be nothing more than so many limitations upon the departments of the government and people." *Taylor v. Governor*, 1 Ark. (1 Pike) 21, 27.

A constitution of a state is not a grant of power, or an enabling act to the legislature; but it is a limitation on the state's general powers of a legislative character, and restricts only so far as the restriction appears either by express terms or by necessary inference. *McConville v. Howell* (U. S.) 17 Fed. 104, 106.

A constitution, "according to the common acceptance of the word in the United States, may be said to be an agreement of the peo-

ple, in their individual capacities, reduced to writing, establishing and fixing certain principles for the government of themselves. Among these principles, one of the most important in all our constitutions is to prescribe and limit the objects of legislative power. The people are sovereign, in power they are supreme, and the legislature acts by delegated and circumscribed authority; circumscribed as to its objects, circumscribed as to its extent over these objects." *State v. Parkhurst*, 9 N. J. Law (4 Halst.) 427, 443.

#### As written and in English.

"In our American constitutional law the word 'constitution' is used in a restricted sense, as implying a written instrument agreed on by the people of the Union, or of any one of the states, as an absolute rule of action and decision for all departments and offices of the government in respect to all points covered by it, which must control till it shall be changed by the authority which established it, and in opposition to which any act or regulation of any such department or officer, or even the people themselves, will be together void." *State v. McCann*, 72 Tenn. (4 Lea) 1, 9 (quoting *Cooley*, *Const. Lim.* pp. 2, 3).

In its most general sense, a "constitution" is defined as that body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised. *Cooley*, *Const. Lim.* 2. The term "constitution" may not be improperly applied to the guiding principles underlying these varying forms of government, whether they are or are not established by any written instrument. *Miller*, *Const.* 63. Comprehensively considered, therefore, a "constitution" consists in the fundamental principles of the government, and, as thus understood, the use of the term would not be inapplicable in referring to almost any kind of established human government. It might be either written or unwritten. The principles, therefore, might rest solely upon the will of an absolute monarch; but in the United States the word "constitution" is used in a restricted sense, as implying the written instrument agreed upon by the people of the Union, or any one of the states, as the absolute rule of action and decision for all departments and officers of government in respect to all the points covered by it, which must control until it shall be changed by the authority which established it. A "constitution," in the American sense of the word, is a written instrument by which the fundamental powers of the government are established, limited, and defined, and by which those powers are distributed among several departments for their safe and useful exercise for the benefit of the body politic. The term "constitution," within the provision that no person shall have the right to vote who shall not be able to read the Constitution of this state, relates to

the Constitution as written, and as written in the English language, so that a person who cannot read the Constitution in the English language is not entitled to vote. *Rasmussen v. Baker*, 50 Pac. 819, 823, 7 Wyo. 117, 38 L. R. A. 773.

#### CONSTITUTIONAL FREEDOM.

"Constitutional freedom" certainly does not consist in exemption from governmental interference in the citizen's private affairs, in his being unmolested in his family, in being; suffered to buy, sell, and enjoy property, and generally to seek happiness in his own way. All these might be permitted by the most arbitrary ruler, even though he allowed his subjects no degree of political liberty. Mr. Justice Story has well shown that constitutional freedom means something more than liberty permitted; it consists in the civil and political rights which are absolutely guaranteed, assured, and guarded; in one's liberties as a man and a citizen—his right to vote, his right to hold office, his right to worship God according to the dictates of his own conscience, his equality with all others who are his fellow citizens; all these, guarded and protected, and not held at the mercy and discretion of any one man or any popular majority. *People v. Hurlbut*, 24 Mich. 44, 106, 108, 9 Am. Dec. 103.

#### CONSTITUTIONAL LAW.

##### See "Unconstitutional."

Constitutional law, in the form which it has taken in the United States, is an American graft on English jurisprudence. Its principles and rules are mainly the work of the present century. They rest upon the fundamental conception of the supreme law, expressed in written form, in accordance with which all private rights must be determined and all public authority administered. The Constitution of Connecticut, art. 2, has divided the powers of government into three distinct departments, each confided to a separate magistracy. To one of these departments is intrusted (article 5) the judicial power of the state. In all cases where the meaning of a written document is to be collected from the words in which it is expressed, its construction, if called in question in the course of a judicial proceeding, is to be determined by the court. This is a proper and necessary exercise of judicial power. Hence it follows that the constitutionality of a statute on which a prosecution is based is a matter for the court, and not for the jury. *State v. Main*, 37 Atl. 80, 69 Conn. 123, 36 L. R. A. 623, 61 Am. St. Rep. 30.

#### CONSTITUTIONAL OFFICE OR OFFICER.

Any of those officers whose tenure and term of office are fixed and defined by the

Constitution are known as "constitutional officers." *Foster v. Jones*, 79 Va. 642, 644, 52 Am. Rep. 637.

Const. § 30, art. 16, provides that all terms of office not otherwise fixed by the Constitution are limited to two years. Held that, since the office of an attorney is one for life, he cannot be regarded as a constitutional officer. *Ex parte Williams*, 20 S. W. 580, 581, 31 Tex. Cr. R. 262, 21 L. R. A. 783.

"Constitutional offices" are those either created or provided for in the Constitution. They are, generally speaking, such as are governmental in their nature, as, for example, the executive, judicial, or legislative offices of the state, or any political division thereof. The offices are either created or provided for in the Constitution, while such offices as are designed for the administration of the affairs of municipalities are ordinarily created by the Legislature. *People v. Scheu*, 69 N. Y. Supp. 597, 599, 60 App. Div. 592.

#### CONSTITUTIONAL TERM.

Rev. St. c. 6, tit. 1, § 8, provides that all vacancies in the office of representative in Congress, senator, justice of the peace, etc., shall be supplied at the general election next succeeding the happening thereof, but when the term of service of any such officer will expire at the end of the year during which the vacancy in his office shall occur, no person shall be chosen to supply such vacancy, but the usual election shall be held for a new officer to hold during the constitutional term. Held, that the expression "constitutional term" did not mean a term of service necessarily commencing on the 1st day of January, since it is evident that the constitutional term of a representative in Congress does not commence on that date, but that the only effect of the section was to dispense with special elections, and, in case the term of service in any office in which a vacancy occurs should expire before the close of the year, a successor should be chosen in the same manner as if no vacancy had happened. *People v. Green* (N. Y.) 2 Wend. 266, 276.

#### CONSTRUCT—CONSTRUCTION.

See "Is Constructed"; "Original Construction."

Construction of instruments, see "Construct—Construction."

The International Dictionary defines the word "construct": "To put together constituent parts of something in their proper place or order; to build; to form; to make." *Morse v. City of West-Port*, 19 S. W. 831, 832, 110 Mo. 502; *Contas v. City of Bradford*, 55 Atl. 989, 990, 206 Pa. 291.

The words "construction, alteration, or repair," as used in the chapter relating to

liens, shall be held to include partial construction, and all repairs done in and upon any building, or other improvement. Ann. Codes & Sta. Or. 1901, § 5652.

#### Alterations and reconstruction.

Every change, alteration, or addition in or to an existing structure does not constitute an "erection or construction of a building" within the meaning of that phrase as used in laws giving mechanics' liens. The change or alteration must be such that the whole structure as changed or altered would commonly be regarded as another new and different building, and the addition of a back building to a main structure, as, for instance, a bathhouse and kitchen to a residence, is not an "erection or construction of a building." *Rand v. Mann* (Pa.) 3 Phila. 429.

Under Gen. St. Mass. c. 151, § 12, giving materialmen a lien for labor and material furnished in the "construction and repair" of vessels, work on a steamer, consisting in enlarging the promenade deck, taking off and replacing the hurricane deck, and other items done in order to adapt the steamer to new uses and service, was included. *Donnell v. Starlight*, 103 Mass. 227, 232.

St. 1848, § 490, providing that, whenever a debt is contracted for labor performed or materials used in the "construction" or repair of any ship or vessel, such debt shall be a lien thereon, and shall be preferred to all other liens except mariners' wages, should be construed to apply to alterations and reconstructions as well as to the original construction, for, if the latter meaning alone had been intended, the word "building" would seem to have been more natural. *The Ferax* (U. S.) 8 Fed. Cas. 1147.

"Construction," as used in Rev. St. 1881, §§ 40, 45, authorizing aid to the construction of railroads, will be construed to provide also for aid in the reconstruction of railroads, reconstruction being but a form of construction. *Bell v. Maish*, 36 N. E. 358, 359, 137 Ind. 226.

Where the structure of a building is so completely changed that in common parlance it may be properly called a 'new building' or a 'rebuilding,' the process of change is such an erection or construction of a building as to be within the meaning of that phrase as used in laws giving mechanics' liens. *Smith v. Nelson* (Pa.) 2 Phila. 113, 114.

The mechanic's lien act, authorizing a mechanic's lien to be filed on buildings for work and materials in the "erection or construction" thereof, means the original building of the house or other building, and cannot be construed to include the repair, alteration, or addition to houses or other buildings already constructed. *Appeal of Hancock*, 7 Atl. 773, 775, 115 Pa. 1 (citing *Rynd v.*

Bakewell, 87 Pa. 460; Appeal of Wetmore, 91 Pa. 276).

A statute authorizing a mechanic's lien for labor performed or materials furnished in "erecting or constructing" a building does not warrant a lien for remodeling or repairing a house, the walls of which were allowed to stand, though newly faced, and in which the owner continued to live while the work was being done. *Perigo v. Vanhorn* (Pa.) 2 Miles, 359, 362.

**Bailment of material used not implied.**

The words "construct and erect" are the usual words employed in a building contract, and they are effective words of sale to pass the title to the building materials, when erected, from the builder to the owner of the land. The words "construct and erect," as used in a contract to construct and erect at a certain brewery a refrigerating machinery and plant, are used in the same meaning as in ordinary building contracts, and do not imply that a bailment is being created. *Ott v. Sweatman*, 31 Atl. 102, 109, 166 Pa. 217.

**As buy or provide.**

"Construct," as used in a contract between two railroad companies, whereby one agrees to use the other's tracks until it has constructed tracks of its own, is not used in the sense of "purchase," and hence the company would be liable for the use of the tracks though it has purchased another road. *Michigan Cent. R. Co. v. Pere Marquette R. Co.*, 87 N. W. 271, 275, 128 Mich. 333.

A statute authorizing a town to "construct" a townhall cannot be construed as authorizing the purchase of a building already constructed. *Barker v. Town of Floyd*, 66 N. Y. Supp. 216, 217, 32 Misc. Rep. 474.

"Construct," as used in Act March 26, 1890, authorizing cities and towns to construct internal improvements, is synonymous with "provide." Ordinarily the meaning of the word "construct" in the sense here meant would be to build or make, but to give the law any effect whatever it must have been known to the Legislature that more than the mere costs of construction, involving the labor necessary, would have to be implied. *Seymour v. City of Tacoma*, 32 Pac. 1077, 1080, 6 Wash. 138.

A statute, Rev. St. Ind. § 3106, granting power to a city to establish and construct wharfs, docks, piers, etc., does not imply power to condemn for public use an existing private wharf. *City of Madison v. Daley* (U. S.) 58 Fed. 751, 755.

**Change of location or removal.**

The words "erection" and "construction," as used in *Sayles' Supp.* art. 8164, giving a lien on a house to any person furnishing tools for the erection thereof, to secure pay-

ment for the tools so furnished for the construction of the house, etc., seem to be synonymous in their meaning, and in common acceptation, when applied to a house, they mean the building of it by putting together the necessary material and raising it; but it does not require a strained sense to bring the removal of a house from the place where it has been put together, and placing it in position or setting it up in another place, within the meaning of these words as used in the law. *Burke v. Brown*, 30 S. W. 934, 10 Tex. Civ. App. 298.

"Construction" means the putting together, ready for use; building; erecting; and hence a mechanic's lien cannot be upheld for the cost of removing an old building bodily and without detachment, and putting it on another foundation, there being no construction. *Eichleay v. Wilson* (Pa.) 42 Wkly. Notes Cas. 525, 527.

**As dispose of or dispense with.**

The power to "construct and maintain" waterworks, conferred on a city, imposes a duty on the municipality, through its corporate authorities, to preserve possession for the benefit of the public. Such power does not include the power to sell and dispose. *Huron Waterworks Co. v. City of Huron*, 62 N. W. 975, 976, 7 S. D. 9, 30 L. R. A. 848, 56 Am. St. Rep. 817.

A general power given by statute to a city to "construct" sidewalks, or not, in all streets, whether macadamized or paved, must be construed as one which deals with the whole subject, and places it within the control of the local authorities. It authorizes them not merely to construct them or not, in their discretion, where they do not now exist, but to remove or dispense with them where they do exist, if in their judgment it is desirable. *Attorney General v. City of Boston*, 142 Mass. 200, 204, 7 N. E. 722, 725.

**As maintain or repair.**

To build or "construct" a railroad is one thing; to "maintain" the structure after it is erected or built is another. *Moorhead v. Little Miami R. Co.*, 17 Ohio, 340, 353.

Laws 1857, c. 521, § 8, authorizes the board of water and sewerage commissioners of Brooklyn, in case they find it necessary to construct a sewer or drain through any part of a street not opened by law, to apply to the Supreme Court to appoint the commissioners, etc., to open said street. Held, that the phrase "to construct" means the maintenance, preservation, and protection, as well as the establishment, of the sewer. *In re Fowler*, 53 N. Y. 60, 61.

"In the common understanding and language of the people, when we speak of the 'erection' or 'construction' of a house or building, we mean the erection of a new

house or building, and not the repairing of an old one." In *re Howett*, 10 Pa. (10 Barr) 379, 380.

In Act N. Y. March 8, 1871 (Sess. Laws 1871, c. 79), entitled "An act to authorize a certain town to raise money for the purpose of constructing a town dock in such town," the word "constructing" implies and includes the keeping it constructed by means of necessary repairs. It is a necessary incident to the general purpose indicated in the construction of the dock, reasonably to be inferred therefrom. *Town of Pelham v. The B. F. Woolsey* (U. S.) 16 Fed. 418, 419.

Internal Revenue Act June 30, 1864 (18 Stat. 284), imposing a tax not only on the dividends of every railroad company, but also on "all profits used for construction," means new constructions adding to the permanent value of the capital, and hence does not apply to earnings expended for keeping the property in its normal condition, and improvements in the way of repairs made to take the place of prior structures. The phrase means only the increased value of the new over the old. *Grant v. Hartford & N. H. R. Co.*, 98 U. S. 225, 228, 23 L. Ed. 878; *Hartford & N. H. R. Co. v. Grant* (U. S.) 11 Fed. Cas. 699, 700.

In Laws 1872, c. 186, relating to the recovery of compensation for services rendered by a contractor against a railroad for the construction of its road, or any part thereof, the term "construction" includes the removal of an old bridge in supplying its place with a larger one constructed of iron, with stone-cut abutments embedded in the earth. *Atchison, T. & S. F. R. Co. v. McConnell*, 25 Kan. 370, 372.

#### Park.

To "construct" a thing is to put together its several parts in their proper place and order, and there is a sense in which to lay out and establish a public park may be held to be a construction, for a park is made up in part of walks and groves which are new constructions. *City Sewerage Utilization Co. v. Board of Health* (Pa.) 1 Leg. Gaz. 402, 403; *City Sewerage Utilization Co. v. Davis* (Pa.) 8 Phila. 625, 626.

#### Street cleaning.

There is a sense in which to lay out and establish a public park may be held to be an erection or construction. To "construct" a thing is to put together its several parts in their proper places and order, and to erect is to found and form, as well as to build or raise and deliver up. A park is made up in part of walks and roads which are new constructions, and of ornamentation, with shrubbery and trees, which are set up in the places in which they are planted, and of booths and summerhouses, which are erected or built. But it cannot be said as much of the

cleaning of the streets of the city; this is a work into which the elements of erection or construction do not enter, and therefore the restraining of the cleaning of the city streets does not fall within the prohibition of the act prohibiting the court in which the application for injunction is made from granting injunctions against the erection or use of any public work of any kind erected or in progress of erection under the authority of the act of the Legislature till the question of title and damages has been settled by the court of law. *City Sewerage Utilization Co. v. Davis* (Pa.) 8 Phila. 625, 626.

#### Of railroad.

The word "completing" has substantially the same signification as "constructing." A railroad is completed or constructed when that is done which is necessary to make it a railroad; when it is fitted for use as a railroad; that is to say, when it is made ready and put in a proper condition for the placing and running of regular trains upon it—for its "operation," as it is usually termed. In its natural and ordinary sense, the word "completing" does not include the equipment of the road with rolling stock or putting it into operation. *De Graff v. St. Paul & P. R. Co.*, 23 Minn. 144, 146.

"Construction" does not always mean "completion." It sometimes means "the act of constructing," and it is used in this sense in the act providing that an appeal from the valuation by commissioners "shall not prevent a railroad company from proceeding in the construction of its road." Here "construction" is used in the sense of the "act of building" or the "progress of construction." *Greenville & O. R. Co. v. Nunnemaker* (S. C.) 4 Rich. Law, 107, 114, 115.

The term "construction," when applied to a railroad as constituting an obstruction in a street, includes not only the movement of earth and the laying down of rails on a roadbed, but the character and purpose of the structure. Two parallel iron rails, in themselves considered, might present little or no obstacle in the way of access to the building which they were before; but the structure being a railroad built for the purpose of moving trains of cars by means of locomotive engines, whether it obstructed access or not depends, not merely on the position of the rails, but also on the use for which they were intended. *Jones v. Erie & W. V. R. Co.*, 25 Atl. 134, 137, 151 Pa. 30, 17 L. R. A. 758, 31 Am. St. Rep. 722.

Act 1853, c. 31, § 1, provides that whenever any railroad company shall acquire a right of way, whether by purchase or the assessment of damages by a jury, the railroad shall have the right to take and remove, for the construction and repairing of the road, any earth, gravel, timber, or any other material on the land so acquired. Held, that the

word "construction" meant not only the making of the roadbed, but also its preparation and readiness for use in a safe and convenient manner. *Preston v. Dubuque & P. R. Co.*, 11 Iowa, 15, 17.

An act incorporating a company for the purpose of constructing a railroad between designated termini, with no further grant of franchises, would not confer the power of taking lands by the right of eminent domain, or even grant the lands owned by the state that might be crossed by the route. *Keyport & M. P. Steamboat Co. v. Farmers' Transp. Co.*, 18 N. J. Eq. (3 O. E. Green) 13, 14.

### CONSTRUCTED.

Act March 6, 1877, which authorized railroad corporations to condemn lands adjoining their road as "constructed," means the roadbed actually existing. *Akers v. United N. J. R. & Canal Co.*, 43 N. J. Law (14 Vroom) 110, 111.

"Construct" means to put together, as the parts of a thing, for a new product; to build; so that, an act providing that fences shall not be "constructed" by railroads of barbed wire, does not apply to fences built before the passage of the act. *Stisser v. New York Cent. & H. R. R. Co.*, 52 N. Y. Supp. 861, 862, 32 App. Div. 98.

"Constructed," as used in St. 1872, c. 53, § 12, providing that railroads hereafter constructed should pass over or under other roads which it was necessary for them to cross, does not mean entirely completed, but a road is "constructed," within the meaning of the statute, if the work thereon has been so far carried forward as to show that it was the intention of the constructed road to make a grade crossing. *Attorney General v. Ware River R. Co.*, 115 Mass. 400, 404.

Gen. St. 1888, § 3481, provides that, "when a new highway shall hereafter be constructed" across a railroad, such highway shall pass under or over the railroad as the highway commissioners shall direct. Held, that the language "when a new highway shall hereafter be constructed" does not refer to the laying out of the highway, but to the building of the crossing over or under the railroad, and there is nothing in the language of the act requiring the laying out of the highway to be fully completed before the commissioners may direct whether the crossing shall be made over or under the railroad. *Smith v. Town of New Haven*, 22 Atl. 146, 148, 59 Conn. 203.

### CONSTRUCTIVE.

The word "constructive" is defined by Webster to be "derivative; inferential." *Middleton v. Parke*, 3 App. D. C. 149, 160.

### CONSTRUCTIVE AUTHORITY.

"Constructive authority" would be authority assumed to have been given because some other antecedent authority had been given. A denial to the orphans' court of incidental powers or constructive authority by Act Md. 1798, c. 101, subc. 15, § 20, does not mean the denial of such authority as is necessarily implied from that which is expressly granted. *Middleton v. Parke*, 3 App. D. C. 149, 160.

### CONSTRUCTIVE BREAKING.

See "Breaking (In Criminal Law)."

### CONSTRUCTIVE CONTEMPT.

"Constructive" or "consequential" contracts are such as are committed outside of the view and presence of the court or judge at chambers. *Cooper v. People*, 22 Pac. 790, 796, 13 Colo. 337, 373, 6 L. R. A. 430; *State v. Clancy*, 61 Pac. 987, 989, 24 Mont. 359.

A "constructive contempt" is that which is not committed in the presence of the court, but which tends by its operation "to obstruct and embarrass or prevent the due administration of justice." *Stuart v. People*, 4 Ill. (3 Scam.) 395, 404; *In re Dill*, 5 Pac. 39, 48, 32 Kan. 688, 49 Am. Rep. 505; *State v. Henthorn*, 26 Pac. 937, 988, 46 Kan. 613; *Territory v. Murray*, 15 Pac. 145, 148, 7 Mont. 251; *Indianapolis Water Co. v. American Strawboard Co. (U. S.)* 75 Fed. 972, 975; *Ex parte Wright*, 65 Ind. 504, 508; *State v. Hansford*, 28 S. E. 791, 792, 43 W. Va. 773; *State v. Shepherd*, 76 S. W. 79, 86, 177 Mo. 205; *State v. McClaugherty*, 10 S. E. 407, 408, 33 W. Va. 250, 253.

"Constructive contempts" are those which arise from matters not transpiring in court, but in reference to failures to comply with the orders and decrees issued by the court and to be performed elsewhere." *Androscoggin & K. R. Co. v. Androscoggin R. Co.*, 49 Me. 392, 400; *Ex parte Wright*, 65 Ind. 504, 508.

### Disobedience of judgment or decree.

A party may be put in contempt for disobeying a judgment or decree for the performance of acts which are within his power, and which the court may properly adjudge and decree to be done. *McMakin v. McMakin*, 68 Mo. App. 57, 60.

### Intent.

"Constructive contempts" may be distributed into two general classes, namely, first, those wherein the contemptuous acts primarily affect public rights or the due administration of public justice, and, second, those which primarily affect private rights, and only remotely and incidentally affect

public rights or public justice. When the contempt consists in the failure or refusal of the party to do or refrain from doing something which he is ordered to do or refrain from doing for the benefit or advantage of the opposite party, the proceeding is not criminal, but is civil and remedial in its nature; and in this sort of contempt the intention with which the act was committed is immaterial, except in fixing the proper measure of punishment. *Indianapolis Water Co. v. American Strawboard Co.* (U. S.) 75 Fed. 972, 975.

#### **Publications concerning legal proceedings.**

Bishop (volume 2, § 26) thus defines "constructive contempt": "According to the general doctrine, any publication, whether by parties or strangers, which concerns a case pending in court, and has a tendency to prejudice the public concerning its merits, and to corrupt the administration of justice, or reflects on the tribunal or its proceedings, or on the parties, the jurors, the witnesses, or the counsel, may be visited as a contempt." *People v. Wilson*, 64 Ill. 195, 225, 16 Am. Rep. 528.

A publication by a newspaper, immediately after a judge of the superior court has sustained a demurrer to a petition, with leave to amend, falsely charging him, in so doing, "with deliberate lying about the law, deliberate, intentional falsification in his official capacity, and deliberate, intentional denial of justice;" with being a "fool," an "impudent rascal," a "criminal on the bench"—constitutes a contempt of court, and an unlawful interference with the proceedings of a court, within Code Civ. Proc. Cal. § 1209, subd. 9. *Ex parte Barry*, 25 Pac. 256, 257, 85 Cal. 603, 20 Am. St. Rep. 248.

A publication in a newspaper, in a city where the Supreme Court of Appeals is sitting, with reference to a case then pending and undetermined, charging three of the four judges of the court with attending a political caucus more than a year before, and in the caucus advising the action out of which the case arose, and promising the caucus to hold its action legal and proper, and charging the court with agreeing to decide the case before an approaching political convention for political purposes, is a contempt of said court, which it may summarily punish. *State v. Frew*, 24 W. Va. 416, 448, 49 Am. Rep. 257.

A publication of the truth as to legal proceedings is not contempt of court. *McClatchy v. Superior Court of Sacramento County*, 119 Cal. 413, 419, 51 Pac. 696, 89 L. R. A. 691.

#### **CONSTRUCTIVE CONTRACT.**

"Constructive contracts" are such as arise when the law prescribes the rights and liabilities of persons who have not in reality

entered into a contract at all, but between whom circumstances make it just that one should have a right, and the other be subject to a liability, similar to the rights and liabilities in cases of express contracts. *Wickham v. Well*, 17 N. Y. S. 518, 519.

"Constructive contracts" are fictions of law, adopted to enforce legal duties by actions of contract where no proper contract exists, express or implied. *Woods v. Ayres*, 39 Mich. 345, 350, 33 Am. Rep. 306; *Western Union Tel. Co. v. Taylor*, 84 Ga. 408, 418, 11 S. E. 396, 398, 8 L. R. A. 189 (quoting *Hertzog v. Hertzog*, 29 Pa. [5 Casey] 465, 467, 468).

Obligations incurred by a person, on the purchase of stock in a corporation, to pay assessments thereon, come within the class of contracts called "constructive contracts," and are not in fact contracts at all. *Robinson v. Turrentine* (U. S.) 59 Fed. 554, 559.

#### **CONSTRUCTIVE CONVERSION.**

A "constructive conversion" takes place when a person does such acts in reference to the goods of another as amount in law to the appropriation of the property to himself. *Scruggs v. Scruggs* (U. S.) 105 Fed. 28, 29.

#### **CONSTRUCTIVE CRIME.**

Where, by a strained interpretation of a penal statute, it is made to include an act not otherwise punishable, it is said to be a "constructive crime"; that is, one built up by the court with the aid of inference, implication, and strained interpretation. Such crimes are repugnant to the spirit and letter of English and American criminal law. *Ex parte McNulty*, 19 Pac. 237, 239, 77 Cal. 164, 11 Am. St. Rep. 257.

#### **CONSTRUCTIVE DELIVERY.**

A "constructive delivery" of personalty takes place when, without actual transfer of the goods, or their symbol, the conduct of the parties is such as to be inconsistent with any supposition other than that there has been a change in the nature of the holding; and whether such change has taken place is a question for the jury. *Swafford v. Spratt*, 67 S. W. 701, 702, 93 Mo. App. 631.

The "constructive delivery" sufficient to make valid a gift must be such as the nature of the thing and its actual position requires. *Wiley v. Backus*, 3 N. W. 431, 432, 52 Iowa, 401.

Payment for the pasturage of a colt on the part of the purchaser is such an assumption of ownership and such an exercise of right as constitutes a "constructive delivery." *Stockwell v. Baird* (Del.) 31 Atl. 811, 1 Marv. 420.

Where a husband executed a deed to his wife and their children, and put the deed on



record, this must be held to be a good "constructive delivery," and the deed took effect at the time of such record. *Holliday v. White*, 33 Tex. 447, 459.

### CONSTRUCTIVE EVICTION.

The doctrine of "constructive eviction" grew out of the great number of cases in which a covenantor's right would be as effectually determined, and his enjoyment of the estate granted as effectually prevented, by other means as through a judgment actually enforced or an actual putting out of possession. Although the name "eviction" is still used to characterize the fact or facts which are allowed to constitute a breach of covenant, an eviction in fact is no longer necessary. *Allis v. Nininger*, 25 Minn. 525, 528.

"Constructive eviction," as the term is used with reference to the breach of the covenants of quiet enjoyment and of warranty, means the inability of the purchaser to obtain possession by reason of a paramount title. "When at the time of the conveyance the purchaser finds the premises in the possession of one claiming under a paramount title, there is a 'constructive eviction,' and the covenants for quiet possession or of warranty will be held broken without any other act on the part of the grantee or the claimant." *Fritz v. Pusey*, 18 N. W. 94, 95, 31 Minn. 368.

#### Of lessee.

To constitute a "constructive eviction," there must be an intentional and injurious interference by the landlord which deprives a tenant of the beneficial enjoyments of the demised premises, or materially impairs such beneficial enjoyment. The fact that the rest of a tenant in an apartment house is disturbed by the noise of children in other apartments of the same building does not constitute such an eviction. *Seaboard Realty Co. v. Fuller*, 67 N. Y. Supp. 146, 147, 33 Misc. Rep. 109.

Eviction is "constructive" when the lessor, without intent to oust the lessee, does an act by which the latter is deprived of the beneficial enjoyment of some part of the premises, in which case the tenant has his election to quit and avoid the lease and rent, or abide the wrong and seek his remedy in an action for the trespass. *Talbot v. English*, 59 N. E. 857, 860, 156 Ind. 299.

### CONSTRUCTIVE FORCE.

The force necessary to be used to constitute the crime of rape need not be actual, but may be constructive or implied. An acquiescence in the act obtained through duress or fear of personal violence is "constructive force." *Shepherd v. State*, 33 South. 266, 267, 135 Ala. 9.

### CONSTRUCTIVE FRAUD.

"Constructive fraud" consists: (1) In any breach of duty which, without an actual fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; or (2) in any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud. Civ. Code Cal. 1903, § 1573; Civ. Code Mont. 1895, § 2118; Rev. St. Okl. 1903, § 744; Rev. Codes. N. D. 1899, § 3849; Civ. Code S. D. 1903, § 1202.

"Constructive fraud" consists in any act of omission or commission, contrary to legal or equitable duty, trust or confidence, which is justly reposed, which is contrary to good conscience and operates to the injury of another. Civ. Code Ga. 1895, § 4025.

Constructive fraud "is indirect, and may be implied from some other acts or omission of an act, which may be in moral contemplation entirely innocent, but which, without expression of actual proof of its innocence, is evidence of fraud." *People v. Kelly* (N. Y.) 35 Barb. 444, 457; *Carty v. Connolly*, 27 Pac. 599, 600, 91 Cal. 15.

Acts contrary to public policy, sound morals, and the provisions of a statute, however honest the intention with which they may have been performed, are deemed "constructive frauds," or frauds in law. *Meyer v. Black*, 16 Pac. 620, 629, 4 N. M. (Johns.) 190 (citing *Leitensdorfer v. Webb*, 1 N. M. 34).

"By 'constructive frauds' are meant such acts or contracts as, though not originating in any actual evil design or contrivance to perpetuate a positive fraud or injury upon other persons, are yet, by their tendency to deceive or mislead other persons, or to violate private or public confidence, or to impair or injure the public interest, deemed equally reprehensible with positive fraud, and are therefore prohibited by law as within the same reason and mischief as acts and contracts done *malo animo*." *Haas v. Sternbach*, 41 N. E. 51, 53, 156 Ill. 44 (citing 1 Story, Eq. Jur. 258). Constructive or legal fraud exists where some settled rule of public policy is violated. *Mills v. Smith*, 19 N. Y. Supp. 654, 857, 65 Hun, 619.

In Story's Eq. Jur. vol. 1, § 395, it is said that another class of constructive frauds consists of those where a person purchases with full notice of the legal or equitable title of other persons to the property. In such cases he will not be permitted to protect himself against such claims, but his own title will be postponed and made subservient to his heirs. He becomes by such conduct particeps criminis with the fraudulent grantor. And, on all such cases of purchase with notice, courts of equity will hold the purchaser a trustee for the benefit of persons whose rights he has thus sought to defraud or de-

feat. *Seymour v. Seymour*, 51 N. Y. Supp. 130, 132, 28 App. Div. 495.

"Constructive fraud," sometimes called "legal fraud," is nevertheless fraud, although it rests more upon presumption, and less upon furtive intent, than moral fraud. *Butler v. Prentiss*, 52 N. E. 652, 656, 158 N. Y. 49 (citing *Cowee v. Cornell*, 75 N. Y. 91, 99, 31 Am. Rep. 428).

"Constructive fraud" is synonymous with "legal fraud," and is such as is implied by law from the nature of the transaction itself. The question of the existence or non-existence of an actual purpose to defraud does not enter as an essential factor in determining the question, but the law regards the transaction as fraudulent per se. *Newell v. Wagness*, 44 N. W. 1014, 1016, 1 N. D. 62.

Where creditors sued out an attachment on the ground that their debtor had fraudulently disposed of its property with a fraudulent intent to hinder and delay its creditors, when there was proof that such allegation was in fact false, and that there was no ground for an attachment, it was such a violation of the law as amounted to "constructive fraud" as against the junior attaching creditors, and would, if permitted to stand, give to the appellee an unfair, inequitable, and unjust advantage over the others. *Davis v. H. B. Claflin Co.*, 63 Ark. 157, 172, 38 S. W. 662, 665, 41 S. W. 996, 35 L. R. A. 776, 58 Am. St. Rep. 102.

In the application of the rule that if a lessor has knowledge of defects in the premises which are not discoverable by the tenant, and which will imperil his person or property, a liability arises from the fraudulent concealment thereof, the terms "fraud," "fraudulent concealment," "constructive fraud," and "deceit" are synonymous. *Shinkle, Wilson & Kreis Co. v. Birney & Seymour*, 67 N. E. 715, 716, 68 Ohio St. 328.

#### Actual fraud distinguished.

"Fraud" in law is of two kinds, actual and constructive. The former arises from deception practiced by means of the misrepresentation or concealment of a material fact, the latter from a rule of public policy, or the confidential or fiduciary relation which one of the parties affected by the fraud sustained towards the other. It is a constituent of actual fraud that the party alleged to have been defrauded was deceived; no positive dishonesty of purpose is required to show constructive fraud. *Forker v. Brown*, 30 N. Y. Supp. 827, 10 Misc. Rep. 161.

Fraud may be actual or constructive. Actual fraud consists in any kind of artifice by which another is deceived; constructive fraud consists in any act of omission or commission, contrary to legal or equitable duty, trust or confidence justly reposed, which is contrary to good conscience and operates to

the injury of another. The former implies moral guilt; the latter may be consistent with innocence. *Massachusetts Ben. Life Ass'n v. Robinson*, 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261. One who knowingly and willfully makes false representations as to material facts, with intention to induce the other to enter into a contract with him, and who does so induce the other to enter into the contract to his injury, is guilty of actual fraud, without regard to his intent as to injury to the other party. It is a fraud in law if the party makes representations which he knows to be false, and injury ensues, although the motive from which the representations proceeded may not have been bad. *Foster v. Northwestern Mut. Life Ins. Co. v. Montgomery* (Ga.) 43 S. E. 79, 90, 116 Ga. 799 (citing *Foster v. Charles*, 6 Bing. 896, 1 E. C. L. 183).

#### Breach of duty.

A breach of duty by a person acting in a fiduciary capacity is constructive fraud. *Warren v. Robinson*, 61 Pac. 28, 30, 21 Utah, 429; *Mills v. Smith*, 19 N. Y. Supp. 854, 857, 65 Hun, 619.

"Constructive fraud" consists of any act of omission or commission, contrary to legal or equitable duty, trust or confidence justly reposed, which is contrary to good conscience and operates to the injury of another. *City of Clay Center v. Myers*, 35 Pac. 25, 28, 52 Kan. 363.

"Constructive fraud" consists, first, in any breach of duty which, without an actual fraudulent intention, gives an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him. *Carty v. Connolly*, 27 Pac. 599, 600, 91 Cal. 15.

The concealment, to the prejudice of another party with whom one is dealing, of any facts which if known to him might affect his decision, and which there is an obligation rising out of the transaction to disclose, is a constructive fraud, without respect to the motive of the party who conceals the fact. *Leary v. King*, 33 Atl. 621, 6 Del. Ch. 108.

The unauthorized purchase by an attorney of property intrusted to him to sell is sometimes termed a "constructive fraud." *Yeoman v. Townshend*, 26 N. Y. Supp. 606, 609, 74 Hun, 625.

#### CONSTRUCTIVE KNOWLEDGE.

Constructive knowledge on the part of the owner of an animal as to its vicious habits is gathered from all the facts and circumstances of each particular case, as well as from well-established inferences or presumptions in law. *Brown v. Green* (Del.) 42 Atl. 991, 993, 1 Pennewill, 535.

**CONSTRUCTIVE MALICE.**

"Constructive or implied malice" is an inference or conclusion of law upon facts proved, as when a person unlawfully and suddenly kills another, without premeditation or design, and without any, or without a considerable, provocation, such as would reduce the crime to manslaughter. *State v. Harrigan* (Del.) 81 Atl. 1052, 9 Houst. 369.

"Implied" or "constructive" malice, in the law of homicide, is an inference or conclusion of law from the facts found by the jury, and among these the actual intention of the prisoner becomes an important and material fact, for, though he may not have intended to take away life or to do any personal harm, yet he may have been engaged in the perpetration of some other felonious or unlawful act from which the law raises the presumption of malice. *State v. Miller* (Del.) 32 Atl. 137, 139, 9 Houst. 564; *State v. Jones* (Del.) 47 Atl. 1006, 1007, 2 Pennewill, 573.

"Constructive malice," as used to define an element of murder in one of the lesser degrees, means implied malice, or malice which is presumed from the facts, as from the imminently dangerous character of the weapon used, or the felonious act in which the defendant or murderer was engaged. *Hogan v. State*, 36 Wis. 226, 238.

"Constructive malice," in the law of libel, is confined to those cases where the words are themselves capable of bearing a libelous meaning. The law in such cases reasonably presumes that the defendant meant to say what he did, but the law presumes no more, and when a hidden defamatory meaning is sought to be attributed to words in themselves innocent, and on their face containing no such sense by facts independent of the publication, the knowledge of such facts must be shown by averment, and proved to have existed in the breast of the defendant. *Caldwell v. Raymond* (N. Y.) 2 Abb. Prac. 193, 196.

**CONSTRUCTIVE NOTICE.**

"'Constructive notice,' as defined by Judge Story, is in its nature no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted." *Cambridge Val. Bank v. Delano*, 48 N. Y. 323, 339 (quoting Story, Eq. Jur. § 399); *Kirklin v. Atlas Savings & Loan Ass'n* (Tenn.) 60 S. W. 149, 157; *Nelson v. Allen*, 9 Tenn. (1 Yerg.) 360, 367; *Jordan v. Pollock*, 14 Ga. 145, 146; *Townsend v. Little*, 3 Sup. Ct. 357, 361, 109 U. S. 504, 27 L. Ed. 1012; *Schweiss v. Woodruff*, 41 N. W. 511, 512, 73 Mich. 473 (citing *Clafin v. Jenheim*, 66 N. Y. 301, 306); *Thomas v. City of Flint*, 81 N. W. 936, 944, 945, 123 Mich. 10, 47 L. R. A. 499; *Fuller & Johnson v. McMahon* (Iowa) 94 N. W. 205; *Hayward*

*v. Mayse*, 1 App. D. C. 133, 140; *Rogers v. Jones*, 8 N. H. 264, 270 (quoting 2 Anstr. 433).

"Constructive notice" is a legal presumption, and will be conclusive unless rebutted; and in many cases it cannot be gainsaid or denied, even by evidence of the absence of actual knowledge of notice. *Brown v. Baldwin*, 25 S. W. 858, 860, 121 Mo. 106.

"Constructive notice is a legal inference of notice of so high a nature as to be conclusive unless disproved, and is in most cases unsusceptible of explanation or rebuttal by evidence that the purchaser had no actual notice and believed the vendor's title to be good." *White v. Fisher*, 77 Ind. 65, 71, 40 Am. Rep. 287.

Constructive notice assumes that no information concerning the prior fact, claim, or right has been directly and personally communicated to the party, but is only inferred by operation of legal presumption. *Levins v. W. O. Peoples Grocery Co.* (Tenn.) 38 S. W. 733, 740 (citing 2 Pom. Eq. Jur. § 604).

Constructive notice is a legal inference from established facts, and when the facts are not controverted, or the alleged defect or infirmity appears on the face of the instrument and is a matter of ocular inspection, the question is one for the court. *Birdsall v. Russell*, 29 N. Y. 220, 249; *Thomas v. City of Flint*, 81 N. W. 936, 944, 945, 123 Mich. 10, 47 L. R. A. 499.

Constructive notice is a creature of the statute, and, to be of any force, the statute must be strictly complied with. *De Lassus v. Winn*, 74 S. W. 635, 636, 174 Mo. 636 (citing *Alt v. Fullerton*, 151 Mo. 598, 603, 52 S. W. 400).

**Actual notice distinguished.**

Notice is of two kinds, actual and constructive. Actual notice may be either express or implied. If the one, it is established by direct evidence; if the other, by proof of circumstances from which it is inferable as a fact. Constructive notice is, on the other hand, always a presumption of law. Express notice embraces not only knowledge, but also that which is communicative by direct information, either written or oral, from those who are cognizant of the fact communicated. Implied notice, which is equally actual notice, arises where the party to be charged is shown to have had knowledge of such facts and circumstances as would lead him, by the exercise of due diligence, to a knowledge of the particular facts; or, as defined by the Supreme Court of Missouri in *Rhodes v. Outcalt*, 48 Mo. 367, 370, a notice is to be regarded in law as actual when the party sought to be affected by it knows of the particular fact, or is conscious of having the means of knowing it, although he may not employ the means in his possession for

the purpose of gaining further information. *City of Baltimore v. Whittington*, 27 Atl. 984, 985, 78 Md. 231.

#### **Implied notice distinguished.**

"Constructive notice," in the law of adverse possession, differs from "implied notice," which is a knowledge imputed impliedly by collateral facts of such a nature as to cast on the party the legal duty of not being willfully or negligently ignorant of all proper inferences to be drawn from such facts. "Constructive notice" is defined to be a knowledge, often conclusively imputed by the court, on presumption that the information must have been communicated. 2 Bouv. Law Dict. tit. "Notice." The underlying principle is that notice, whether express, implied, or constructive, is but a mode or means of imputing knowledge, actually, impliedly, or legally; and knowledge is but information imputed by notice in one of these several modes. *Wells v. Sheerer*, 78 Ala. 142, 147.

#### **As notice from circumstances.**

"Constructive notice" of a defective sidewalk on the part of the mayor and board of aldermen of a city means such notice as may be inferred from the fact that an obvious defect had existed so long as to be generally noticed by persons passing over it, and thus raise an inference that the mayor, or some members of such board, or employé of defendant whose duty it was to keep the streets in repair, had notice of such defects. *Pool v. City of Jackson*, 23 S. W. 57, 59, 98 Tenn. 62.

By "constructive notice" is meant such notice as the law imputes from the circumstances of the case. After a street has been out of repair so that the defect has become known and notorious to those traveling the street, and there has been full opportunity for the municipality, through its agents charged with that duty, to learn of its existence and repair it, the law imputes to it notice, and charges it with negligence. *Keen v. City of Havre de Grace*, 48 Atl. 444, 445, 93 Md. 84.

In considering the knowledge which the owner of an animal must have as to its dangerous character before he can be held liable for its acts, the court said: "Notice may be of two kinds. It may be an actual notice; that is, knowledge brought home to the party himself that his dog has bitten a certain person, at a certain time, under certain circumstances, which he had no right to do. Or a man may keep a vicious bull, and may have notice brought home to him of some immediate injury that he has done; that is actual notice. In case of any accident happening or injury being done, either by one animal or the other, in that case the master would be liable. But that is not the only case in which the master may be liable. There may be a case in which there is no actual notice, but where there are certain

facts and circumstances which, being brought to his knowledge, imply notice; that is, by reason of the duty that is imposed upon him, he reasonably ought to know. If a man has a dangerous dog, though he may never have bitten any person, if he is of a vicious and ferocious character, and that knowledge is brought home to his wife under those circumstances, in case of injury inflicted by that dog he unquestionably would be liable though no actual notice had been given. In other words, that is what the law terms 'constructive notice,' which means nothing more nor less than that there are facts and circumstances which are brought to his knowledge tending to show that the animal is a dangerous and ferocious animal, and therefore he would be liable for any consequences which may result from the viciousness of the animal." *Barclay v. Hartman* (Del.) 43 Atl. 174, 175, 2 Marv. 351.

#### **As notice of facts putting on inquiry.**

"Constructive notice" is notice imputed by the law to a person not having actual notice, and every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself. *Kansas Moline Plow Co. v. Sherman*, 41 Pac. 623, 626, 3 Okl. 204, 32 L. R. A. 33; *Gress v. Evans*, 46 N. W. 1132, 1134, 1 Dak. 387; *Scheuber v. Wheeler* (Tex.) 15 S. W. 503, 504; *Jordan v. Pollock*, 14 Ga. 145, 146; *Rev. St. Okl.* 1903, § 2790; *Rev. Codes N. D.* 1899, §§ 5117, 5118; *Civ. Code S. D.* 1903, §§ 2451, 2452.

The general doctrine is that whatever puts a party on inquiry amounts in law to notice, provided the inquiry becomes a duty, as in the case of purchasers or creditors. *Jewell v. Truhn*, 38 Minn. 433, 437, 38 N. W. 106.

A person is said to have "constructive notice" when, by any circumstances whatever, he is put upon inquiry which amounts in the judgment of law to notice, providing the inquiry becomes a duty, as in the case of purchasers and creditors, and would lead to the knowledge of the requisite fact by the exercise of ordinary diligence and understanding. *Jackson v. Waldstein* (Tex.) 27 S. W. 26, 27.

"Constructive notice" is whatever puts a party where he should make inquiry, and amounts in judgment of law to notice, provided it becomes a duty, as in the case of purchasers and creditors, and would lead up to the knowledge of acquired fact by the exercise of ordinary diligence. *Hood v. Fahnestock*, 1 Pa. (1 Barr) 470, 472, 473, 44 Am. Dec. 147.

A party is charged with a constructive notice as to the condition of the title to real estate whenever he has information or knowl-

edge of some extraneous facts which of themselves do not amount to nor show an actual notice, but which are sufficient to put a reasonably prudent man upon an inquiry respecting a conflicting interest, claim, or right, and the circumstances are such that the inquiry, if made and followed with reasonable care, would lead to a discovery of the truth. *Lang Syne Gold Min. Co. v. Ross*, 18 Pac. 358, 361, 362, 20 Nev. 127, 19 Am. St. Rep. 337. It is such notice "as would put a prudent man on inquiry which, if prosecuted with ordinary diligence, would lead to actual notice of the right or title in conflict with which he was about to purchase." *Matesky v. Feldman*, 48 N. W. 733, 734, 75 Wis. 103.

"Constructive notice" may be said to be a knowledge by the purchaser of some facts which would put him upon inquiry, and require him to examine other matters that would generally unfold the true title. If he omit in a proper case to make examination, he is conclusively charged with negligence, and notice of the defect in the title. *Acer v. Westcott*, 46 N. Y. 384, 7 Am. Rep. 355; *First Nat. Bank v. National Broadway Bank*, 47 N. Y. Supp. 880, 882, 22 App. Div. 24. Under such definition, the one who accepts, as collateral for a personal loan, certificates of stock which show on their face that the borrower holds them as trustee, is put on inquiry as to the nature and effect of the trust, so as to have constructive notice thereof. *First Nat. Bank v. National Broadway Bank*, 47 N. Y. Supp. 880, 882, 22 App. Div. 24.

"Constructive notice" of an outstanding title in land is the notice imparted by the registry. *Hill v. Tissier*, 15 Mo. App. 299, 306.

"Constructive" or "record" notice is such notice as is presumed to be imparted by recording with the proper authorities a properly drawn and properly acknowledged instrument. *Livingston v. Stevens (Iowa)* 94 N. W. 925, 927.

A recital in a deed of a prior unrecorded mortgage as an existing incumbrance is actual notice of such unrecorded mortgage to the grantee, and "constructive notice" of its existence to parties claiming under him. *Buchanan v. Balkum*, 60 N. H. 406.

#### **Presumptive notice distinguished.**

See "Presumptive Notice."

#### **CONSTRUCTIVE OCCUPANCY.**

As applied to a homestead, "constructive occupancy" is defined as a temporary vacation without abandonment, and with a bona fide and subsisting intention to return. *Davis v. Kelly*, 87 N. W. 347, 62 Neb. 642.

#### **CONSTRUCTIVE POSSESSION.**

"Constructive possession" is that which exists in contemplation of the law without

actual personal occupancy. *Newcome v. Crews*, 32 S. W. 947, 98 Ky. 839; *Brown v. Volkening*, 64 N. Y. 76, 80.

One is in "constructive possession" of real estate when it is in the custody or occupancy of no one, but when he has a title thereto. *Brown v. Hartzell*, 87 Mo. 564, 567.

Constructive possession "means that possession which is not actual, visible, notorious, and hostile. It is that possession which is deduced by a mode of interpretation; a possession which is inferred. Constructive possession is almost unknown in England. It is a doctrine peculiarly adapted to and has mainly grown up in the American states. The ordinary and usual method of supporting constructive possession is by entering under a recorded deed, or other equivalent record of title, upon a portion of the premises described therein, which in a new country is all the owner can do; and the public record of the boundaries is held to be equivalent to actual occupancy of the whole and every part of the premises." *Hodges v. Eddy*, 38 Vt. 327, 337.

The term "constructive possession" may be applied to designate the relation between the owner of property and the property when the owner is not in actual possession thereof, but when he knows where the property is situated, so that he is able to recover the actual possession when he desires. Such property is not lost, but in the possession of the owner to such an extent that a taking thereof constitutes larceny. *Pritchett v. State*, 34 Tenn. (2 Sneed) 285, 288, 62 Am. Dec. 463.

"Constructive possession" of land is where a person, having paper title to a contract of land, is in actual possession of only a part thereof. In such a case the law construes the possession to extend to the boundary of a tract. Hence adjacent owners may be in constructive possession of the same land included in the boundaries of each tract. In such case no prescription can arise in favor of either. *Civ. Code Ga.* 1895, § 3586.

"Constructive possession," which may or may not be adverse possession, arises when one under color of title, by patent, deed, or other writing, takes actual possession of a part of his land, thus in law acquiring possession to the extent of his boundaries contained in his patent, deed, or other writing. Thus, constructive possession has its origin in the maxim of the common law, "Possession of a part shall be construed as possession of the whole." *Garrett v. Ramsey*, 26 Va. 345, 350, 351.

Possession, following the registry of title, without any actual occupancy of the premises, is called "civil" or "constructive" possession, as distinguished from "natural" or "corporeal" possession. *Civ. Code arts.* 3427, 3428, 3431; *Ashley Co. v. Bradford*, 33 South. 634, 639, 109 La. 641.

Constructive possession follows the legal title, the rightful owner being deemed in possession until he is ousted and dispossessed. Possession follows the title, in the absence of actual possession adverse to it. *Woolfolk v. Buckner*, 55 S. W. 168, 169, 67 Ark. 411.

The "constructive possession" by the vendee which supersedes the right of stoppage in transitu exists when the carrier enters expressly into a new agreement, distinct from the original agreement, to hold the goods for the consignee as his agent, not for the purpose of expediting them to the place of original destination, but in a new character, for the purpose of custody on his account. *Smith v. Gall* (Fla.) 83 South. 527, 529, 60 L. R. A. 547 (citing *Whitehead v. Anderson*, 9 Mees. & W. 518).

A pistol left in the room of its owner during his absence, or in the possession of any particular person, remains in his constructive possession while in his room, and its theft therefrom is punishable, though the owner was in another state at the time of the theft. *Webb v. State* (Tex.) 44 S. W. 498.

#### Actual possession distinguished.

See "Actual Possession."

#### Possession of part under deed.

"Constructive possession" is a possession in law without a possession in fact. What will give one a constructive possession of land when he has not the actual possession is a question very largely depending on the facts of the particular case. It is held that the owner of land who enters into and holds possession of a portion of the land covered by his deed, and claiming under his deed, is, by construction and by virtue of his claim under his deed, legally in possession of all that his deed covers, though he has not the actual possession of the whole. *Hodges v. Eddy*, 38 Vt. 327, 344; *Fleming v. Maddox*, 30 Iowa, 239, 241.

Where one in actual possession at the same time holds under deed or title, he holds, to the extent of such deed or title, outside of his actual possession, by what is termed "constructive possession," and by "actual possession" to the extent of his inclosure of the lands of which he is in possession. *Ramirez v. Smith* (Tex.) 56 S. W. 254, 259, (citing *Cunningham v. Frandtzen*, 26 Tex. 34, 35; *Evitts v. Roth*, 61 Tex. 84).

#### CONSTRUCTIVE SEISIN.

"Constructive seisin" is seisin in law where there is no seisin in fact. Thus, when the state issues a patent to a person who never takes any sort of possession of the land granted to him, he has nevertheless constructive seisin of all the land in his grant, though some one else be at the time in ac-

tual possession of it. *Garrett v. Ramsey*, 26 W. Va. 345, 351.

#### CONSTRUCTIVE SEIZURE.

As applied to the levy of an execution, "constructive seizure" means that the officer has received the execution for levy, and by virtue thereof makes a just and true inventory of the debtor's goods and files it as a return of the writ, such acts amounting to a constructive seizure and possession of the goods, though he does not take actual possession thereof, he being regarded as in possession as a matter of law. *Lloyd v. Wyckoff*, 11 N. J. Law (6 Halst.) 218, 222.

#### CONSTRUCTIVE SERVICE.

The doctrine of "constructive service," in the law of master and servant, is that a discharged employé holding himself ready to do the work has therefore done the work, and that readiness is therefore equivalent to all performance. A learned writer uses this language: "The doctrine of constructive services, however, does not permit an employé who has been wrongfully discharged to remain willfully idle during the period for which he was engaged. Constructive services never had, as we think, supported any such principle, and in a large measure the support heretofore found for it upon authority has disappeared. It may not be too much to say that the doctrine has in England, where it has its origin, been repudiated. The law there established that a servant wrongfully discharged has no action for wages unless something is due for past services actually rendered, and as to any other claim on the contract it is for the breach of it, and for his damages resulting therefrom, being the ordinary action for damages, and not the common-law action of *indebitatus assumpsit*." *James v. Allen County*, 6 N. E. 246, 249, 44 Ohio St. 226, 58 Am. Rep. 821.

#### CONSTRUCTIVE TOTAL LOSS.

A "constructive total loss" is one which gives to the person insured a right to abandon, under a provision authorizing abandonment of the thing insured if more than half thereof in value is actually lost or would have to be expended to recover it from the peril; if it is injured to such an extent as to reduce its value more than one-half; if, the thing insured being a ship, the contemplated voyage cannot be lawfully performed without incurring an expense to the insured of more than half the value of the thing abandoned, or without incurring a risk which a prudent man would not take under the circumstances; or if, the thing insured being cargo or freightage, the voyage cannot be performed nor another ship procured by the master within a reasonable time, and with reasonable diligence, to forward the cargo,

without incurring a like expense or risk. Rev. Code N. D. 1899, §§ 45, 69; Civ. Code S. D. 1903, § 1915.

A "constructive total loss," in insurance law, is that which entitles the assured to claim the whole amount of the insurance on giving due notice of abandonment. *Devitt v. Providence Washington Ins. Co.*, 65 N. E. 777, 779, 173 N. Y. 17 (citing *Arn. Ins.* § 1081).

The term "constructive total loss" is defined by Mr. Arnould in his work on Marine Insurance as follows: "An absolute total loss takes place when the subject insured wholly perishes, or there is a privation of it, and its recovery is hopeless. A constructive total loss takes place when the subject insured is not wholly destroyed, but its destruction is rendered highly probable; or the privation of it, though not quite irretrievable, is such that its recovery is either exceedingly doubtful or too expensive to be worth the attempt. An absolute total loss entitled the assured to claim from the underwriter the whole amount of his subscription. A constructive total loss entitles him to make such claim on condition of giving notice of abandonment of all right and title to any part of the property that may still exist or may still be recovered." *Murray v. Great Western Ins. Co.*, 25 N. Y. Supp. 414, 416, 72 Hun, 282; *McLain v. British & Foreign Marine Ins. Co.*, 38 N. Y. Supp. 77, 78, 16 Misc. Rep. 336. Where a boat was raised and found to be so injured as to be past repair, there was a constructive total loss. *McLain v. British & Foreign Marine Ins. Co.*, 38 N. Y. Supp. 77, 78, 16 Misc. Rep. 336. Where it appeared that a vessel valued at \$75,000 was sold for a little over \$1,000 after the stranding, and that after making over \$5,000 worth of repairs, the purchasers resold her for about \$25,000, the jury was justified in finding that the vessel was a constructive total loss. *Murray v. Great Western Ins. Co.*, 25 N. Y. Supp. 414, 416, 72 Hun, 282.

In *Wright v. Williams* (N. Y.) 20 Hun, 320, Barrett, J., said: "It is undoubtedly the general rule in insurance free of particular average that the underwriter is only liable for the total loss. In the former case the thing insured is physically destroyed—substantially so, at least; in the latter, the material form may exist, but the value to the owner is gone. The rule, then, is that, if the expense of repair will exceed one-half the value of the ship when repaired, there is a constructive total loss, and it may be abandoned." *Devitt v. Providence Washington Ins. Co.*, 70 N. Y. Supp. 654, 657, 61 App. Div. 390.

A "constructive total loss," as applied to marine insurance, is one where the loss, though not actually total, is of such a character that the insured is entitled, if he sees fit, to treat it as total by an abandonment. A constructive total loss of cargo may arise

by the loss of the ship under circumstances amounting to the destruction of the contemplated adventure, when no part of the cargo can be forwarded by a substituted ship except at a cost beyond the value. So, also, it may arise if the damage to the goods, though repairable, cannot be repaired except at an expense greater than their value when repaired, and is thus impracticable from a business point of view. There is also in the United States a conventional rule, originally adopted because of its convenience and certainty, which authorizes an abandonment of ship or cargo when the damage exceeds a moiety of the value, and a recovery as for a total loss. An abandonment is indispensable in all cases of constructive total loss, except in those where it could not possibly be of any benefit to the insurer. *Insurance Co. of North America v. Canada Sugar-Refining Co.* (U. S.) 87 Fed. 491, 493, 31 C. C. A. 65; *Devitt v. Providence Washington Ins. Co.*, 70 N. Y. Supp. 654, 657, 61 App. Div. 390; *Globe Ins. Co. v. Sherlock*, 25 Ohio St. 50, 64.

#### CONSTRUCTIVE TRUSTEE.

"A person may become a 'trustee by construction' by intermeddling with and assuming the management of trust property without authority. Such persons are trustees de son tort." *Perry, Trusts* (3d Ed.) § 245; *Morris v. Joseph*, 1 W. Va. 256, 91 Am. Dec. 396; *Piper v. Hoard*, 107 N. Y. 73, 13 N. E. 626, 1 Am. St. Rep. 789. "During the possession and management of such constructive trustees they are subject to the same rules and remedies as other trustees, and they cannot avoid their liability by showing that they were not in fact trustees, nor can they set up the statute of limitations." *Perry, Trusts* (3d Ed.) § 245. Thus, where an administrator with the will annexed executes, without authority, a trust created by the will, he becomes a constructive trustee, or a trustee de son tort. *Penn v. Fogler*, 55 N. E. 192, 197, 182 Ill. 76.

#### CONSTRUCTIVE TRUSTS.

Constructive trusts are raised by equity for the purpose of working out right and justice. All instances of constructive trusts may be referred to what equity denominates "fraud," either actual or constructive, including acts or omissions in violation of fiduciary obligation. If one party obtains the legal title to property not only by fraud, or by violation of confidence or fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property, which really belongs to another, equity carries out its theory of double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity the beneficial owner. *Nester v. Gross*, 69 N. W. 39, 41, 66 Minn. 371 (citing

1 Pom. Eq. Jur. § 155); *Springer v. Young*, 12 Pac. 400, 402, 14 Or. 280; *Lewis v. Lindley*, 48 Pac. 765, 771, 19 Mont. 422. And see *Cline v. Cline*, 68 N. E. 545, 548, 204 Ill. 180; *Riley v. Martinelli*, 82 Pac. 579, 580, 97 Cal. 575, 21 L. R. A. 33, 33 Am. St. Rep. 209 (citing *Bayles v. Baxter*, 22 Cal. 575; *Currey v. Allen*, 84 Cal. 254).

Perry, in his work on Trusts, defines "constructive trusts" as those which arise when a person, clothed with some fiduciary character, by fraud or otherwise gains some advantage to himself. Courts construe this to be an advantage for the cestui que trust, or a constructive trust. *Kaphan v. Toney* (Tenn.) 58 S. W. 909, 913; *Burks v. Burks*, 66 Tenn. (7 Baxt.) 353, 356; *Gabert v. Olcott*, 23 S. W. 985, 987, 86 Tex. 121; *Preston v. Beall*, 19 S. W. 175, 177, 14 Ky. Law Rep. 61. "Constructive trusts" are limited by this writer to that large class of trusts which equity raises from frauds committed by one party on another, and he makes "express, implied, and resulting trusts" embrace all those trusts which arise from the express agreements and intentions of the parties, or from their intentions implied from their agreements, or from their express or implied agreements; in short, all trusts that arise, result, or are implied from the contracts and relations of the parties. *Kaphan v. Toney* (Tenn.) 58 S. W. 909, 913.

Perry, in his classification of "constructive trusts," uses this language: "Trusts that arise from some equitable principle, independent of the existence of any fraud; as, where an estate has been purchased, and the consideration money paid before the deed is taken, equity will raise a trust by construction for the purchaser." Equity in such case will regard the vendor as trustee of the legal title of the land for the benefit of the vendee. So, when a vendor of land takes notes from the purchaser for the purchase price, and uses these notes in purchase of other lands, after which the title to the land sold fails, the vendor will be entitled to hold such lands in trust for the purchaser. *Matthews v. Crowder* (Tenn.) 69 S. W. 779, 780.

The subject of constructive trusts is intimately connected with that of frauds. Indeed, the basis of all such trusts is fraud, either actual or presumed. Rightly understood, a "constructive trust" is only a mode by which courts of equity work out equity and prevent or circumvent fraud and overreaching. There are, therefore, two well-defined classes of constructive trusts, corresponding with the two classes of fraud, viz., (1) those which are raised in cases of actual fraud, and (2) those raised in cases of presumed or constructive fraud. Those of the first class are commonly called "trusts ex maleficio." 1 Beach, Mod. Eq. Jur. § 226. Thus equity will, as against a servant charged with the care of offices of a banking cor-

poration and the preservation of the property therein, declare a trust in favor of the latter with respect to the proceeds of money stolen from it by the former while in the discharge of his said duty. *Nebraska Nat. Bank v. Johnson*, 71 N. W. 294, 296, 51 Neb. 546.

The generic term "implied trusts" includes resulting and constructive trusts, which latter are sometimes called "trusts ex maleficio." *Springer v. Young*, 12 Pac. 400, 402, 14 Or. 280.

Constructive trusts are of three kinds, or arise from one or the other of three conditions of fact: First, trusts arising from actual fraud; second, trusts which arise from a constructive fraud; and, third, trusts which arise from some equitable principle independent of the existence of fraud. *O'Bear Jewelry Co. v. Volfer*, 17 South. 525, 529, 106 Ala. 205, 28 L. R. A. 707, 54 Am. St. Rep. 31.

If a trust be constituted by the acts of the parties, the possession of the trustee is the possession of the cestui que trust, and no length of possession as such will bar an action to recover; but if a party is to be constituted a trustee by decree of a court of equity, founded on fraud or the like, his possession is then considered adverse, and the statute of limitations will run and be a bar. *Willson v. Louisville Trust Co.*, 44 S. W. 121, 123, 102 Ky. 522.

A confidential relation is not necessary to establish a constructive trust. It may arise from actual fraud. This fraud alone, however, will not be sufficient to warrant relief, unless the party relied upon the fraudulent representations which were the inducements to their contracts. *Edelman v. Latshaw*, 28 Atl. 475, 476, 159 Pa. 644.

"Trusts arising by operation of law" are such trusts as arise or are imposed by law itself, without any act of the parties. Such trusts arise, among other things, from fraud, actual or constructive, and are termed "constructive trusts." These trusts are such obligations as the law imposes on tortfeasors who are guilty of unjust enrichment. *Brison v. Brison*, 17 Pac. 689, 690, 75 Cal. 525, 7 Am. St. Rep. 189.

#### Direct or express trust distinguished.

See, also, "Express Trust."

A "direct" or "express" trust is one springing from the agreement of the parties, created by words either expressly or impliedly evincing the intention to create a trust. It is distinguished from a "constructive" or "implied" trust, which are trusts created by equity law—a trust not created by any words either expressly or impliedly evincing a direct intention to create a trust, but by the construction of equity in order to satisfy the demands of justice. *Currence v. Ward*, 27 S. E. 329, 330, 43 W. Va. 367.



**Intention to create trust.**

"Constructive trusts" include all those instances in which a trust is raised by the doctrine of equity for the purpose of working out justice in the most efficient manner, where there is no intention of the parties to create such a relation, and in most cases contrary to the intention of the one holding the legal title, and where there is no express or implied, written or verbal, declaration of the trust. *Sandford v. Hamner*, 22 South. 117, 119, 115 Ala. 406 (citing 2 Pom. Eq. Jur.); *Stubbins' Adm'r v. Briggs*, 68 S. W. 392, 393, 24 Ky. Law Rep. 230; *McVity v. Stanton*, 30 N. Y. Supp. 934, 935, 10 Misc. Rep. 105; *Graham v. King*, 24 S. W. 430, 431, 96 Ky. 339.

In most cases of constructive trust, pure and simple, an element of fraud, actual or constructive, is the basis upon which the trust is founded. Equity sometimes proceeds upon the maxim that an intention to fulfill an obligation should be imputed, and assumes that the purchaser intended to act in pursuance of his fiduciary duty, as in case of a trustee who uses trust funds to pay for property furnished in his own name, though no doubt in many cases the intention is to violate duty. *Fulton v. Jansen*, 34 Pac. 331, 332, 99 Cal. 587.

As constructive trusts are imposed by equity, contrary to the trustee's intention and will, upon property in his hands, they are often termed "trusts in invitum," and this phrase furnishes a criterion generally accurate and sufficient for determining what trusts are truly constructive. 2 Pom. Eq. Jur. § 1044. Thus, where defendant accepted the agency of a town, and purchased for it certain property, was furnished by it with funds to pay in cash one-half the price, and on execution of such agency made the purchase, and paid with such funds the required cash payment, taking title in his own name as absolute owner, there was a constructive trust in favor of the town as trustee. *Sandford v. Hamner*, 22 South. 117, 119, 115 Ala. 406.

Where a person's acts amount to constructive fraud at least, equity will declare a constructive trust for the purpose of administering justice and right, though such a trust was not within the contemplation of the parties. Equity will impress a trust, contrary to the intention and will of a party, where a fund has been obtained by him in violation of his duty to another. In order to raise this duty, there need be neither a promise for the benefit of another nor express fiduciary relations between them. It may be raised by representations, conduct, and the like, that have been relied upon by another under such circumstances as create an equitable estoppel upon one to pursue thereafter an opposite course for his own advantage. Actual fraud, intentional as regards the party seeking relief, is not essential to the rais-

ing up of a constructive trust any more than an equitable estoppel. If one makes an appropriation of a fund, which, if permitted to stand, would, by reason of the circumstances pending the transaction, work a wrong to another having an equity therein, and give him an unconscientious advantage over that other, the act will be regarded as what is called a "constructive fraud" in equity. *Barnes v. Thuet*, 89 N. W. 1085, 1087, 116 Iowa, 359 (citing *Anglo-American Savings & Loan Ass'n v. Campbell*, 13 App. D. C. 581, 43 L. R. A. 622).

Constructive trusts depend on conclusions of law, independent of contract or intent, are commonly imposed in invitum, and embrace every trust arising by operation of law which is neither implied nor resulting. *Beecher v. Foster*, 42 S. E. 647, 651, 51 W. Va. 605.

Constructive trusts are those which exist by construction of law alone, without any actual or supposed intention that a trust should be created, but merely to assert the rights of parties or baffle fraud. *Dunn v. Zwillling*, 62 N. W. 746, 747, 94 Iowa, 233.

**Wrongful acquisition of property.**

Constructive trusts arise when the legal title to property is obtained by a person in violation, express or implied, of some duty owed to the one who is equitably entitled, and when the property thus obtained is held in hostility to his beneficial rights of ownership. *Graham v. King*, 24 S. W. 430, 431, 96 Ky. 339; *Fulton v. Jansen*, 34 Pac. 331, 333, 99 Cal. 587; *Willson v. Louisville Trust Co.*, 44 S. W. 121, 123, 102 Ky. 522; *Sandford v. Hamner*, 22 South. 117, 119, 115 Ala. 406. Certain species of constructive trusts arise from actual fraud; many others spring from the violation of some positive fiduciary obligation. In all the remaining instances there is, latent perhaps, but none the less real, the necessary element of that unconscientious conduct which equity calls "constructive fraud." *McVity v. Stanton*, 30 N. Y. Supp. 934, 935, 10 Misc. Rep. 105 (citing 2 Pom. Eq. Jur. §§ 1032, 1044, 1045).

Where any person clothed with some fiduciary character wrongfully or fraudulently conducts a transaction so as to gain an advantage to himself over another person interested, the law converts him into a trustee, contrary to his intention and against his will, and a constructive trust arises. *Quinn v. Kellogg*, 35 Pac. 49, 51, 4 Colo. App. 157.

There is a constructive trust, when lands are conveyed and no security is taken for the purchase money, that the purchaser shall be a trustee of the land for the vendor until the purchase money is paid. *Morgan v. Dalrymple*, 46 Atl. 666, 60 N. J. Eq. 466.

A constructive trust arises by operation of law from the act of the parties coupled

with the transactions had. Thus, where an attorney of the assignee of an insolvent debtor purchased the property of the insolvent, a constructive trust arose in favor of the creditors of the insolvent. *Broder v. Conklin*, 53 Pac. 699, 700, 121 Cal. 282. And so in cases where solicitors or agents had purchased for their principals at judicial sale and taken title in their own names. *Aller v. Crouter*, 54 Atl. 426, 429, 64 N. J. Eq. 381.

Only a constructive trust arises where a trustee becomes purchaser of the trust property at a sale which he controls; and therefore where trustees, in order to protect their own interests in the property, purchased it at an execution sale which was alleged to be under their control, only a constructive trust could arise, and a failure of the cestui que trust to take any steps to enforce their rights for 15 years would be a bar to an action by them. *Bruner v. Finley*, 41 Atl. 334, 339, 187 Pa. 389.

A "constructive trust" is one implied by operation of law. Thus where M., as attorney in fact for a devisee residing in a distant city, received her share of the estate, remitted a portion, and retained the remainder, which he invested in real estate, took the title in his own name, and afterwards conveyed it to his wife, the devisee permitted him to retain her property at his request, and upon his representations that he could thereby obtain a greater profit, a constructive trust was created. *McMonagle v. McGlinn* (U. S.) 85 Fed. 88, 89, 91.

Where a wife's father, with her consent, for the purpose of making an equal distribution of his property, causes land to be conveyed to her husband by a deed of general warranty, the land is not charged with any trust in favor of the wife, since, to constitute a constructive trust, it must arise in either of two classes of cases—those which are raised in actual fraud, and those raised in presumptive or constructive fraud. *Acker v. Priest*, 61 N. W. 235, 239, 92 Iowa, 610.

Persons may become "trustees by construction" by intermeddling with and assuming the management of property without authority. They are held to be trustees de son tort, in the same manner that persons who deal with a deceased person's estate without authority are administrators de son tort. If one enters upon the lands of an individual, takes the rents, and manages and carries on the property, he may be charged as a guardian, trustee, or bailiff, and so may one who takes personal property. *Bailey v. Bailey*, 32 Atl. 470, 471, 67 Vt. 494, 48 Am. St. Rep. 828.

## CONSTRUE—CONSTRUCTION.

See "Equitable Construction"; "Liberal Construction"; "Practical Construction"; "Strict Construction."

"Strictly, the term [construction] signifies determining the meaning and proper effect of language by a consideration of the subject-matter and attending circumstances in connection with the words employed." *Johnson v. Des Moines Life Ins. Co.*, 105 Iowa, 273, 277, 75 N. W. 101, 102 (quoting Webster's Dict.).

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Within the meaning of the rule that to constitute a "common error which makes the law" the error must be in the observing, construing, or interpreting law, and not one in direct disobedience of that which is law, "to construe or interpret a statute" is to read it for the purpose of ascertaining its meaning and effect. *O'Donnell v. Glenn*, 23 Pac. 1018, 1022, 9 Mont. 452, 8 L. R. A. 629.

The "construction" of a will is the ascertainment of the testator's express intention—what he meant by what he said—which is to be determined by the court as a question of fact, and not by the application of arbitrary rules of law. *Stratton v. Stratton*, 44 Atl. 699, 700, 68 N. H. 582.

"Construction," as applied to statutes, is an interpretation to ascertain the intention of the lawmakers. This is generally accomplished by a literal reading of the words used. There are many cases, however, where the words do not express the intention perfectly, when it is allowed to adopt what writers on the civil law sometimes call a "rational interpretation," and collect the intention from the rational or probable conjecture. It is also held that when it appears that the words of the law, however clear in themselves, lead to false consequences or unjust decisions, the palpable injustice which would follow from its literal sense compels an effort to discover an interpretation which is not what the law literally says, but what it means. *People v. New York City Tax Com'rs*, 95 N. Y. 554, 559.

The "construction" of deeds is the ascertainment from competent evidence of the intention of the parties. *Bartlett v. La Rochelle*, 44 Atl. 302, 68 N. H. 211 (citing *Crawford v. Parsons*, 63 N. H. 438; *Johnson v. Conant*, 64 N. H. 109, 7 Atl. 116); *Johnson v. Conant*, 7 Atl. 116, 123, 64 N. H. 109 (citing *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584, 592, 4 Sup. Ct. 566, 28 L. Ed. 527).

"Construction," as applied to written law, is said by Black in his *Construction and Interpretation of Law* to be the "art or process of discovering and expounding the meaning and intention of the authors of the law with respect to its application to a given case, where that intention is rendered doubtful either by reason of apparent conflicting provisions or directions, or by reason of the fact that the given case is not explicitly provided for in the law." Where a statute provided that the permitting of any one, not a member of the family, in a room where liq-

nor is sold on a day when such liquor selling is illegal, shall be a misdemeanor, and an indictment charged that persons were so illegally permitted to be within a room where liquor was sold by virtue of the laws of the state of Indiana, a motion to quash the indictment in that it did not charge that the room was one where liquor was sold by virtue of a license was held not to present a question of a statutory construction, but rather of pleading, and was not appealable under a statute providing that questions concerning the proper construction of a statute shall be appealable. *Deane v. State*, 64 N. E. 916, 917, 159 Ind. 313.

#### Ambiguity implied.

The phrase "construction of a statute," as used in Acts 1901, p. 666, § 8, providing that every case in which there is in question the proper construction of a statute, and which case would be otherwise unappealable, shall be appealable directly to the Supreme Court, means to interpret, to elucidate, and to define and declare the meaning of that which is obscure and uncertain, and can have no application to a statute in which there is nothing doubtful or ambiguous in its terms. Construction can only be employed for the discovery of the true intent and meaning of an instrument, and when the language is plain there can be no construction, because there is nothing to construe. *Terre Haute & L. R. Co. v. Erdel*, 62 N. E. 706, 707, 158 Ind. 344.

#### As drawing conclusions.

"Construction" has been defined by Dr. Lieber (Lieber on Political Hermeneutics, c. 1) as "the drawing of conclusions respecting subjects that lie beyond the direct expression of the text, conclusions which are in the spirit, though not within the letter, of the text." *Jones v. Proprietors of Morris Aqueduct*, 36 N. J. Law (7 Vroom) 206, 209; *People v. New York City Tax Com'rs*, 95 N. Y. 554, 559; *State v. Smith*, 35 Neb. 13, 23, 52 N. W. 700, 16 L. R. A. 791.

#### As effect.

Where a statute abolished powers as they then existed, and provided that thenceforth the creation, construction, and execution of powers were to be governed by the provisions of such statute, by the term "construction" the revisers and the Legislature meant not merely the meaning and force of the words used in creating the power; they had a wider notion in the use of the word, and intended by it what should be the effect, in law, of the creation and execution of the power upon the property which was the subject of it, and upon all persons interested therein, closely or remotely. Thus a "constructive trust" is one raised by operation of law, and distinguished from one created by the express words of some written instrument. *Cutting v. Cutting*, 86 N. Y. 522, 535.

#### Interpretation distinguished.

"Construction," as distinguished from "interpretation," involves the drawing of conclusions regarding subjects that are not always included in the direct expression, while "interpretation" is used for the purpose of ascertaining the true sense of any form of words. *Bloomer v. Todd*, 19 Pac. 135, 138, 3 Wash. T. 599, 1 L. R. A. 111.

#### As regarded.

"Construed," as used in Code Civ. Proc. § 5, providing that the sections of the Code, so far as they are substantially the same as the common law, must be construed as a continuation thereof, and not as a new enactment, means "regarded" or "considered," and not "interpreted," "explained," or "translated." *Churchill v. Pacific Imp. Co.*, 31 Pac. 560, 561, 96 Cal. 490.

### CONSTUPRATE.

"Constuprate," which is given by Johnson as one definition of "ravish," is defined to mean to violate, to debauch, to defile, so that the word "ravish" implies sexual or carnal knowledge. *Harper v. Delp*, 3 Ind. 225, 230.

"Constuprate," from the Latin "constupro," to violate, is given by Worcester as an appropriate definition of "debauch," and hence such term implies more than seduce. *Koenig v. Nott* (N. Y.) 2 Hill. 323, 329.

### CONSUETUDINES.

The word "consuetudines" generally means "tolls," but if the context raises a doubt, the expression may be interpreted by usage. The grant of a fair, "cum omnibus libertatibus et liberis consuetudinibus ad hujusmodi feriam pertinentibus," does not give a right to take tolls. *Earl of Egremont v. Saul*, 6 Adol. & El. 924.

### CONSUL.

Consuls are agents of their governments, and in the United States it belongs exclusively to the President, by and with the advice and consent of the Senate, to appoint consuls to such places as he and they may deem to be meet. They are officers created by the Constitution and law of nations, and not by act of Congress. *Sidel v. Peschkaw*, 27 N. J. Law (3 Dutch.) 427, 429.

A consul is a commercial agent of a country, residing in a foreign seaport, whose duty it is to support commercial intercourse of the state, and especially of the individual citizens. *Schunior v. Russell*, 18 S. W. 484, 495, 83 Tex. 83.

A government commercial agent residing in a foreign seaport, whose duty it is to sup-

port commercial intercourse with the state, and especially to protect the rights of its individual citizens, is a "consul" or "consular officer," within a statute authorizing such officer to take and certify the depositions. *Schunior v. Russell*, 18 S. W. 484, 485, 83 Tex. 83.

A consul is a mercantile agent of the sovereignty by which he is appointed to protect the commercial interests of its citizens or subjects in foreign states. *Seidel v. Besch-kaw*, 27 N. J. Law (3 Dutch.) 427, 429.

"A consul is a commercial agent with public functions, accredited to the national government by a foreign power, and is admitted to be under the particular protection of the law of nations." *Sartori v. Hamilton*, 13 N. J. Law (1 J. S. Green) 107, 109.

#### As all consular officers.

"Consul general," "consul," and "commercial agent," as used in the title relating to diplomatic and consular officers, shall be deemed to denote full, principal, and permanent consular officers, as distinguished from subordinates and substitutes. U. S. Comp. St. 1901, p. 1149.

"Deputy consul" and "consular agent," when used in the title relating to diplomatic and consular officers, shall be deemed to denote consular officers subordinate to such principals, exercising the powers and performing the duties within the limits of their consulates or commercial agencies respectively; the former at the same ports or places, and the latter at ports or places different from those at which such principals are located respectively. U. S. Comp. St. 1901, p. 1150.

"Consular officer," when used in the title relating to diplomatic and consular officers, shall be deemed to include consuls general, consuls, commercial agents, deputy consuls, vice consuls, vice commercial agents, and consular agents, and none others. U. S. Comp. St. 1901, p. 1150.

The word "consul," when used in the title on foreign relations, shall be understood to mean any person invested by the United States with and exercising the functions of consul general, vice consul general, consul, or vice consul. U. S. Comp. St. 1901, p. 2783.

The word "consul" has two meanings. In its more limited sense it denotes an officer of a particular grade in the consular service, but in the second article of the Constitution, authorizing the President to appoint "consuls," the word is used in a broader sense, and denotes all consular officers, of whatever grade. *Dainese v. United States*, 15 Ct. Cl. 64, 74.

The word "consul," as used in Comp. St. 1899, c. 73, § 6, is understood to mean any person invested by the national government with the functions of consul general, vice

consul general, consul, or vice consul. *Morris v. Linton*, 85 N. W. 565, 568, 61 Neb. 537.

#### As magistrate.

See "Magistrate."

#### As public minister.

A consul is neither an ambassador nor a public minister. He is not the representative of his nation, nor is he employed in the management of national concerns. He is no more than a commercial agent attending to individual interests. The law of nations does not exempt a foreign consul from liability to the laws of the state in which he resides. *State v. De La Foret* (S. C.) 2 Nott & McC. 217, 218.

Consuls are not public ministers, with the immunity of ambassadors and public ministers from suits in the courts of the country to which they are sent. *Wilcox v. Luco*, 50 Pac. 758, 759, 118 Cal. 639, 45 L. R. A. 579, 62 Am. St. Rep. 305.

A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes. He has a right to interpose claims for the restitution of property belonging to the subjects of his own country, but he is not considered as a minister or diplomatic agent of his sovereign, intrusted, by virtue of his office, with authority to represent it in his negotiations with foreign states, or vindicate his prerogatives. *The Anne*, 16 U. S. (3 Wheat.) 435, 445, 4 L. Ed. 428 (citing 1 Kent, Comm. 43); *Seidel v. Peschkaw*, 27 N. J. Law (3 Dutch.) 427, 429. He has not the immunities of an ambassador, but in civil and criminal cases is subject to the local laws in the same manner as other foreign residents, owing temporary allegiance to the state to which he is accredited. *Seidel v. Peschkaw*, 27 N. J. Law (3 Dutch.) 427, 429. His sovereign may sufficiently intrust him with such authority, but in such case his diplomatic character is superadded to his ordinary powers, and ought to be recognized by the government within whose domains he assumes to exercise it. *The Anne*, 16 U. S. (3 Wheat.) 435, 445, 4 L. Ed. 428.

## CONSULT—CONSULTING.

In a contract by a doctor to perform the necessary surgical service for the treatment of all injured employes of a railroad company, if required to do so by the chief surgeon as consulting oculist and aurist in any class of cases, "consulting" is a special technical term, and does not include actual treatment and prescriptions given by such doctor. The term "consulting" would include a diagnosis of the case, and advice as to the proper treatment to be pursued while under treatment. It does not require him to perform surgical and medical services for the treatment of

persons placed under his care by the chief surgeon. *Union Pac. Ry. Co. v. Graddy*, 41 N. W. 809, 810, 25 Neb. 849.

In a postnuptial settlement providing that the trustee may hold the legal title for the wife's sole and separate use, with the absolute right of disposition as she may choose, upon "consultation with and getting advice from the trustee," the words quoted are equivalent to "consent of the trustee." *Colyer v. Wheeler*, 75 S. W. 1089, 1091, 110 Tenn. 58.

#### CONSULTING ENGINEER.

In an action against a corporation, where a juror, on his examination, stated that he was consulting engineer of an officer of the defendant corporation, this did not imply that he was a salaried officer of the corporation, but simply that he was a scientific expert, consulted by the corporation occasionally. *Coppersmith v. Mound City Ry. Co.*, 51 Mo. App. 357, 366.

#### CONSULTATION.

The mere calling into a doctor's office for some medicine to relieve a temporary indisposition, or the calling at the home of the insured by the doctor for the same purpose, cannot be considered a "consultation of a physician," within the meaning of a question in an application for a life insurance policy as to the consultation of a physician. *Billings v. Metropolitan Life Ins. Co.*, 41 Atl. 516, 518, 70 Vt. 477.

#### CONSUME.

"Consume," as used in a will giving testator's wife all his personalty, his son and daughter to take the portion remaining unconsumed at her death, is broad, and implies absolute power of sale in the wife. *Cain v. Robertson*, 61 N. E. 26, 27, 27 Ind. App. 198.

To "consume" is to destroy, to bring to utter ruin. Webster, Dict. A notice to a fire company by the insured that his house has been consumed is sufficient to show the entire destruction of the insured house. *Campbell v. Monmouth Mut. Fire Ins. Co.*, 59 Me. 430-438.

An indictment alleging that defendant set fire to a barn, by the burning of which a dwelling house was burned and "consumed," does not require the state to show that the substance and fiber of the wood of such portion of the house as was on fire was actually destroyed. It was sufficient to find that some portion of the dwelling house had been actually on fire and burned. *Commonwealth v. Tucker*, 110 Mass. 403, 404.

#### CONSUMABLE ARTICLES.

"Consumable" or "perishable" articles are of two classes: (1) Those which are

necessarily destroyed in their use, such as corn, hay, etc.; (2) those which are not so much so, as being productive, and the capital kept up by the increase, such as stock of horses, cattle, etc. *Patterson v. Devlin* (S. C.) McMUL. Eq. 459, 466.

#### CONSUMMATE.

See "Curtsey Consummate."

Where a contract of sale was duly executed, containing conditions for deferred payments and for assuming debts, these sales were "consummated," so as to entitle the agent to commissions for effecting them, although the conditions were never complied with. *Micks v. Stevenson*, 51 N. E. 492, 493, 22 Ind. App. 475.

#### CONSUMMATION.

See "Final Consummation."

"Consummation," as applied to a marriage, means the commencement of true and open matrimonial cohabitation. The courts have used the word "consummation" generally as a completion of the marriage relation. It is not necessarily limited to the act of sexual intercourse, but means the mutual assumption of marital rights, duties, and obligations. *Sharon v. Sharon*, 22 Pac. 26, 37, 79 Cal. 633; *Id.*, 16 Pac. 345, 360, 75 Cal. 1.

The word "consummating," as used in an agreement where a party pledges himself to come to a house for the purpose of consummating a compromise of a suit, means "completing." *Hinchman v. Ballard*, 7 W. Va. 152, 185.

#### CONSUMPTION.

It is a matter of common knowledge that consumption is not a disease of the mind, and that ordinarily such disease does not affect the mind of the sufferer, except by sympathy with the weakness of the body. *Denny v. Stokes*, 72 S. W. 209, 211, 31 Tex. Civ. App. 425.

"Consumption," within the meaning of a question in an application for a life policy whether the applicant's parents, etc., have been afflicted with consumption, scrofula, insanity, epilepsy, disease of the heart, or other hereditary disease, is to be construed only as an inquiry whether such relatives have been afflicted by such disease in a hereditary form, the word "other" in the question plainly indicating that the inquiry is so limited. *Gridley v. Northwestern Mut. Life Ins. Co.* (U. S.) 11 Fed. Cas. 2, 8.

#### CONTACT.

"Contact with poisonous substances," in an insurance policy exempting the insurer

from liability for injuries to insured occasioned by contact with poisonous substances, is not limited to such contact resulting from the voluntary and conscious action of plaintiff. *Meehan v. Traders' & Travelers' Acc. Co. of New York*, 68 N. Y. Supp. 821, 822, 84 Misc. Rep. 158.

## CONTAGIOUS DISEASE.

A "contagious" disease is one that is communicated by contact or touch. *Stryker v. Crane*, 50 N. W. 1132, 1133, 33 Neb. 690.

A "contagious" disease is one that is communicable by contact or bodily exhalation, as distinguished from an "infectious" disease, which originates from a cause acting from hidden influences, like the miasma of prison ships or marshes, or through the pollution of water or the atmosphere, or from the various dejections from animals. The word "contagious," however, is often used in a similar sense with "pestilential" or "poisonous," and is not strictly confined to influences emanating directly from the body. *Grayson v. Lynch*, 16 Sup. Ct. 1064, 1068, 163 U. S. 468, 41 L. Ed. 230.

A contagious disease may prevail to a greater or less extent and still there be no epidemic. "Contagious" disease simply means one communicable by contact, and the victim of such a disease may be so isolated from others of its species as to render contact and epidemic impossible. *Pierce v. Dillingham*, 67 N. E. 846, 849, 208 Ill. 148.

In Crim. Code, c. 10, § 76, prohibiting sales of domestic animals infected with contagious or infectious diseases, the words "contagious or infectious" were meant to describe a disease, and not distinctive diseases, though the definition of a standard English author is that "contagious disease" is communicated by contact or touch, and that infection is the subtle or virulent matter proceeding from diseased bodies, and imparting the same to others. *Stryker v. Crane*, 50 N. W. 1132, 1133, 33 Neb. 690; *Wirth v. State*, 22 N. W. 860, 862, 63 Wis. 51.

## CONTAIN.

See "While Contained In."

Containing by estimation, see "By Estimation."

A statute provided, as a cause for demurrer, "that the complaint does not state facts sufficient to constitute a cause of action." A defendant demurred to a complaint for the reason that it did not "contain" facts sufficient to constitute a cause of action. In demurring to a pleading, it is not necessary to use the exact language of the statute. Other words of equivalent meaning may be employed. The word "contain," though not synonymous, is as broad in its meaning as

used in such demurrer as the word "state," for, if a complaint does not "contain" facts sufficient to constitute a cause of action, it certainly does not "state" such facts. *State v. Younts*, 89 Ind. 813, 814; *Leach v. Adams* (Ind.) 52 N. E. 818, 814.

### As warranty of quantity.

The words of a deed describing the length of lines and boundaries, and concluding with the words "containing so many acres," do not import a warranty of quantity. *Rickets v. Dickens*, 5 N. C. 343, 346, 4 Am. Dec. 555; *Powell v. Lyles*, 5 N. C. 348, 350.

Where a contract for the sale of land "does not specify the number of acres sold or contracted to be sold, otherwise than by the general words 'containing so many acres,' this could hardly be looked on as a warranty, but rather as matter of description." *Russell v. Keeran* (Va.) 8 Leigh, 9, 14 (citing *Keyton's Adm'x v. Brawford's Ex'rs* [Va.] 5 Leigh, 48).

A conveyance of land described by metes and bounds, and said to contain "180 acres strict measure," is to be construed as a mere matter of description, which is subject to the description by metes and bounds; and hence a deficiency of 9 acres in the quantity of land is no breach of the covenants for title. *Andrews v. Rue*, 34 N. J. Law (5 Vroom) 402, 404.

## CONTAINED IN.

"Contained," as used in a fire insurance policy insuring certain buildings and household furniture while located and contained as herein described, will not be held to apply to the buildings, but will relate only to personal property in the buildings, so that a removal of additions away from the dwelling does not violate the terms of the policy. *Hannon v. Hartford Fire Ins. Co.*, 58 N. Y. Supp. 549, 550, 41 App. Div. 228.

The words "contained in," as used in an insurance policy insuring certain personal property, "all while contained in the above-described building," must be construed to limit the insurance to the property while contained in the building described, and not to extend to it while it is contained in any other building. Numerous cases, however, hold that the phrase "contained in," as so used, is descriptive of the place at which the property is located at the time of the insurance, while others hold that the phrase should be construed with reference to the use of the insured property; that is, if its ordinary use causes it to be absent from such place, and if, being so absent, it is destroyed by fire, the property is nevertheless protected by the policy. For such holding, see *McCluer v. Girard Fire & Marine Ins. Co.*, 43 Iowa, 349, 22 Am. Rep. 249; *American Cent. Ins. Co. v. Haws* (Pa.) 11 Atl. 107; *Mills v. Farmers'*

Ins. Co., 37 Iowa, 400. But in these cases the terms of the policies were somewhat less definite than that of the one above mentioned, which has such an unequivocal expression as to prevent the application of the above-mentioned doctrine of construction according to use. *British America Assur. Co. v. Miller*, 44 S. W. 60, 62, 91 Tex. 414, 89 L. R. A. 545, 66 Am. St. Rep. 901.

The phrase "contained in," as used in a fire policy insuring property contained in a certain building, did not include property actually situated in nearby buildings, though they were used in connection with the business carried on in the building specifically covered by the policy. *Liebenstein v. Aetna Ins. Co.*, 45 Ill. App. 303, 305.

#### **In relation to animals.**

A fire policy insured horses against loss by fire, "all contained in" assured's barn at a certain place. A lightning clause was attached which insured against any loss or damage caused by lightning to the property insured, subject in all respects to the terms and conditions of the policy. Held, that the words "all contained in," as used in the policy and as applied to the horses, did not imply that they should not be taken from the barn, and if they were they would not be covered by the policy, since such a construction would render the kind of property thus insured practically valueless to its owners; and hence the words should not be construed as limiting the company's liability to lightning causing the death of the horses only while they were in the barn, but covered a death while the horses were being pastured in a field on assured's farm. *Haws v. Fire Ass'n of Philadelphia*, 114 Pa. 431, 434, 7 Atl. 159.

In a policy of insurance on a number of mules, the policy stating them to be all contained in a certain barn, the words "contained in" were employed as matter of description, and not of warranty, and hence the insurance covered the mules, though they were outside of the barn. *Holbrook v. St. Paul Fire & Marine Ins. Co.*, 25 Minn. 229, 233.

A policy insured certain horses, describing them specifically, and contained the following clause: "All contained in his new 2-story frame barn situated," etc. It also contained a printed clause whereby the company agreed to indemnify the insured for such loss or damage as should happen by fire to the property so situated and specified. It also contained a condition as follows: "This policy shall be void and of no effect if the property insured be removed to any other building or location than that described herein." Held, that the clause "all contained in his new 2-story frame barn" is not to be construed so that the company will be exempt from liability for the death of one of the

animals which occurred by reason of lightning while the animal was not within the barn. *American Cent. Ins. Co. v. Haws (Pa.)* 11 Atl. 107, 110.

#### **In relation to carriages and harness.**

A policy of insurance described a phaeton as "contained" in a frame barn, and the phaeton was destroyed by fire while at a carriage shop undergoing repairs. In this case the word "contained" means the same as the word "kept," and meant that when not in use the phaeton was kept in the barn described as its ordinary place of deposit; but it did not mean that the carriage would not be removed from the barn, or that the risk assumed was limited to such time only as it should be in such barn. *McCluer v. Girard Fire & Marine Ins. Co.*, 43 Iowa, 349, 351, 22 Am. Rep. 249.

A policy insuring horses, carriages, etc., "contained in" a certain frame stable building, should be construed to mean that the insurance was in force and insured against such of the articles as were contained in the stable at the time of the loss, and did not authorize a construction which would cover a hack once put into the stable, and then taken out, and burned while in another building for the temporary purpose of repairs. *Bradbury v. Norwich Union Fire Ins. Soc.*, 15 Atl. 34, 36, 80 Me. 396, 6 Am. St. Rep. 219.

In an insurance policy on carriages and harnesses contained in a certain building, the words "contained in" were used to designate the usual place of deposit of the property when not in use or while being prepared for use, and the policy covered the property while at a repair shop, several hundred yards away from the place named, for the purpose of repair. *Niagara Fire Ins. Co. v. Elliott*, 85 Va. 962, 9 S. E. 694, 695, 17 Am. St. Rep. 115.

#### **In relation to cars and engines.**

In a policy of insurance against loss by fire, covering the buildings and certain passenger cars contained in car house No. 1, and an engine contained in engine house No. 2, the words "contained in" were not intended merely as a description of and to identify the property insured, but were a limitation of the risk; and where such engine and cars were destroyed by fire while in regular use by the owner on its road, at a distance from such car and engine house, the insurance company incurred no liability. *Annapolis & E. Ry. Co. v. Baltimore Fire Ins. Co.*, 32 Md. 37, 41, 3 Am. Rep. 112.

#### **In relation to furniture and goods.**

Where a policy was issued on articles of furniture described as "contained in" a certain house, the phrase "contained in" was used in a descriptive sense, and not as

a warranty that the furniture was to remain there; and hence, on a loss of such furniture after having been removed to another house, the insurer was liable. *Lyons v. Providence Washington Ins. Co.*, 14 R. I. 109, 111, 51 Am. Rep. 364; *Lyons v. Providence Washington Ins. Co.*, 13 R. I. 347, 349, 43 Am. Rep. 32.

In a policy insuring a "stock of goods, such as are generally kept in a country store, contained in" a certain described building, the term "contained in" limits the risk to the time the goods remain in the same building in which they were when the policy was issued. They constitute a restriction upon the risk, and make it continue only so long as the goods remained in that particular building. *Maryland Fire Ins. Co. v. Guedorf*, 43 Md. 506, 512.

#### In relation to machinery.

A fire policy was on machinery, consisting of cards, pickers, etc., contained in the first story of a four-story and basement brick building. The pickers were in a one-story building, the floor being on a level with the four-story building, with bricks joining into the main building, entering from it through a frame building adjoining, and then through a large iron door, "as if going from the house into the kitchen." There were no pickers except in the one-story building. Held, that the words "first story" included the picker room. *Meadowcraft v. Standard Fire Ins. Co.*, 61 Pa. (11 P. F. Smith) 91, 94.

#### In relation to wearing apparel.

"Contained in," as used in a policy of insurance on personal property described as "contained in" a frame dwelling house, was not a warranty that all of the articles should always remain in the dwelling house, so as to preclude a recovery for loss of such articles while temporarily absent therefrom. Thus, where one of the articles insured under such a policy was a fur dolman intended for outdoor wear, the policy covered a loss of the same by fire in the shop of a furrier, where it had been sent for repairs. *Noyes v. Northwestern Nat. Ins. Co.*, 64 Wis. 419, 421, 25 N. W. 415, 419, 54 Am. Rep. 631.

A policy of insurance on wearing apparel described the property as "contained in" a house on a certain lot in a city. Held, that the policy contemplated that the wearing apparel might be used in the ordinary way, and that the words "contained in" meant that the house was to be regarded merely as a place of deposit when the apparel was not in ordinary use, and hence that the company was liable for its loss by fire while being worn outside of the house. *Longueville v. Western Assur. Co.*, 2 N. W. 394, 51 Iowa, 553, 83 Am. Rep. 146.

Where a policy insured wearing apparel "contained in a certain building," though the words "contained in," etc., must be construed in accordance with the nature of the article insured, and therefore would not require the property to be continuously kept in the place designated, which would be inconsistent with its use, the condition nevertheless required that the property should be kept in the place designated when not in use, and therefore it was not covered by the policy where it was taken by the insured to another town on her temporary removal thereto. *Towne v. Fire Ass'n of Philadelphia*, 27 Ill. App. 433, 437.

### CONTEMNOR.

The name "contemnor" is used to designate a person guilty of contempt of court. *Wyatt v. People*, 28 Pac. 961, 963, 17 Colo. 252.

### CONTEMPLATE.

The primary signification of the word "contemplate" is to "consider attentively," or "meditate." A secondary meaning of the word is "to intend," and in ordinary conversation the word is frequently used as a synonym for the word "intend"; that is, to express a well-formed purpose. The word has been held to be synonymous with the words "expect" or "intend." *Buckingham v. McLean*, 54 U. S. (13 How.) 151, 167, 19 L. Ed. 90; *Jones v. Howland*, 49 Mass. (8 Metc.) 877, 41 Am. Dec. 525. As used in Rev. St. 1889, § 5955, providing that in all suits on policies of life insurance it shall be no defense that the insured "contemplated" suicide at the time he made application for the policy, it is equivalent to "intended" or "had resolved," and it is not sufficient to show that the insured at the time of his application had "considered" the subject of suicide. *Aetna Life Ins. Co. v. Florida* (U. S.) 69 Fed. 932, 935, 16 C. C. A. 618, 30 L. R. A. 87.

#### Agreement imported.

A deed of land, bounding on the passageway, two rods wide, which is to be laid out between the premises and land of A., the grantor to make and maintain all the fences between the said "contemplated passageway" and the premises, shows the agreement of the parties that there should be such a passageway as distinctly as if it had been already laid out, and has a like effect, by way of covenant and estoppel, as a description of a way already laid out. *Tufts v. City of Charleston*, 68 Mass. (2 Gray) 271, 273.

#### Foreseen distinguished.

The word "contemplated," as used in a statement that a lessor should have contem-



plated the condition of the premises on which a third person was injured, means more than "foreseen," the latter word indicating that such lessor might regard many things as likely to happen for which he would not have to answer. The word "contemplated" means that he should have known of the probability of things likely to happen for which he would be responsible. *Oxford v. Leathe*, 43 N. E. 92, 93, 165 Mass. 254.

#### CONTEMPLATION OF ASSIGNMENT.

Sayles' Civ. St. art. 65, § 9, declares that all property conveyed or transferred by the assignor previous to and "in contemplation of the assignment" shall pass to the assignee, notwithstanding the transfer. Held, that the phrase "in contemplation of the assignment" means that the transfer must have been executed or a preference given with the intent then formed to make the assignment, and it will not be sufficient that the assignor at the time had the assignment under consideration. *Simmons Hardware Co. v. Kaufman*, 8 S. W. 283, 286, 77 Tex. 131.

#### CONTEMPLATION OF BANKRUPTCY.

"Contemplation of bankruptcy," as used in Bankr. Act 1867, making void any preference given by a creditor in contemplation of bankruptcy, means that the preferred creditor should know of the debtor's insolvency, or should co-operate with him to obtain the priority. *Peckham v. Burrows* (U. S.) 19 Fed. Cas. 85, 89.

Within the meaning of 1 Rev. St. pt. 1, c. 18, tit. 4, § 4, which declares it unlawful for any incorporated company to make any "transfer or assignment in contemplation of the insolvency" of such company to any person, and declares such transfer or assignment to be utterly void, includes a transfer or assignment in contemplation of existing insolvency, as well as a transfer or an assignment made in contemplation or anticipation of future insolvency. It means merely a transfer or assignment because of existing or anticipated insolvency. It is not enough that the insolvency and the act of transfer or assignment coexist. *Paulding v. Chrome Steel Co.*, 94 N. Y. 334, 339.

The phrase "in contemplation of bankruptcy," as used in U. S. Bankr. Act 1841, providing that all payments, securities, conveyances, or transfers of property, etc., made or given by any bankrupt in contemplation of bankruptcy, etc., shall be void, means that the payment or delivery must be with the intent to defeat the general distribution of effects which takes place under a commission of bankrupt. It is not sufficient that it should be made in contemplation of insolvency. *Jones v. Howland*, 49 Mass. (8 Metc.) 377, 384, 41 Am. Dec. 525.

#### As an act of bankruptcy.

Rev. St. § 5110, subd. 9, providing that no discharge shall be granted a bankrupt if he has, "in contemplation of becoming bankrupt," made any pledge, payment, transfer, assignment, or conveyance of any part of his property for the purpose of defrauding any creditor or person having a claim against him, or being relieved of the satisfaction of his debt, means a transfer in contemplation of committing an act of bankruptcy. Such a transfer is in itself an act of bankruptcy if made with intention to cover up his property from his creditors and to prevent its distribution among them, and the fact "that the bankrupt did not then intend or expect to go into bankruptcy" does not relieve the transfer from being construed as done in "contemplation of becoming bankrupt," within the meaning of the statute. In re Duff (U. S.) 4 Fed. 519-522.

Bankr. Act 1867 (14 Stat. 518) § 39, providing that any person who, being bankrupt or insolvent, or in "contemplation of bankruptcy" or insolvency, shall give any warrant to confess judgment or procure or suffer his property to be taken on legal process with intent to give a preference, shall be deemed to have committed an act of bankruptcy, means in contemplation of committing what was made by the act an "act of bankruptcy." In re Craft (U. S.) 6 Fed. Cas. 701, 702.

#### As condition of insolvency.

The words "in contemplation of bankruptcy" are not necessarily limited to acts done which would per se be acts for which the party might or would be declared a bankrupt under the bankrupt laws, but which must and would produce on his part a state of bankruptcy, in which he might become the proper subject of the bankrupt law. Mr. Justice Parke, in *Morgan v. Brundrett*, 5 B. & Ald. 289, says: "The meaning of these words I take to be that the payment or delivery must be with intent to defeat the general distribution of effects which takes place under a commission of bankrupt." Mr. Justice Patteson said: "The recent cases have gone to a great length, but they seem to have proceeded on the principle that if a party be insolvent at the time when he makes a payment or a delivery, and afterwards becomes bankrupt, he must be deemed to have contemplated bankruptcy at the time when he made the payment; but I think this is not correct, for a man may be insolvent and yet not contemplate bankruptcy." The general conclusion from the English cases seems to be that a conveyance by a person to one knowing himself to be insolvent to one creditor with a design of giving him a preference over the other creditors in the event of his own expected bankruptcy, was in itself a bankruptcy as a fraud upon the bankrupt act. But whether it be so or not, under

those laws it is a natural, if not the necessary, intention deducible from the whole structure and policy of the bankrupt laws of the United States. *Arnold v. Maynard* (U. S.) 1 Fed. Cas. 1181, 1183; *Hutchins v. Taylor* (U. S.) 12 Fed. Cas. 1079, 1081; *Wakeman v. Hoyt* (U. S.) 28 Fed. Cas. 1850, 1851; *Ashby v. Steere* (U. S.) 2 Fed. Cas. 15, 18; *Atkinson v. Bank* (U. S.) 2 Fed. Cas. 100.

Bankr. Act 1841, c. 9, providing that all future payments, securities, conveyances, or transfers of property, or agreements made or given, by any bankrupt in "contemplation of bankruptcy," for the purpose of giving a preference to one not a bona fide creditor or purchaser, without notice, shall be void, is not limited to and does not mean contemplation on the part of the bankrupt of committing an act of bankruptcy, within the terms of the act, for which his creditor might proceed against him in invitum, or his own contemplation of voluntarily taking the benefit of the act, but it means contemplation of a state of bankruptcy or known insolvency and inability to carry on his business, and a stoppage of his business. "In other words, that he contemplated a breaking up and failure and stoppage of his trade or business, and thus to become, in the sense of the old law, a 'bankrupt,' or one whose trade in business is broken up, his counter or table being, in a figurative sense, *bankus ruptus*." *Morse v. Godfrey* (U. S.) 17 Fed. Cas. 854, 862; *Everett v. Stone* (U. S.) 8 Fed. Cas. 898, 901. As used in Bankr. Act 1841, c. 9, referring to acts done in "contemplation of bankruptcy," it has often been adjudged to mean contemplation of an insolvency and inability of the debtor to pay his debts, and also a contemplation of a total stoppage and destruction of his business consequent thereon. *Winsor v. Kendall* (U. S.) 30 Fed. Cas. 820, 822; *In re Smith*, 13 Rep. 296, 297.

Bankr. Act 1841, providing that assignments made in "contemplation of bankruptcy" should be void, does not mean that there was in the bankrupt's mind an actual intention of becoming a bankrupt. If his pecuniary condition or act committed was such that he could not reasonably avoid becoming a bankrupt, the law considers him as acting in contemplation of bankruptcy. *In re Smith* (U. S.) 9 Fed. 592, 593; *In re Smith*, 13 Rep. 296, 297. The paramount question is, what was the pecuniary condition of the bankrupt when the gift was made? If one who is not insolvent makes a gift and shortly afterwards fails, but his failure can be traced to other causes, he will not be held to have made the gift in contemplation of bankruptcy, and so to have forfeited his right to his discharge. *In re Smith*, 13 Rep. 296, 297.

Bankr. Act 1841, § 2, making void all conveyances in "contemplation of bank-

ruptcy," means conveyances made by one who is insolvent, and knows it, and expects to stop payment. *Jones v. Howland*, 49 Mass. (8 Metc.) 377, 385, 41 Am. Dec. 525.

Within the statute providing that all conveyances, etc., made or given by any bankrupt in "contemplation of bankruptcy," and for the purpose of giving any person a preference or priority over his general creditors, not made to a bona fide creditor or purchaser for a valuable consideration without notice, shall be deemed utterly void the phrase "contemplation of bankruptcy" does not mean a contemplation of applying for the benefit of a bankrupt law, or a proceeding in a court of bankruptcy, but a contemplation of the breaking up of one's business, or an inability to continue it. A knowledge of such a derangement of one's affairs as would prevent a party from carrying on his business is a contemplation of bankruptcy; not mere insolvency, for a party may be insolvent and not know it, and yet payments made or securities given by him not be in contemplation of bankruptcy, if at the time he fully expected to continue his business and retrieve his losses; but if he did not expect this, or if the derangement of his affairs was such as to make the inability to continue his business highly probable, then the act was 'in contemplation of bankruptcy' within the meaning of the bankrupt law." *Atkinson v. Farmers' Bank* (U. S.) 2 Fed. Cas. 100.

#### As proceedings in bankruptcy.

"Contemplation of bankruptcy," as used in reference to the conveyance of property by a bankrupt, means that the property must have been conveyed by the debtor in contemplation of a decree adjudging him a bankrupt, or an act of bankruptcy on an application by himself to be decreed a bankrupt, and cannot be construed as meaning a mere state of insolvency. *Buskington v. McLain*, 13 How. 150, 167; *In re Hanibel* (U. S.) 11 Fed. Cas. 431.

The words "contemplation of bankruptcy," as used in the bankruptcy act in relation to the bankrupt's right to be discharged, meant contemplation on his part of becoming a bankrupt on his voluntary petition, or of doing an act or acts which will enable his creditors to obtain an adjudication against him. The contemplation merely of a condition of insolvency is not enough. *In re Carmichael* (U. S.) 96 Fed. 594, 596; *In re Hirsch* (U. S.) 96 Fed. 468, 477.

A debtor cannot be said to be "in contemplation of bankruptcy" at a time when no bankruptcy law is in existence, although a bill for a bankruptcy statute is then pending before Congress, and the debtor expects to take the benefit of it if it should become a law. *In re Hirsch* (U. S.) 96 Fed. 468, 477.

**CONTEMPLATION OF DEATH.**

The term "transfer of property in contemplation of death," in the transfer tax law, c. 908, providing that taxes shall be imposed on the transfer of property made in contemplation of death, or intended to take effect in possession or enjoyment at or after such death, refers to a gift causa mortis. In *re Cornell's Estate*, 73 N. Y. Supp. 32, 36, 66 App. Div. 162.

Within the meaning of the statutes imposing a tax on any transfer of property made in contemplation of death of the grantor, the conveyance by a man 72 years of age, not in good health, though then recovering from an illness, of the principal part of his property, to relatives who were required to, and did, give bonds to pay to him annually during his life in sums equal to or exceeding the income from the property so conveyed, the conveyance of such property taking effect immediately, and there being no power of revocation reserved, was not made "in contemplation of death," and was not subject to such tax. In *re Edgerton's Estate*, 54 N. Y. Supp. 700, 703, 35 App. Div. 125.

This court has held that the words "in contemplation of death," as used in Gen. Tax Laws, § 220, subd. 3, imposing a transfer tax when the transfer is of property made in contemplation of death of the grantor or vendor, do not refer to that general expectation which every mortal entertains, but rather the apprehension which arises from some existing condition of body or some impending peril. In *re Baker's Estate*, 82 N. Y. Supp. 390, 391, 83 App. Div. 530 (citing In *re Spaulding's Estate*, 49 App. Div. 541, 63 N. Y. Supp. 694, affirmed 163 N. Y. 607, 57 N. E. 1124).

**CONTEMPLATION OF INSOLVENCY.**

A statute which forbids any transfer or assignment of the property of a debtor "in contemplation of insolvency" does not refer merely to acts done in anticipation of insolvency—that is, in view of a future state of things expected or contemplated to take place after the act is done—but also includes assignments made in view or contemplation of present existing or contemplated insolvency. *Robinson v. Bank of Attica*, 21 N. Y. 406, 411. As used in Rev. St. 603, § 4, declaring a disposition of property "in contemplation of insolvency" unlawful and void, it does not mean simply an insolvency existing as a fact, but, to come within the prohibition of the statute, the act must be done with knowledge and because of existing or contemplated insolvency. *Paulding v. Chrome Steel Co.*, 94 N. Y. 334, 338; *Heroy v. Kerr*, 21 N. Y. Super. Ct. (8 Bosw.) 194, 200; *New Britain Nat. Bank v. A. B. Cleveland Co.*, 36 N. Y. Supp. 387, 391.

"Contemplation of insolvency," as used in 2 Rev. St. (5th Ed.) 600, § 4, declaring transfers by corporations in contemplation of insolvency to be void, must also mean something more than mere expectation of its occurrence. It must include provision against its result, so far as the transferee is concerned, and that can only be applicable where he is already a creditor, and the object is to take his debt out of the equal ratable distribution of the assets of the company when insolvent." *Heroy v. Kerr* (N. Y.) 21 How. Prac. 409, 420. It must include provision against its results so far as a transferee is concerned, and that can only be applicable where he is already a creditor, and the object is to take his debt out of the equal ratable distribution of the assets of the company when insolvent. *New Britain Nat. Bank v. A. B. Cleveland Co.*, 36 N. Y. Supp. 387, 391. 91 Hun, 447; *Heroy v. Kerr*, 21 N. Y. Super. Ct. (8 Bosw.) 194, 200.

If a debtor at any time, from the state of his circumstances, contemplates that he will not be thenceforth able to pay his debts as they mature, he "contemplates insolvency" within the meaning of the bankruptcy act. In *re Dibblee* (U. S.) 7 Fed. Cas. 651, 654.

"Contemplation of insolvency," as used in Laws 1883, c. 349, § 2, providing that every sale, mortgage, hypothecation, lien, or other security given by any insolvent within 60 days prior to the making of any assignment for the benefit of creditors, and in contemplation of bankruptcy, means in contemplation of availing himself of the benefits of the state insolvent laws. *Anstedt v. Bentley*, 21 N. W. 807, 809, 61 Wis. 629.

Rev. St. c. 18, art. 1, §§ 7-9, prohibited any assignment or transfer, "in contemplation of insolvency," with an intent to prefer any particular creditor. Held, that an insurance company could not be said to act in contemplation of insolvency merely because the sums insured exceeded its capital. *Holbrook v. Bassett*, 18 N. Y. Super. Ct. (3 Bosw.) 147, 171.

**Assignment for benefit of creditors.**

An assignment by an insolvent debtor of all his property in trust for the benefit of all his creditors is not an assignment in "contemplation of insolvency," within the meaning of a statute declaring assignments made to any person in contemplation of insolvency void. *Haxton v. Bishop* (N. Y.) 3 Wend. 13, 17.

**Transactions in due course of business.**

The New York insolvent act, declaring that any transfer or conveyance, etc., made "in contemplation of insolvency," shall be void, does not include a mortgage executed by a corporation, after its insolvency, in pursuance of an agreement to secure advances made before there was any expecta-

tion of insolvency. *Brower v. Husted*, 21 N. Y. Supp. 324, 325, 66 Hun, 631.

An act done by a corporation in the ordinary and usual course of business, uninfluenced by the state of its affairs, cannot be said to have been done "in contemplation of insolvency." Thus, when a national bank indebted to another bank makes the remittances to it by mail in the ordinary course of business, if made in good faith, the latter may apply them to cancel the indebtedness, though the remitting bank fails before they are received. A bank or a business concern may be considered as acting in contemplation of insolvency when, in making some disposition of its assets, it is actuated by some knowledge of its insolvency. *Hayden v. Chemical National Bank (U. S.)* 84 Fed. 874, 876, 28 C. C. A. 548.

## CONTEMPORANEOUS.

"Contemporaneous," as used in the statement that circumstances and declarations which are contemporaneous with the main fact under consideration are competent evidence as *res gestæ*, does not mean perfect coincidence of time between the declaration and the main fact. "It is enough that the two are substantially contemporaneous. They need not be literally so. The declaration must, however, be so proximate in point of time as to grow out of, elucidate, and explain the character and quality of the main fact, and must be so closely connected with it as to virtually constitute but one entire transaction, and to receive support and credit from the principal act sought to be elucidated and explained. The evidence offered must not have the earmarks of a device or afterthought, nor be merely narrative of a transaction which is really and substantially passed." *Alabama G. S. R. Co. v. Hawk*, 72 Ala. 112, 117, 47 Am. Rep. 403.

The rule of "contemporaneous exposition" is thus expressed: "When the language of an act is doubtful in its meaning, and cannot be made plain by the help of any other part of the same statute, or of any act in *pari materia* which may be read with it or in the course of the common law up to the time of its passing, the court may consider what was the construction put upon the act when it first came into operation." Dissenting opinion of Magle, J., in *State v. Kelsey*, 44 N. J. Law (15 Vroom) 1, 47.

"Contemporaneous," as used in a statement that memoranda are inadmissible to refresh the memory of a witness unless contemporaneous with the transaction about which witness is testifying, has apparently a very unsettled meaning. In *Wood v. Cooper*, 1 Car. & K. 646, a witness was allowed to look at his examination before commissioners in bankruptcy, signed by him, given within a fortnight of the time of the happening of certain occurrences, and when the

facts were fresh in his memory. So, in *State v. Colwell*, 3 R. L. 132, a witness was allowed to refer to a memorandum made a day or two after a previous trial, when an interval of about eight days had elapsed from the time when the occurrence transpired concerning which the witness gave testimony. In *Billingslea v. State*, 85 Ala. 323, 5 South. 137, it was held proper to allow a witness to refresh his recollection by resort to the minutes of statements made to a grand jury within a week after the occurrence about which he was being interrogated. In *Spring Garden Mut. Ins. Co. v. Evans*, 15 Md. 54, 74 Am. Dec. 555, it was held that a witness, who, five months after the occurrence of certain facts, and at the request of a party interested, made a statement in writing and swore to it, could not be allowed to testify to his belief in its correctness. *Putnam v. United States*, 16 Sup. Ct. 923, 927, 162 U. S. 687, 40 L. Ed. 1118.

## CONTEMPT.

See "Civil Contempt"; "Consequential Contempt"; "Constructive Contempt"; "Criminal Contempt"; "Direct Contempt"; "Indirect Contempt"; "Private Contempt."

The principal ingredient of the definition of "contempt" is disregard of the authority of the court. It is provided in Code Civ. Proc. § 584, that certain stated acts or omissions are contempt of the authority of the court. Definitions taken from works of authority are as follows: "A willful disregard of or disobedience of a public authority." "Disrespect; willful disregard of the authority of a court or legislature." In *re MacKnight*, 27 Pac. 336, 338, 11 Mont. 126, 28 Am. St. Rep. 451 (citing *Bouvier's and Anderson's Law Dicts.*).

"Contempts" may be classified as contempts in the face of the court, and contemptuous words or writings concerning the court. 2 Hawk. P. C. 220. *Territory v. Murray*, 15 Pac. 145, 147, 7 Mont. 251.

"Blackstone says that contempt of court may be committed by speaking or writing contemptuously of the court or judges, acting in their judicial capacity, and by anything that demonstrates a gross want of that regard and respect which, once courts of justice are deprived of, their authority is entirely lost among the people." *Territory v. Murray*, 15 Pac. 145, 148, 7 Mont. 251; *Kissel v. Lewis*, 61 N. E. 209, 210, 27 Ind. App. 302.

"Contempt" is a disobedience of the rules and orders of a court, which has power to punish such offense. Contempts may arise by contemptuous behavior in the face of the court, or by disobedience to some rule, right, or process. *Welch v. Barber*, 52 Conn. 147, 156, 52 Am. Rep. 567.

"The Practical Register defines a 'contempt' to be a disobedience to the court, or an opposing order despising the authority, justice, and dignity thereof. Sometimes it arises from one or more opposing and disturbing the execution or service of the process of the court, and using force to the party that serves it." *Conover v. Wood* (N. Y.) 5 Abb. Prac. 84, 89.

"Contempts" were classified in *City of Newport v. Newport Line Co.*, 92 Ky. 445, 17 S. W. 435, as follows: "Those which are in *facie curiæ*, or direct, or those which are constructive or consequential; or, as stated by some writers, civil or criminal." *Nienaber v. Tarvin*, 20 Ky. Law Rep. 451, 454, 46 S. W. 513, 515, 104 Ky. 149 (citing 4 Bl. Comm. 284; Rap. "Contempts").

"Contempt" is a disobedience of the court by acting in opposition to the authority, justice, or dignity thereof. It commonly consists in a party doing otherwise than he is enjoined to do, or not doing what is commanded or required by the order or decree of the court, in all which cases the party disobeying is liable to be attached and committed for the contempt. *Lyon v. Lyon*, 21 Conn. 185, 198.

A "contempt" is an offense against a court as an organ of justice, and a court can rightfully punish it on summary conviction, whether the same act be punishable as a crime or misdemeanor on indictment or not. *Yates v. Lansing* (N. Y.) 9 Johns. 395, 417, 6 Am. Dec. 290.

Besides the various classes of contempts which are known to the common law of England and particularly described, and besides those relating to officers and others connected with the courts concerning which the law is plain and explicit, there are many which are claimed to be exclusively within the discretion of the court. The belief in the existence of such is alone in the breast of the court. They may be construed to spring from a gesture, a word, or a look. The offense is without specification and without definition. It may become an offense of opinion, of feeling, or of prejudice, an offense which has no other legislation than the imperfections of human nature, blinded and misled by the circumstances of the moment, notion of caprice, and the improper bias of passion, or by those powerful influences from which the most upright and enlightened mind cannot be considered or trusted to be wholly exempt. *Ex parte Hickey*, 12 Miss. (4 Smedes & M.) 751, 774.

In treating of the subject of "Contempt," Bishop in his work on Criminal Law (volume 2 [7th Ed.] § 243) says: "No court of justice could accomplish the object of its existence unless it could in some way preserve order and enforce its mandates and decrees. The common method of doing these things is by the process of contempt. There-

fore the power to proceed thus is incident to every judicial tribunal, derived from its very constitution, without any express statutory aid." The decisions of this court have approved and adhered to this doctrine. *Flashback v. State*, 80 N. E. 1088, 1090, 181 Ind. 804, 818.

In *Stuart v. People*, 4 Ill. (3 Scam.) 395, the Supreme Court says: "Contempts are either direct, such as are offered to the court while sitting as such, and in its presence, or constructive, being offered not in its presence, but tending by their operation to obstruct and embarrass or prevent the due administration of justice." Erskine, in a letter to a member of the bar, very clearly stated the general principle: "Every act which tends to frustrate the mandates of a court of justice is a contempt of its authority. But I may venture to lay down this distinct and absolute limitation of the process of the court, namely, that it can only issue in cases where the court which issues it has awarded some process, given some judgment, made some legal order, or done some act which the party against whom it issues, or other on whom it is binding, have either neglected to obey, contumaciously refused to submit to, incited others to defeat by artifice or force, or treated with terms of contumely and disrespect in the face of the court." *Gandy v. State*, 13 Neb. 445, 449, 14 N. W. 143, 145 (citing 27 Howell, St. Tr. 1019).

#### Contempt of judge distinguished.

The term "contempt of court," and not "contempt of the judge," is applicable to a violation of a final decree creating a permanent injunction rendered by a special judge, and therefore such judge has no authority to punish such contempt. *Kissel v. Lewis*, 61 N. E. 209, 210, 27 Ind. App. 302.

#### As criminal offense.

Proceedings for contempt, prosecuted to preserve the power and vindicate the dignity of the court, and to punish for the disobedience of their orders, are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. In *re Nevitt* (U. S.) 117 Fed. 448, 458, 54 C. C. A. 622.

A contempt of court is a quasi criminal offense against the court, for which a party may be fined and imprisoned as for a specific criminal offense, but it is not a "misdemeanor" in the strict sense of the term. In *re Fil Kl*, 22 Pac. 146, 147, 80 Cal. 201 (citing *Ex parte Ah Men*, 19 Pac. 380, 77 Cal. 198, 11 Am. St. Rep. 263; *New Orleans v. New York Mail & S. Co.*, 87 U. S. [20 Wall.] 387, 392, 22 L. Ed. 354).

Contempt of court is a specific criminal offense. But what class of criminal offenses "contempt" belongs to is nowhere defined. It may be punished by a fine or imprisonment,

at the discretion of the court, and there is no limit placed to the extent of either. So that a contempt incurred by violating an order of court prohibiting any one from interfering with the receivers of a railway with its operation is a criminal offense. In *re Acker* (U. S.) 66 Fed. 290, 292.

Contempt is in the nature of a criminal offense, and is so punished under Kentucky statutes, being placed in the chapter regulating crimes and punishments. The power to hear and determine this offense, and fix the punishment of it by fine or imprisonment, is necessarily a judicial power, which neither the mayor of a city nor the chairman of the board of trustees of a town can exercise. *Roberts v. Hackney*, 58 S. W. 810, 811, 109 Ky. 265.

Contempt of the court is a specific criminal offense, and a proceeding for contempt is in the nature of a criminal offense, and to be governed by the strict rules of construction which prevail in criminal cases. In *re Reese* (U. S.) 107 Fed. 942, 947, 47 C. C. A. 87 (citing *Vanzandt v. Argentine Min. Co.* [U. S.] 48 Fed. 770).

A contempt not committed in presence of the court is denominated by law as a "constructive contempt." It is a criminal offense, for which the punishment may be imprisonment without limit of duration, and one charged with it has the same inalienable right to be heard in his defense that he would if charged with murder or any other crime. *Boyd v. Glucklich* (U. S.) 116 Fed. 131, 134, 53 C. C. A. 451 (citing *McClatchy v. Superior Court of Sacramento County*, 119 Cal. 413, 51 Pac. 696, 39 L. R. A. 691; *State ex rel. De Buys v. Judges of Civil District Court*, 32 La. Ann. 1256; In *re Reese* [U. S.] 47 C. C. A. 87, 107 Fed. 942).

Contempt of court is of two kinds: That which is committed in open court, and that which is committed out of the view and hearing of the court. For the punishment of the first by commitment and fine, no proceeding need be contradictorily with the offender; but for the punishment of the latter by the same means, the offender must be allowed to offer evidence and argument in his defense, otherwise any judgment which the court may pronounce will be absolutely void. *Rapalje on Contempts*, § 111. Contempt of court is a specific criminal offense, and a party charged therewith, though the proceeding is more or less summary in character, has the same inalienable right to be heard in his defense as he would against a charge of murder or any other crime. *McClatchy v. Superior Court of Sacramento County*, 51 Pac. 696, 698, 119 Cal. 413, 39 L. R. A. 691.

Proceeding for contempt is of two kinds: First, to punish the contemptuous conduct of the persons with respect to the authority and

dignity of the court; second, as a method of affording relief *inter partes*. The first is a proceeding of a criminal nature, instituted by the court of its own motion, heard by it in a summary manner, and punishable by imprisonment until the contempt be purged, or by a fine payable to the state. The second is set on foot at the instance of parties aggrieved. Such a proceeding is remedial in its nature, and the relief afforded is by imprisonment until the party adjudged in contempt does justice to his adversary. Proceedings in contempt instituted by a petition of depositors in a savings bank, setting out the orders of the chancellor for the investment of the funds of the institution, and that the managers made investments in disregard of these orders, and that in consequence of the loss sustained thereby the institution became insolvent, in which answers were filed by the managers and testimony taken by commission, was a proceeding for contempt of the second class, and as such appealable. *Dodd v. Una*, 5 Atl. 155, 165, 40 N. J. Eq. 672.

A contempt of court is quasi criminal in its nature, and therefore an appeal from a sentence of fine and costs for contempt is not limited by Rev. St. § 5649, providing that the Supreme Court has not jurisdiction of appeals if the amount of the judgment is less than \$300. *Brimson v. State*, 58 N. E. 803, 804, 63 Ohio St. 847.

In *State ex rel. Van Orden v. Sauvinet*, 24 La. Ann. 119, 18 Am. Rep. 115, Judge Tallaferra said: "A contempt of court is an offense against the state, and not against the judge personally." Again, in *Ex parte Hickey*, the court said: "The whole doctrine of contempt goes to the point that the offense is a wrong to the public, not to the person or the functionary to whom it is offered, considered merely as an individual." Const. art. 3, § 1, provides that the Governor "shall have power to grant pardons after conviction," etc. A judgment imposing a fine for contempt is a conviction. Therefore the Governor has the right to pardon a person committed for contempt. *Sharp v. State*, 49 S. W. 752, 753, 102 Tenn. 9, 43 L. R. A. 788, 73 Am. St. Rep. 861.

Contempt is an offense against the court as an organ of public justice. And the court can rightfully punish on a summary conviction, whether the same act be punishable as a crime or misdemeanor on indictment or not. A conviction on indictment will not purge the contempt, nor will a conviction for contempt be a bar to an indictment. *Yates v. Lansing* (N. Y.) 9 Johns. 395, 417, 6 Am. Dec. 290.

The idea of criminality, existing in the willful disobedience of orders and decrees made in the administration of justice, is so far a necessary ingredient of everything

which is called a "contempt" that every contempt may be said to be a criminal contempt. Therefore it is said that proceedings to punish contempts are criminal proceedings. Under these principles the imprisonment of a constable until the payment of a fine levied by a justice for failure to serve process is authorized as a punishment for contempt, and does not constitute imprisonment for debt, although the fine inures to the benefit of the party injured by the refusal to serve the process. *Ex parte Robertson*, 11 S. W. 669, 670, 27 Tex. App. 628, 11 Am. St. Rep. 207.

#### **Disrespectful language.**

The employment of language by counsel in an appellate court, which is manifestly disrespectful toward a judge of an inferior court, is contempt of the appellate court. *Friedlander v. Sumner Gold & Silver Min. Co.*, 61 Cal. 116, 117.

#### **As felony.**

See "Felony."

#### **Pleadings.**

"Contempt" is defined by Code, § 14, subd. 2, as any disdain or abuse of a mandate or proceeding of the court. A false answer does not constitute a contempt. *Fromme v. Gray*, 86 N. Y. Supp. 1107, 1108, 14 Misc. Rep. 592.

The mere drafting by an attorney of a petition by persons not parties to a cause, asking in respectful language a new trial, is not contempt. *State v. Hansford*, 28 S. E. 791, 792, 43 W. Va. 773.

#### **Refusal to testify.**

Contempt of court is a disobedience to the rules or orders of the court, which interferes with the due administration of the law. A refusal of a witness to answer any question which he may be lawfully required to answer is a contempt of court, and if he persists in the refusal he may be punished accordingly. *Samuel v. People*, 164 Ill. 379, 385, 45 N. E. 728. Thus a physician who has been subpoenaed, and is interrogated as an expert witness only, may be punished as for a contempt for refusing to testify, when no compensation greater than that allowed an ordinary witness has been paid or promised him, the fees prescribed in Rev. St. c. 53, § 47, being the only fees provided for by statute. *Dixon v. People*, 48 N. E. 108, 110, 168 Ill. 179, 89 L. R. A. 116.

Contempt of court is the refusal of a witness to testify at all, or to answer particular questions pertinent to the issue, before a court having jurisdiction of the controversy or proceedings in which the witness is required to give the evidence, he being competent, and is an offense against the

state, and not an offense against the judge. *Rudd v. Darling*, 25 Atl. 479, 481, 64 Vt. 456.

#### **CONTEMPT PROCEEDINGS.**

As an action, see "Action."

As civil action or suit, see "Civil Action—Case—Suit—etc."

As criminal case, see "Criminal Case or Cause."

As remedy, see "Remedy."

As special proceeding, see "Special Proceeding."

In *Ex parte Robinson*, 86 U. S. (19 Wall.) 505, 22 L. Ed. 205, "contempt" is defined as an act in disrespect of a court or its process, and which obstructs the administration of justice or tends to bring the court into disrepute. In *People v. Wilson*, 64 Hill, 165, it is said: "All acts which impede, embarrass, or obstruct a court or tend to produce such effects, whether done in or out of court, are to be considered as done in the presence of the court, and are contempt." *State v. Hansford*, 28 S. E. 791, 792, 43 W. Va. 773.

#### **CONTENT.**

An expression that "I am content to give" amounts to as much as "I promise to pay," and either the action of debt or covenant would lie thereon. *Douglas v. Hennessy*, 10 Atl. 583, 584, 15 R. I. 272 (citing *Anon.*, 3 Leon. 119).

#### **CONTENTION.**

The word "contention" is employed in the English courts as a synonym for "point" or "proposition." *Orvis v. Jennings* (N. Y.) 6 Daly, 434, 446.

#### **Strife.**

The word "contention" in Gen. St. tit. 12, § 123, making it a crime to disturb or break the peace, or stir up and provoke contention and strife, by following and mocking any person, etc., does not necessarily imply blows. It may be evidenced by passionate looks, words, and gestures. Thus, the use of abusive language towards another was held to be a stirring up of contention and strife within the meaning of the act. *State v. Warner*, 34 Conn. 270, 279.

#### **CONTENTIOUS.**

"Contentious," as used in the statement of the rule that the possession necessary to give rise to a title by prescription must be a contentious one, means "opposition on good grounds." *Lehigh Valley R. Co. v. McFarlan*, 43 N. J. Law (14 Vroom) 605, 621.

# CONTENTS.

## Of account or note.

The "contents" of a note is the sum it shows to be due, and the same may be said without much violence to language of an account, and is so used in the judiciary act of 1789, declaring that no federal court shall have cognizance of any suit to recover the contents of any note or other chose in action in favor of an assignee, unless a suit could have been prosecuted in such court to recover the contents if no assignment had been made. *Wilkinson v. Wilkinson* (U. S.) 29 Fed. Cas. 1269.

The "contents" of a note is the sum it shows to be due, and the same may, without much violence to language, be said of an account. *Sere v. Pitot*, 10 U. S. (6 Cranch) 332, 335, 3 L. Ed. 240. The "contents" of a note is the amount it shows to be due, and the same may be said of an account. *North American Transportation & Trading Co. v. Morrison*, 20 Sup. Ct. 869, 872, 178 U. S. 262, 44 L. Ed. 1061; *Simons v. Ypsilanti Paper Co.* (U. S.) 83 Fed. 193, 195.

In relation to commercial instruments, such as promissory notes, acceptances, and bonds, the sum promised to be paid is familiarly spoken of as the "contents." *Simons v. Ypsilanti Paper Co.* (U. S.) 33 Fed. 193, 195.

In the eleventh section of the judiciary act, which provides that no district or circuit court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, the word "contents," as employed with reference to promissory notes and similar writings, designates the specific sums named therein, and payable by the terms of the instruments themselves. *Barney v. Globe Bank* (U. S.) 2 Fed. Cas. 894, 897.

Rev. St. § 629 [U. S. Comp. St. 1901, p. 503], provides that no circuit court shall have cognizance of any suit to recover the contents of any promissory note or other chose in action in favor of an assignee, unless a suit might have been prosecuted in such court to recover the said contents if no assignment had been made, except in case of foreign bills of exchange. Held, that the "contents" of a contract or chose in action, in the sense in which the term is used in section 629, are the rights created by it in favor of a party in whose behalf stipulations are made in it which he has a right to enforce in a suit founded on the contract, and therefore a suit to recover such stipulations is a suit to recover such contents. *Corbin v. Black Hawk County*, 105 U. S. 659, 665, 26 L. Ed. 1136; *Republic Iron Min. Co.*

*v. Jones* (U. S.) 37 Fed. 721, 723, 2 L. R. A. 746.

## Of building or house.

A policy of insurance insured a granary and its contents, a barn and its contents, and a toolhouse and its contents, wherever situate. It was contended that the word "contents," when used in a policy which was not a shifting policy, was used as synonymous with the words "being in or stored in," and imparted sufficient description to the property, the use of which necessitated its temporary absence from the building, and that the word was used merely to indicate their place of deposit when not temporarily absent in the ordinary course. But the court held that such word should be confined to the property in the barn or insured building at the time of the loss (citing *Farmers' Mut. Fire Ins. Ass'n v. Kryder*, 81 N. E. 851, 5 Ind. App. 430), and hence the policy did not cover property removed and placed in another building on the premises. *Benton v. Farmers' Mut. Fire Ins. Co.*, 60 N. W. 691, 102 Mich. 281, 26 L. R. A. 237.

"Contents," as used in a fire policy insuring a barn and butcher shop as one building for a certain amount, the contents for a certain amount, a smokehouse for a certain amount, and its contents for a certain amount, is not a certain and definite description of any particular class of goods. Its meaning must be ascertained by considering the context, the nature and methods of the business for which the building whose contents are to be insured is to be used, and the understanding and intentions of the parties as expressed at the time the insurance was contracted for. *Graybill v. Penn Tp. Mut. Fire Ins. Ass'n*, 32 Atl. 632, 633, 170 Pa. 75, 29 L. R. A. 55, 50 Am. St. Rep. 747.

Where a fire policy is issued on the contents of a certain building, the word "contents" does not cover the property in the building at the time the policy was issued after such property has been removed from the building. *Shertzer v. Mutual Fire Ins. Co. of Hartford County*, 46 Md. 506, 509; *Benton v. Farmers' Mut. Fire Ins. Co.*, 60 N. W. 691, 693, 102 Mich. 281, 26 L. R. A. 237.

The phrase "contents of a house" in a will devising the house, its furniture, and all contents thereof, does not include a safe in the house, containing securities, but the word is to be limited in its meaning by the word "furniture" to only include property of a similar kind. The rule, in brief, as well stated by the learned justice who decided the recent case of *Ludwig v. Bungart*, 67 N. Y. Supp. 177, 33 Misc. Rep. 177, holding that money and jewelry were not included, is that in the construction of wills, when certain things are mentioned or enumerated in a bequest, followed in the same clause



by a more general description, that description is taken only to cover things of a like kind with those mentioned or enumerated; and this is so because it is presumed the testator had only things of that class in mind. The general phrase "contents of a house," following the specific one of household furniture, must therefore be confined to matters ejusdem generis. *Fenton v. Fenton*, 71 N. Y. Supp. 1083, 1087, 35 Misc. Rep. 479.

"Contents therein," as used in a fire policy on a barn and the contents therein, does not cover horses which, though stabled in the barn, are killed by lightning outside. *Farmers' Mut. Fire Ins. Ass'n v. Kryder*, 31 N. E. 851, 5 Ind. App. 430, 51 Am. St. Rep. 284.

### CONTENTS UNKNOWN.

The phrase "contents unknown," as used in a bill of lading, so qualifies the description of the package contained in the bill that the carrier issuing the bill is not liable to account for the package as described. *Miller v. Hannibal & St. J. R. Co.*, 90 N. Y. 430, 433, 43 Am. Rep. 179 (citing *Haddow v. Parry*, 3 Taunt. 308; *Shepherd v. Naylor*, 71 Mass. [5 Gray] 591).

In a bill of lading the phrase "weight, contents and value unknown" does not place the burden upon the libellant to show in the first instance that the goods were put up in the cases by the manufacturer or shipper in good order and condition, and does not bind the court, in the absence of such proof, to presume that the injury to the goods arose from defects existing when they were packed for shipment, or which occurred previous to the shipment. *English v. Ocean Steam Nav. Co.* (U. S.) 8 Fed. Cas. 719.

The term "contents unknown," in a bill of lading acknowledging the receipt in good order and condition of casks containing bristles, and stating "weight and contents unknown," cannot be construed as an admission by the master as to the condition of the goods beyond that visible to the eye, or apparent from handling the casks or boxes, or their outside protection, whatever it may be. *The Columbo* (U. S.) 6 Fed. Cas. 178; *The California* (U. S.) 4 Fed. Cas. 1058.

A bill of lading reciting that a certain number of barrels of molasses marked, etc., were shipped in good order and condition, "contents and gauge unknown," cannot be construed as implying more than ignorance of the quantity or quality, not of the fact of there being molasses in the cask. *Nelson v. Stephenson*, 12 N. Y. Super. Ct. (5 Duer) 538, 552.

The words "contents unknown," written in a bill of lading, does not preclude either

of the parties, on the loss of the goods, from showing the real contents of the package. *Fassett v. Ruark*, 3 La. Ann. 694.

The words "contents unknown," contained in a bill of lading, show that the master is ignorant as to the real character of the goods and as to the condition they are in, though the bill also specifies the goods to be 30 hogsheads of bacon. Consequently under such a bill the master cannot be presumed to agree that the goods are shipped in good order and condition. *Vernard v. Hudson* (U. S.) 28 Fed. Cas. 1162, 1163.

The words "contents and weight unknown," added with pen and ink at the bottom of a bill of lading, exclude any inference that the owner is bound by a memorandum on the margin of the bill giving the weight, as the addition of the words at the bottom with a pen clearly indicate an intent on the part of the carrier not to be bound by any supposed ascertainment of the weight at the time by the shipper. *The Andover* (U. S.) 1 Fed. Cas. 855.

The words "contents and value unknown," in the printed part of a bill of lading, only applies to packages mentioned therein, the contents of which are concealed from view, and does not apply to corn in bulk loaded into the car from an elevator. *Tibbits v. Rock Island & P. Ry. Co.*, 49 Ill. App. 567, 571.

### CONTEST.

See "Actual Contest"; "During Time of Contest."

To "contest" means to strive to win or hold; to controvert, litigate, oppose, call in question, challenge, dispute; to defend, as a suit or other proceeding. *Parks v. State*, 13 South. 756, 759, 100 Ala. 634; *Robertson v. State*, 10 N. E. 582, 600, 109 Ind. 79.

The word "contest" in constitutions and statutes is a word of art, having a distinct, defined meaning. It is a litigation. It implies a plaintiff and defendant, and a thing in controversy, and a board or other tribunal which decides such a contest is essentially a court. *Pratt v. Breckinridge*, 65 S. W. 136, 142, 112 Ky. 1.

Mr. Webster gives the following definition of the term "contest": "to make a subject of dispute; to call in question; to dispute; to dispute the declared result of an election." *Oxford v. Frank*, 70 S. W. 426, 429, 30 Tex. Civ. App. 343.

#### Of elections.

Const. art. 7, § 12, directing specific legislation for the trial of "election contests," means proceedings which are usually instituted, within a prescribed period after the election, for or on behalf of the succe-

ful candidate, for the purpose of establishing his right to the particular office in controversy. *People v. Londoner*, 22 Pac. 764, 767, 13 Colo. 303, 6 L. R. A. 444.

"The contest of an election" must be, what its name implies, an adversary proceeding by which the matters in controversy may be settled upon issues joined. In the contest of a county seat election it is necessary that some of the parties actually interested adversely to the contestant should be made parties thereto. *Burke v. Perry*, 42 N. W. 401, 402, 26 Neb. 414.

#### CONTESTED ELECTIONS.

As complaint, see "Complaint."

As a suit, see "Suit."

As case, see "Case."

As civil action or cause, see "Civil Action—Case—Suit—etc."

A "contested election," within the meaning of Code, § 8177, in reference to contested elections, means a contest of the election, and includes every election in which the statutes provide for a contest, whether on account of the particular wrongs complained of or not. *Parks v. State*, 13 South. 756, 759, 100 Ala. 684.

"The primary meaning of the verb 'to contest,' as given by Webster, is to make a subject of dispute, contention, or litigation, or call into question; to controvert; to oppose; to dispute." It is further defined as meaning "to defend, as a suit or other judicial proceeding; to dispute or resist, as to claim by due course of law; to litigate." An election may be said to be contested whenever an objection is formally urged against it, which, if found to be true in fact, will invalidate it. Therefore the power to determine contested elections necessarily carries with it jurisdiction over every possible objection which may be urged against the election of the officer, which is the subject of the contest. *Robertson v. State*, 10 N. E. 582, 600, 109 Ind. 79.

Const. art. 8, § 3, providing that in all "contested election cases" the ballots cast may be counted, etc., means only statutory contests, in which the contestant seeks not only to oust the intruder, but to have himself inducted into the office, and does not mean any proceeding in which the election of one holding an office is contested. *State ex rel Ewing v. Francis*, 88 Mo. 557, 561.

"Contested elections," as used in Wag. St. p. 574, § 58, providing that costs of contested election may be adjudged against the unsuccessful party, and the payment thereof enforced as in civil cases, only applies to contests of elections which can be had before courts in which costs can be adjudged and the payments thereof enforced as in civil cases of execution on fee bill, or in

some other manner provided for in the courts. It does not include election contests in the House of Representatives. *Steele v. Wear*, 54 Mo. 531, 535.

#### CONTESTED WILL.

A will is "contested" under the provision of Code, § 4298, providing that any person interested in a will who has not contested the same may, after its admission to probate, contest its validity in equity by a party in interest, by filing in the court where it is offered for probate allegations in writing that the will was not duly executed, or as to the soundness of mind of the testator, or of any other valid objections thereto. *Breeding v. Grantland*, 33 South. 544, 135 Ala. 497.

#### CONTIGUOUS.

"Contiguous property," as used in Act 1872, authorizing the corporate authorities of cities and villages to make local improvements by special assessments of contiguous property, means real property contiguous to and benefited by the proposed improvement. *Rich v. City of Chicago*, 38 N. E. 255, 260, 152 Ill. 18.

#### Abutting or adjacent.

"Contiguous property," as used in Const. art. 9, § 1, vesting the corporate authorities of cities and villages with power to make local improvements by special assessment or by special taxation, or both, of contiguous property, is used in its popular sense, and means, in the case of a street improvement, the property which abuts on the street or sidewalk, or is bounded by the street. *Adams County v. City of Quincy*, 22 N. E. 624, 627, 130 Ill. 563, 6 L. R. A. 155.

"Contiguous" means in actual contact or touching; and hence a deed conveying a saltworks and lands contiguous thereto does not convey land about three-fourths of a mile from the main body of the saltworks' land, and separated therefrom by the intervening lands of other persons. *Holston Salt & Plaster Co. v. Campbell*, 16 S. E. 274, 275, 89 Va. 396.

"Contiguous," as used in Const. art. 15, § 9, defining a homestead to be a person's dwelling place, with that part of his land and property which is about and contiguous to it, means touching sides, adjoining, adjacent. *Linn County Bank v. Hopkins*, 28 Pac. 606, 47 Kan. 580, 27 Am. St. Rep. 309.

Rev. St. art. 2754, which forbids the closing of public roads without the consent of the "contiguous property owners," means "those property owners through whose land the road passes, or, at all events, whose property is actually touching on the road." *Raxdale v. Seip*, 32 La. Ann. 435, 436.

Upton, in the Case of Municipality No. 2, 7 La. Ann. 76, says the word "adjacent" was given the force of "contiguous," and it was held that only land contiguous to the portion of the street improved was subject to assessment. *McCormick v. City of Omaha*, 56 N. W. 626, 627, 37 Neb. 829.

#### Land cornering.

"Contiguous," as defined in Webster's Unabridged Dictionary, means "in actual or close contact to; touching; adjacent; near; lying adjoining." A tract of land is "contiguous" to another tract which corners with it. *Clements v. Crawford County Bank*, 40 S. W. 132, 133, 64 Ark. 7, 62 Am. St. Rep. 149.

#### Right of way in street.

Acts 1879, § 2, authorizing assessments for the improvement of public streets upon "contiguous" property, cannot be construed to authorize an assessment on a railroad in the street, for, if the interests or rights of the railroad in the street have a corporeal or physical existence, they must be represented by the street, and a street cannot be "contiguous" to itself. *South Park Com'rs v. Chicago, B. & Q. R. Co.*, 107 Ill. 105, 108.

The right of way of a railroad in a public street is "contiguous property," so far as street improvements are concerned, within a statute subjecting contiguous property to such tax for the local improvements. *Chicago, R. I. & P. Ry. Co. v. City of Moline*, 41 N. E. 877, 878, 158 Ill. 64.

#### Separation as affecting.

"Contiguous" means to touch or to be in actual contact, and where three lots are separated from five others by an alley they are not "contiguous" lots within the mechanic's lien law. *Bolen Coal Co. v. Ryan*, 43 Mo. App. 512, 515.

"Contiguous," as used in a fire insurance policy providing that the generating or evaporating in the building, or contiguous thereto, of any substance for a burning gas, or the use of gasoline for lighting, is prohibited, unless by special agreement indorsed on the policy, is a relative term, and, being employed in reference to a building, means in close proximity to such building. "Contiguous" is defined to be adjacent; in actual close contact; touching; near. Hence gasoline works of the insured, situated at least 50 feet from the building which contained the property insured, were not "contiguous" to the building. *Arkell v. Commerce Ins. Co.*, 69 N. Y. 191, 192, 25 Am. Rep. 168.

The term "contiguous" means adjacent, according to Webster's Dictionary, and as used in a fire policy providing that, if the risk shall be increased by the erection or

use of any building contiguous thereto without the consent of the company indorsed thereon, the policy should be void, could not be held to mean and apply to the objects "near by" the building insured, and hence that an erection 25 feet distant from the building insured was not to be construed as "contiguous" thereto, within the meaning of the policy. *Olson v. St. Paul Fire & Marine Ins. Co.*, 29 N. W. 125, 35 Minn. 432, 59 Am. Rep. 333.

Where one driving on a highway turned off on a private road, and at a point 50 or 100 feet from the highway was injured owing to a defect in such private road, the place of the injury was not "contiguous" to such highway. *Chapman v. Cook*, 10 R. I. 304, 307, 14 Am. Rep. 686.

#### Same—Navigable water.

"Contiguous territory," as used in *Mansf. Dig.* § 922, authorizing municipal corporations to annex contiguous territory in the same county, includes territory separated from a city by a navigable river. *Vogel v. City of Little Rock*, 15 S. W. 836, 54 Ark. 335. *Mansf. Dig.* § 922, authorizing municipal corporations to annex "contiguous territory" in the same county, means territory "not separated from the corporation by outside land," and the fact that a navigable river intervenes is not conclusive that the land is not contiguous. *Vestal v. City of Little Rock*, 15 S. W. 891, 892, 54 Ark. 321, 11 L. R. A. 778.

As used in Act Cong. Aug. 2, 1882, c. 874, 22 Stat. 186 [U. S. Comp. St. 1901, p. 2931], prohibiting the carrying of emigrant passengers from any port or place in a foreign country, except ports and places "in foreign territory contiguous to the United States," unless the spaces and accommodations therein mentioned be provided, "territory contiguous" meant the entire jurisdiction of a foreign country which had territory contiguous to the United States; therefore Vancouver's Island, B. C., is "territory contiguous" within the act. *The Danube* (U. S.) 55 Fed. 993, 995.

Const. art. 4, § 3, declares that each representative district shall consist of convenient and contiguous territory. Held, that the word "contiguous," as there used, did not necessarily mean contact by land, but simply meant that the territory was convenient of access. Thus territory might be "contiguous," within the meaning of the Constitution, though it be separated by wide stretches of deep and navigable waters. *Houghton County Sup'rs v. Secretary of State*, 52 N. W. 851, 92 Mich. 638, 16 L. R. A. 432.

#### Same—Sidewalk.

Land which is only separated by a sidewalk from the portion of the street to be paved is "contiguous" to the proposed improvement. *Chicago, B. & Q. R. Co. v. City*

of Quincy, 27 N. E. 192, 193, 186 Ill. 563, 29 Am. St. Rep. 334.

### CONTIGUOUS LOTS.

"Contiguous lots," within the meaning of the mechanic's lien statutes, providing that but one lien shall be necessary when the separate buildings on which the lien is claimed shall be erected under one general contract and upon contiguous lots, means lots that are bounded and described on recorded plats of cities and towns, and such as lie adjacent to each other; and the fact that the two houses for which material is furnished have another house between them, and the half lots on which the houses are situated are mortgaged to different persons, does not prevent such lots from being contiguous. *Bulger v. Robertson*, 50 Mo. App. 499, 503.

### CONTIGUOUS PERSON.

In New Orleans Waterworks Charter (Acts La. 1877, p. 51, § 18), providing that nothing in the act should be construed to prevent the city council from granting to any persons contiguous to the river the privilege of laying pipes to the river exclusively for his own use, the terms "contiguous person" means a person whose lot actually fronts on the river, or is separated from the river only by a public highway, with no private owner intervening or possible on the block or square so situated. There is no line of demarcation short of this, for in the broad sense the whole city of New Orleans is "contiguous" to the Mississippi river. The question of contiguity is to be determined by present circumstances. If an owner had been, but is not now, within the meaning of the term "contiguous," his former right would have passed from him along with all other rights dependent on continued present contiguity. *New Orleans Waterworks Co. v. Ernst* (U. S.) 32 Fed. 5, 6.

### CONTINENTAL.

The word "continental" is in general and prevalent use, and means "pertaining to or characteristic of a continent." As applied to or designating an insurance company, it would be descriptive of the bounds within which such company carried on its business. It is a generic term, and hence its exclusive appropriation will not be permitted. *Continental Ins. Co. v. Continental Fire Ass'n* (U. S.) 96 Fed. 846, 848.

### CONTINENTAL CURRENCY.

"Continental currency" is paper money emitted under the authority of Congress. *Wharton v. Morris* (Pa.) 1 Dall. 125, 126, 1 L. Ed. 65.

## CONTINGENCY.

A "contingency" is a fortuitous event, which comes without design, foresight, or expectation. *People v. Village of Yonkers* (N. Y.) 89 Barb. 266, 272.

A stipulation between a shipper and a common carrier, stating that the shipper undertook all risk of loss, injury, or damage, and other "contingencies" in loading, would ordinarily be understood as referring only to accidents or casualties, and is designed only to exempt the carrier from his common-law liability as insurer against accidents untended by negligence. *Keeney v. Grand Trunk Ry. Co.* (N. Y.) 59 Barb. 104, 140.

St. 1869, c. 368, concerning the apportionment of rent, provided that when lands are held by lease of a person having an estate therein determinable on a life or on any contingency, and such estate shall be determined before the day on which any rent is required or made payable, then such rent may be apportioned. The words "or any contingency" meant the happening of some event affecting the nature and character of the estate itself, and an essential and necessary part of it, on which the continuance of the estate depends. *Adams v. Bigelow*, 128 Mass. 365, 366.

12 & 13 Vict. c. 107, § 178, relating to cases where a bankrupt has contracted a "liability to pay money on a contingency" which has not happened at the time of issuing the fiat or filing the petition, would not include liability on a promise to restore leased premises to their original state at the determination of the tenancy. *Maples v. Pepper*, 18 C. B. 177, 189.

### Contingent liability or demand distinguished.

A contingent liability is one thing, and contingency, the happening of which may bring into existence a liability, is another and a very different thing. In the former case there is a liability which will become absolute on the happening of a certain event; in the latter there is none until the event happens. *Fernald v. Johnson*, 71 Me. 437, 440.

"There is a distinction between a contingent demand and a contingency whether there will ever be a demand. The former is a demand which might have been proved under the late bankruptcy law of the United States, but the latter is not." *Woodard v. Herbert*, 24 Me. (11 Shep.) 358.

### As an estate.

See "Estate."

### In attachment statutes.

"Contingency," as used in V. S. 1071, providing that money or other things due to the defendant may be attached by trustee

process, if it is due absolutely and without contingency, will be construed to mean a contingency affecting the debt itself, and not merely its time of payment. *Rowell v. Felker*, 54 Vt. 526, 529.

Rev. St. 1841, c. 119, § 63 (Rev. St. 1857, c. 86, § 55), provides that no person shall be adjudged trustee by reason of any money or other thing due from him to the principal defendant, unless it is at the time of the service of the writ due absolutely, and without depending on any contingency. Held, that the word "contingency," as there used, meant in the event which might prevent the principal from having any claim on the trustee or right to call on him to account, and not one which, though the principal may require the trustee to account, may show that there is nothing due on settlement made. *Cutter v. Perkins*, 47 Me. 557, 569; *Dwinel v. Stone*, 30 Me. (17 Shep.) 384, 389.

### CONTINGENT.

Contingent "is the quality of being casual; the possibility of coming to pass; an event which may occur; a possibility; a casualty. All anticipated future events which are not certain to occur are 'contingent' events, and may be properly denominated mere 'possibilities,' more or less remote, while anticipated events which are certain to occur, or must necessarily occur, are in no degree 'contingent.'" *Verdier v. Roach*, 31 Pac. 554, 556, 96 Cal. 467.

The word "contingent" ordinarily means "liable to occur." In law its meaning is dependent upon an uncertain future event. The words "contingent as an indorser," in a compromise deed, are equivalent to saying that the defendant is liable as an indorser to an extent dependent upon the future acts of the prior obligors of the note indorsed, and the language implies that at the time the deed was executed plaintiff regarded the note as a valid independent obligation, enforceable, to some extent at least, against the maker and prior indorsers, and that he intended thereby to reserve to himself any benefits to be derived therefrom, and also the right to collect of and from the defendant, in accordance with the provisions of the deed, such sum as might fall upon the defendant to pay. *Bovns v. Stewart*, 59 N. Y. Supp. 721, 723, 28 Misc. Rep. 475.

Contingent "implies a possibility, and when applied to a use, remainder, devise, bequest, or other legal right or interest, implies that no person in interest exists, and that whether such interest or right ever will exist depends on an uncertain future event." *Jemison v. Blowers* (N. Y.) 5 Barb. 686, 692; *Haywood v. Shreve*, 44 N. J. Law (15 Vroom) 94, 104.

The word "contingent," when used with reference to the vesting of a use or remain-

der, means that the vesting of the estate depends on an uncertain event, as on the death of a person, or on the taking effect of a certain event. *Taylor v. Gould* (N. Y.) 10 Barb. 388, 396.

### CONTINGENT BEQUEST.

The general rules for determining whether a gift is vested or contingent are that, where the time of division or payment is of the substance of the gift, then the legacy is contingent; when the time is mentioned only as a qualifying clause in the payment or division, then the legacy is vested. A second rule is that the law inclines to regard legacies as vested rather than contingent. *Andrews v. Russell*, 28 South. 703, 705, 127 Ala. 195.

### CONTINGENT CLAIM.

A "contingent claim" is one which has not accrued, and which is dependent on the happening of some future event. *Hospes v. Northwestern Mfg. & Car Co.*, 50 N. W. 1117, 48 Minn. 174, 15 L. R. A. 470, 31 Am. St. Rep. 637.

A "contingent claim" against an estate, within the statute providing for the settlement thereof, is one where the absolute liability depends on some future event which may never happen, and which therefore renders such liability uncertain and indeterminate. *Austin v. Saveland's Estate*, 45 N. W. 955, 956, 77 Wis. 108; *Jorgenson v. Larson*, 88 N. W. 439, 440, 85 Minn. 134; *Greene v. Dyer*, 32 Me. 460, 463. It is where the liability depends on some future event after the debtor's death which may or may not happen, and therefore makes it now wholly uncertain whether there will ever be a liability. *Stevens v. Stevens*, 72 S. W. 542, 545, 172 Mo. 28 (citing *Sargent's Adm'r v. Kimball's Adm'r*, 37 Vt. 320).

"Contingent claim," as used in the statute excluding contingent claims from the operation of a trustee process, did not mean debts certain as to liability and uncertain only as to amount, but the contingency related to the liability. *Downer v. Topliff*, 19 Vt. 399, 402.

A "contingent claim," within the rule that claims against an estate which are not contingent are barred if not presented within a certain time, is one depending upon something thereafter to happen. Such a claim is not contingent after the happening of the event. In *re Halleck's Estate* (Cal.) Myr. Prob. 46, 49.

A "contingent claim," within Comp. St. c. 23, § 258 et seq., is a claim against a decedent, not absolute or certain, but depending upon some event after the death of the testator or intestate which may or may not happen. A subsisting demand against the

estate of a deceased person which had matured and was capable of being enforced during the lifetime of the deceased is not a contingent claim. *Slichter v. Cox*, 72 N. W. 848, 849, 52 Neb. 532.

A "contingent claim," as "used in relation to the presentation of claims to the administrator of an estate, is one which does not become absolute and capable of liquidation before the expiration of the time limited by order of the probate court for the presentation of claims against the estate of one deceased, for consideration and allowance or disallowance. *Hantzch v. Massolt*, 63 N. W. 1069, 1070, 61 Minn. 361; *State v. Probate Court*, 68 N. W. 1063, 1065, 66 Minn. 246.

The term "contingent claim," as used in Gen. St. c. 63, § 45, concerning the proof of claims against estates, means a claim of such character that it may become absolute during the time limited for the proof and allowance of such claims, and, to entitle the claimant to share in the assets in the hands of the executor or administrator, it must become absolute within the time limited for the payment of such claims. *Clark v. Winchell*, 53 Vt. 408, 415.

Where a promise to pay rent is absolute, it is not a "contingent claim," and therefore is subject to garnishment. *Rowell v. Felker*, 54 Vt. 526, 529.

#### **Absolute distinguished.**

As used in an insurance policy, the terms "interest" and "title" are not synonymous. A mortgagor in possession and a purchaser holding under a deed defectively executed have both of them absolute as well as insurable interests in the property, though neither of them has the legal title. "Absolute" is here synonymous with "vested," and is used in contradistinction to "contingent" or "conditional." *Loventhal v. Home Ins. Co.*, 112 Ala. 108, 116, 20 South. 419, 33 L. R. A. 258, 57 Am. St. Rep. 17.

#### **Administrator's liability.**

A claim against an estate of an administrator who had failed to pay funds in his hands to creditors after a decree directing such payment is not a "contingent claim" within the meaning of a statute providing that contingent claims against a decedent might be proved before the probate court, and if the claim becomes absolute within two years the creditor should be entitled to payment out of the estate. A contingent claim depends upon some fact found which may or may not happen, and therefore makes it now wholly uncertain whether there ever will be a liability. In this case the creditor's debt was an absolute debt against the administrator, enforceable against him personally and against his own property. *Sargent's Adm'r v. Kimball's Adm'r*, 37 Vt. 320, 321.

#### **Claim payable on third person's death.**

"Contingent claims," as the term is used in reference to claims against the estate of a decedent, mean claims which may never accrue. A claim depending upon a future contingency, upon a happening of an event that may never happen, does not accrue until the event happens; until then it is not a claim. A claim payable on the death of a third person is an absolute and not a contingent claim. *Farris v. Stoutz*, 78 Ala. 180, 183.

#### **Contractor's or seller's liability.**

Pub. Acts 1879, p. 272, providing that the garnishee shall be liable on any contingent claim against him in favor of the principal defendant, cannot be construed to include the 10 per cent. of the estimated contract price for the erection of a building, which was to be retained from the payments made, as the work progressed, until after completion, there being a stipulation for a forfeiture in the event that the work was not done by the time stipulated. *Webber v. Bolte*, 16 N. W. 257, 51 Mich. 118.

Where a person had purchased and paid for lands, but the wife of the vendor had not joined in the contract, and, after the vendor's death, refused to execute a deed for her dower interest, the purchaser's claim against the estate ceased to be a contingent claim upon her refusal. *Jorgenson v. Larson*, 88 N. W. 439, 440, 85 Minn. 184.

#### **Indorser's and surety's liability.**

Rev. St. c. 109, § 13, requiring that in the settlement of an estate a fund should be kept in the hands of the administrator for contingent claims, means those only concerning which it is uncertain or contingent whether they will ever become debts. Of that kind is the liability of a surety. *Greene v. Dyer*, 82 Me. 460, 463.

The statute places contingent claims against the estate of a decedent, which are duly proved, in such a position that if they become absolute within two years from the close of the commission their holder shall receive payment to the same extent as other creditors. Such claims may be presented and proved as contingent before either the probate court or the commissioners, while absolute claims are proved and allowed only before the commissioners, except on appeal. Where a claimant indorsed a note for the deceased for his accommodation, and the note became due after his death, and was paid by such indorser while the commission remained open, the claim was then an absolute claim, and must be proved before the commissioners as such, and the right to prove it as a contingent claim did not then exist. *Lytle v. Bond's Estate*, 39 Vt. 388, 391.

A contingent claim or demand is one dependent on future events which may never happen, such as a contract of indorsement which is conditional and contingent, imposing no liability and no right to demand of the indorser until the indorsee, at maturity, makes demand of the maker and he fails to pay, of which due notice shall be given the indorser. The liability of the surety on an administrator's bond is contingent until the principal shall fail in the performance of the duty required of him by law; but whenever there is a failure it is absolute, and he is bound to answer to this, saving the ultimate interest in the assets from whatever injury they may sustain from the breach of the conditions of the bond. The right of action against such surety accrues at the time of the breach by the principal, and the statute of limitation commences to run from such time, and not from the time when such breach has been judicially determined. *McDowell v. Jones*, 58 Ala. 25, 32.

An indorser stands in substantially the same relation to the debt of an intestate as a surety, so far as concerns the element of contingency. He is liable to the holder, yet has no absolute claim against the estate of the maker until he pays the note. His claim is contingent upon the enforcement of the note against him, and it comes within the definition of a contingent claim as given in *Sargent's Adm'r v. Kimball's Adm'r*, 37 Vt. 320, where it is said, "A contingent claim is where the liability depends upon some future event which may or may not happen, and therefore makes it now wholly uncertain whether there ever will be a liability." *Curley v. Hand's Estate*, 53 Vt. 524, 525.

#### Partnership claim against partner.

Under the rule that, unless the affairs of a firm are wound up and all the debts paid, neither partner has any remedy against or liability to the other for payment from one to the other of what may have been advanced or received in the business, a claim by one partner against the estate of a deceased partner on a partnership claim is a contingent claim against the estate until the settlement of the firm's business. *Logan v. Dixon*, 41 N. W. 713, 715, 73 Wis. 533.

#### Personal liability on secured debts.

A claim against the estate of a decedent on his assumption of a mortgage is, before foreclosure, only a contingent claim, which cannot be proved as a debt against his estate. *Terhune v. White*, 34 N. J. Eq. (7 Stew.) 98, 99.

A note payable absolutely and secured by mortgage on land is not, as between the holder and the estate of the maker, a "contingent claim," within the provision of the statute that if any person shall be liable as

security for the deceased, or shall have any other contingent claim against his estate which cannot be proved as a debt before the commissioners, the same may be presented, with proper proofs, etc., to the probate court. *Osmun v. Oakland Circuit Judge*, 64 N. W. 949, 950, 107 Mich. 27.

Gen. St. c. 99, §§ 5, 6, relating to "contingent" claims against estates, could not be construed to include a claim which was due absolutely, and could have been proved at any time, the only resemblance to a contingency in which was that the claimant thought he had a lien as security for the debt which he did not have. *Sears v. Wills*, 89 Mass. (7 Allen) 430, 431.

#### Stockholder's liability.

Where the deceased had subscribed for stock in a corporation, but he only paid a portion of the amount of his subscription, though all was due and payable, the claim for the balance was not a contingent claim. *State v. Probate Court*, 68 N. W. 1063, 1065, 66 Minn. 246.

In the absence of statutory provisions, a claim of a creditor of an insolvent corporation against a stockholder therein, to compel the payment of a balance due on bonus stock, depends on whether the creditor was defrauded by the issuance of such stock, and as to whether he comes into equity with clean hands, and such a claim, as against an estate of a deceased stockholder, and before the assets of the corporation are fully administered, is a "contingent claim," within the meaning of chapter 53, Gen. St. *Hospes v. Northwestern Mfg. & Car Co.*, 50 N. W. 1117, 1122, 48 Minn. 174, 15 L. R. A. 470, 31 Am. St. Rep. 637.

The liability of the estate of a deceased stockholder for corporate debts, under article 10, § 3, of the Constitution, providing that each stockholder of any corporation shall be liable to the amount of the stock owned by him, cannot be allowed by the probate court as a contingent claim. The only contingency, or, to speak more accurately, the only uncertainty, would be as to the amount of the claim, which could only be determined upon a full settlement of the affairs of the corporation and an adjustment of all the rights and liabilities of the stockholders and creditors. *National German-American Bank v. Tapley*, 57 N. W. 1065, 1066, 56 Minn. 430.

The claim by a receiver of a national bank against the estate of a deceased stockholder is a contingent claim, where at the time of the death of such stockholder the bank was open and transacting business in the usual way, and continues so until after the year in which claims against the estate can be presented. *Wickham v. Hull*, 71 N. W. 352, 353, 102 Iowa, 469.

**Warrantor's Liability.**

Actions of covenant for breaches of a warranty made by the ancestor during his lifetime, and where the breaches may not occur until long after the expiration of the limitation provided by statute for the bringing of suit against the heir, and liabilities as sureties upon bonds, where the liability of the surety is not fixed until long after the close of the estate in the probate court, are examples of contingent liabilities which are not barred by a statutory limitation of time within which to exhibit claims against a decedent's estate. *Payson v. Hadduck* (U. S.) 19 Fed. Cas. 23.

**CONTINGENT DEBT OR LIABILITY.**

Contingency distinguished, see "Contingency."

Anderson's Law Dictionary defines a "contingent liability" to be a liability which is not absolute, but depends upon an uncertain event, as the liability of an indorser. The liability of an indorser or surety is contingent, and not actual, until default by the payee or principal. *State v. Sheets*, 72 Pac. 334, 335, 26 Utah, 105.

A statute providing that the trustee process shall not extend to debts which are contingent means that, to prevent the trustee process from attaching, the contingency must be such as to affect the debt itself, which is supposed to be due, and not simply the liability of the trustee to have the effects or credits called out of his hands in a particular manner. *Downer v. Curtis*, 25 Vt. 650, 654.

Rev. St. U. S. § 5068, authorizing contingent debts to be proved against the estate of a bankrupt, does not mean demands whose existence depend on contingency, but existing demands, the cause of action for which depends on a contingency. *Sayre v. Glenn*, 6 South. 45, 46, 87 Ala. 631 (citing *French v. Morse*, 68 Mass. [2 Gray] 111; *Woodard v. Herbert*, 24 Me. [11 Shep.] 358).

Rev. St. U. S. § 5068, relating to the contingent liabilities of a bankrupt, cannot be construed to mean the possibility that, by means of proceedings not yet instituted, the bankrupt may have enforced against him a liability created by statute, which can be enforced only by methods provided for by the statute, and which does not grow out of any contract on the part of the bankrupt with the person or persons for whose benefit the statute may be invoked. *First Nat. Bank v. Hingham Mfg. Co.*, 127 Mass. 563, 568.

A "contingent liability" contracted by a bankrupt, in its legal signification, means an obligation of the bankrupt arising from his contract, the duty to perform which is dependent as to when and whether the obliga-

tion shall become absolute on the occurrence of an event, the happening of which is a matter of some uncertainty. *Haywood v. Shreve*, 44 N. J. Law (15 Vroom) 94, 104.

Rev. St. U. S. § 5068, providing that all cases of contingent debts and contingent liabilities, contracted by the bankrupt and not otherwise provided for, may be allowed, etc., means "such as can become fixed and absolute, and do so become, by the happening of the contingency before the order for the final dividend, and such as, under an order of the court prescribing the manner, are of a character to be susceptible of ascertainment and liquidation." *Steele v. Graves*, 68 Ala. 21, 27.

The act of bankruptcy providing that, in cases of contingent debts and contingent liabilities contracted by the insolvent, the creditor may make claim therefor, and have his claim allowed with the right to share in the dividends, if the contingency happens before the final order, did not include a contract given by one partner to another to assume all the debts of the firm, and save him harmless therefor, the contingency depending on a breach of a contract by one of the parties before there would be a debt or liability. *Fernald v. Johnson*, 71 Me. 437, 440.

"Contingent liability," in the law of negotiable paper of an accommodation indorser on the part of the person making a gift of land, is not of itself conclusive proof that the gift was made for the purpose of defrauding the holder of the note. The settled rule is that, as to all existing creditors, voluntary conveyances are fraudulent, without regard to the existence of an actual intent to defraud. *Long Branch Banking Co. v. Dennis*, 39 Atl. 689, 690, 56 N. J. Eq. 549.

**CONTINGENT DEMAND.**

Contingency distinguished, see "Contingency."

Bankr. Act 1841, § 5, providing that all persons having contingent demands against a bankrupt should be permitted to come in and prove such debts or claims and to have the same allowed them, was construed to include only actual contingent debts, and not mere personal obligations imposing no debt or duty which is capable of being estimated in value. *Woodard v. Herbert*, 24 Me. (11 Shep.) 358, 361.

Bankr. Law 1841, § 5, authorizes the proof of contingent demands against a bankrupt, and declares that the holders thereof shall be entitled to a dividend thereon on their claims having become absolute. Held, that the term "contingent demand," as there used, meant debts payable on a future contingency which did not happen before the issuing of the commission. Thus, the claim of the grantee in a deed on a covenant of



quiet enjoyment before breach is a contingent demand against the grantor which may be proved under the act. *Jemison v. Blowers* (N. Y.) 1 Barb. 686, 687.

A demand against a bankrupt by his grantee or assignee, upon a covenant of seisin in a conveyance, founded upon a possible claim for dower in the land conveyed, is not such a contingent demand as could have been exhibited against the estate of a bankrupt, under Bankr. Act 1841, § 5. *Magwire v. Riggin*, 44 Mo. 512, 514.

### CONTINGENT ESTATE.

"An estate is contingent while the person to whom it is limited is uncertain, i. e., while it is uncertain who will take if the precedent estate then terminates." *Sheridan v. House* (N. Y.) 4 Abb. Dec. 218, 225.

Contingent estates are estates which come into enjoyment or possession on the happening of some uncertain event. *Haywood v. Shreve*, 44 N. J. Law (15 Vroom) 94, 104; *Smith v. West*, 103 Ill. 332, 337.

An estate is contingent while the person to whom or the event upon which it is limited to take effect remains uncertain. *Thorn-ton v. Zea*, 55 S. W. 798, 799, 22 Tex. Civ. App. 509; *In re Davis' Estate*, 36 N. Y. Supp. 822, 826, 91 Hun, 53; *Augustus v. Seabolt*, 60 Ky. (3 Metc.) 155, 162; *Hopkins v. Hopkins* (N. Y.) 1 Hun, 352, 354; *Leslie v. Marshall* (N. Y.) 31 Barb. 560, 564; *Hersee v. Simpson*, 46 N. Y. Supp. 755, 756, 20 App. Div. 100; *Smaw v. Young*, 20 South. 370, 375, 109 Ala. 523; *Comp. Laws Mich.* 1897, § 8795; *Gen. St. Minn.* 1894, § 4374; *Civ. Code Mont.* 1895, § 1116; *Civ. Code Cal.* 1903, § 695; *Civ. Code Idaho* 1901, § 2358; *Rev. St. Wis.* 1898, § 2037.

It is provided by statute that future estates are either vested or contingent, and that they are vested when there is a person in being who would have immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate, but are contingent whilst the person to whom or the event upon which they are limited to take effect remains uncertain. *Wadsworth v. Murray*, 51 N. Y. Supp. 1038, 1043, 29 App. Div. 191.

An estate is vested in interest when there is a present fixed right of future enjoyment, and an estate is contingent when a right of enjoyment is to accrue on an event which is dubious and uncertain. Thus, the interest of the children of the grantor in a conveyance of land to trustees in trust for his wife, with directions that at her death the trustee shall sell the land, and divide the proceeds equally among the children, creates a contingent, and not a vested, estate. *Strode v. McCormick*, 41 N. E. 1091, 1093, 158 Ill. 142.

### CONTINGENT EXPENSE.

A contingent expense must be deemed to be an expense depending on some future uncertain event. *People v. Village of Yonkers* (N. Y.) 39 Barb. 266, 272.

The adjective "contingent," as used in appropriation bills to qualify the word "expenses," has a technical and well-understood meaning. It is usual for Congress to enumerate the principal classes of expenditure which they authorize, such as clerk hire, fuel, light, postage, telegrams, etc., and then to make a small appropriation for the minor disbursements incidental to any great business, which cannot well be foreseen, and which it would be useless to specify more accurately. For such disbursements, a round sum is appropriated under the head of "contingent expenses." *Dunwoody v. United States* (U. S.) 22 Ct. Cl. 269, 280.

### CONTINGENT INTEREST.

A contingent interest is an actual creation, whose existence may be cut off by few or many contingencies, but whose very existence gives it a possible value, in which respect it differs from an expectancy. *In re Robbins' Estate*, 49 Atl. 233, 199 Pa. 500.

The term "contingent interest," as used in the rule of law that all contingent interests are assignable in equity, will be construed not to include a right of reverter in case of the breach of a condition subsequent. *Nicoll v. New York & E. R. Co.*, 12 N. Y. 121, 132.

It is not the uncertainty of enjoyment in the future, but the uncertainty of the right to that enjoyment, which makes the difference between a vested and a contingent interest. *Temple v. Scott*, 143 Ill. 290, 296, 32 N. E. 366 (citing 4 Kent, Comm. 206); *Hawkins v. Bohling*, 48 N. E. 94, 95, 163 Ill. 214; *Lewis v. Howe*, 66 N. E. 975, 977, 174 N. Y. 340.

The mere fact that power was given to the trustee to sell on the request of the life tenant, and to use the proceeds, did not make the interest of the remainderman contingent, the interest vesting subject to the power. *Hawkins v. Bohling*, 48 N. E. 94, 95, 163 Ill. 214.

### CONTINGENT LEGACY.

Where a legacy is directed to be paid at a future time or on a future event, it is vested or contingent, according to the intent of the testator as expressed in his will. If the time or event is annexed to the payment of the legacy, it is vested; if to the substance or gift of the legacy, it is contingent. A legacy bequeathed to a person to hold in trust to pay the interest to A. during her natural life, and after her death to pay the

principal sum to her children, is a vested legacy. *Rubencane v. McKee*, 6 Atl. 639, 641, 6 Del. Ch. 40.

A legacy is contingent, and not vested, when the payment thereof is deferred for reasons personal to the legatee. Thus, a will directing the trustee, on the death of a life tenant, to pay out of the residuary estate a certain amount to each of two nephews of testatrix when they shall reach majority, and, in case either die before that age, to pay his legacy to the survivor, creates contingent, and not vested, legacies. *In re Engle's Estate*, 31 Atl. 76, 78, 166 Pa. 280.

### CONTINGENT LIABILITY.

See "Contingent Debt or Liability."

### CONTINGENT LIMITATION.

When a remainder in fee is limited upon any estate which would by the common law be adjudged a fee tail, such remainder is valid as a contingent limitation upon a fee, and vests in possession on the death of the first taker without issue living at the time of his death. *Rev. Codes N. D. 1899, § 3328.*

### CONTINGENT REMAINDER.

As an estate, see "Estate"

A remainder is contingent while the person to whom or the event upon which it is limited to take effect remains uncertain. *Hennessey v. Patterson*, 85 N. Y. 91, 100; *City Council of Augusta v. Radcliffe*, 66 Ga. 469, 473; *Taylor v. Gould* (N. Y.) 10 Barb. 388, 396; *Poor v. Considine*, 73 U. S. (6 Wall.) 458, 474, 18 L. Ed. 869; *Owen v. Eaton*, 56 Mo. App. 563, 567.

Contingent remainders are estates which come into enjoyment or possession on the happening of some uncertain event. *Haywood v. Shreve*, 44 N. J. Law (15 Vroom) 94, 104; *Newton v. Southern Baptist Theological Seminary*, 74 S. W. 180, 24 Ky. Law Rep. 2310.

A contingent remainder is one which is limited to take effect on an event or condition which may never happen or be performed until after the determination of the preceding particular estate. *Griswold v. Greer*, 18 Ga. 545, 546; *Wallace v. Minor*, 10 S. E. 423, 425, 86 Va. 550; *Leslie v. Marshall* (N. Y.) 31 Barb. 560, 566.

A contingent remainder is one the vesting or taking effect in interest of which is by the terms of its creation made to depend on some contingency which may never happen at all. *City of Peoria v. Darst*, 101 Ill. 609, 618 (citing 2 Washb. Real Prop. 519).

"Where it is doubtful and uncertain whether the use of the estate limited in fact will ever vest in an estate or interest or not, there the use or estate is said to be 'contingent.' It may either vest or never vest, as the contingency may happen." *Micheau v. Crawford*, 8 N. J. Law (3 Halst.) 90, 96 (quoting *Lovie's Case*, 10 Coke, 85).

A remainder is contingent when it is limited to take effect on an event which may never happen, or which may not happen until after the preceding particular estate ends, or is limited to a person not in being or not ascertained. *Williamson v. Field's Ex'rs* (N. Y.) 2 Sandf. Ch. 533, 552; *Woodman v. Woodman*, 35 Atl. 1037, 1038, 89 Me. 128; *Robinson v. Palmer*, 38 Atl. 103, 104, 90 Me. 246; *Schuyler v. Hanna*, 31 Neb. 807, 810, 47 N. W. 932 (citing *Brown v. Lawrence*, 57 Mass. [3 Cush.] 390, 397; *Thomson v. Ludington*, 104 Mass. 193; *Smith v. Rice*, 130 Mass. 441).

A contingent remainder is an "estate in remainder limited to take effect either to a dubious and uncertain person or upon a dubious and uncertain event, so that the particular estate may never be determined and the remainder never take effect." *Bunting v. Speck*, 21 Pac. 238, 290, 41 Kan. 424, 3 L. R. A. 690; *Jemison v. Blowers* (N. Y.) 5 Barb. 686, 692; *Marvin v. Ledwith*, 111 Ill. 144, 150, *Harvard College v. Balch*, 49 N. E. 543, 544, 171 Ill. 275; *Temple v. Scott*, 32 N. E. 366, 367, 143 Ill. 290; *Haward v. Peavey*, 21 N. E. 503, 505, 128 Ill. 430, 15 Am. St. Rep. 120; *Phinzy v. Foster*, 7 South. 836, 837, 90 Ala. 262; *Owen v. Eaton*, 56 Mo. App. 563, 567 (approved in *De Lassus v. Gatewood*, 71 Mo. 871); *Poor v. Considine*, 73 U. S. (6 Wall.) 458, 474, 18 L. Ed. 869; *Hauptman v. Carpenter* (D. C.) 16 App. Cas. 524, 528; *Richardson v. Penicks* (D. C.) 1 App. Cas. 281, 284; *Throop v. Williams*, 5 Conn. 98, 100. The principle is that the precedent particular estate and the remainder are one estate in law, and hence the rule is they must subsist and be in esse at one and the same time, either during the continuance of the first estate or at the very instant when that is determined, so that no other estate can come between them. *Marvin v. Ledwith*, 111 Ill. 144, 150.

"A remainder is contingent, though the remainderman is in being and ascertained, so long as it remains uncertain whether he will be absolutely entitled to the estate limited to him in remainder if he lives, and such estate continues until all the precedent estates have ceased." *Price v. Sisson*, 13 N. J. Eq. (2 Beasl.) 168, 176; *Hawley v. James* (N. Y.) 5 Paige, 318, 467.

"A contingent remainder is that part of an estate in fee bestowed conditionally upon one of two or more persons—which one is not certain—the rest of which is bestowed definitely upon some other person or persons named. The part thus not definitely

disposed of to some particular person or persons is provided to go to some other person or persons of the two or more named—which of the two or more is left uncertain, and is to be fixed and made certain by succeeding events. The remainder itself is certain, but the person who is to have it is uncertain until it is determined by the events named.' Chancellor Kent says the definition of a contingent remainder in 1 Rev. St. N. Y. 723, § 13, is brief and concise. 'A remainder,' says the statute, 'is contingent whilst the person to whom or the event upon which it is limited to take effect remains uncertain.'" *Yocum v. Siler*, 61 S. W. 208, 209, 160 Mo. 281.

"Contingent remainders may be divided into two classes, the distinguishing element being the character of the event upon the happening of which is made to depend the vesting of the remainder. The first class, according to this classification, would include all those remainders which are contingent because the persons who are to take are not ascertained or are not in being. Such would be remainders to the heirs of a living person or to an unborn child. In the first case the remainder is contingent, because 'nemo est hæres viventis.' The heirs cannot be ascertained until the death of the ancestor, and the remainder will become vested only upon the death of that person. In the second case the remainder is contingent until the child is born. If the remainder is to a class, as to children, it will vest in the first born, subject to be opened upon the birth of a second to let it in, and so on. If the particular estate terminated after the birth of the first, the remainder would vest completely in that child, free from the claims of any child born thereafter." *Shannon v. Bonham*, 60 N. E. 951, 953, 27 Ind. App. 369 (quoting *Tiedeman*, Real Prop. 412; 4 Kent, Comm. 207); *Temple v. Scott*, 32 N. E. 366, 367, 143 Ill. 290.

A contingent remainder may be limited in conveyances at common law. It relates only to lands, tenements, and hereditaments, real or mixed. It requires a freehold to precede and support it, and must vest, at farthest, at the instant the preceding estate determines. *St. Amour v. Rivard*, 2 Mich. 294, 303.

A contingent remainder is not an estate in lands, since it is merely the chance of having; but it is an interest in land which has long remained inalienable, simply because it has never been thought worth legislating about; so that, as *Williams* says (Real Prop. 257), "the circumstances of a contingent remainder having been so long inalienable at law was a curious relic of the ancient feudal system." *Godman v. Simmons*, 113 Mo. 122, 131, 20 S. W. 972.

A "contingent remainder does not rise to the dignity of an estate in the land, and confers no interest in the seisin. Strictly speaking, it is not an estate at all, but a mere

chance of having one if the contingency turn out favorably to the remainderman." *Butterfield v. Sawyer*, 58 N. E. 602, 603, 187 Ill. 598.

Under 4 Rev. St. p. 2432, pt. 2, c. 1, tit. 2, § 13, a conveyance of a life estate, with remainder to the heirs of the grantee surviving her, creates a contingent remainder, because both the person to whom and the event upon which the estate is limited to take effect are uncertain. *Hall v. La France Fire Engine Co.*, 53 N. E. 513, 514, 158 N. Y. 570. The interest of children during the mother's life, in lands conveyed to a trustee to collect the rents and pay them to a certain woman during her life, and after her death to convey the land to her children, if they shall survive, is a contingent remainder. *Temple v. Scott*, 32 N. E. 366, 367, 143 Ill. 290; *Robinson v. Palmer*, 38 Atl. 103, 104, 90 Me. 246.

#### Executory devise distinguished.

Where an estate has been devised to a person in fee, defeasible in case he dies without leaving any lawful issue surviving him, with the remainder in fee to the use of testatrix, such a disposition of the property would have been termed at common law a "conditional limitation by way of an executory devise," but under the system prevailing in this state may be denominated a "contingent remainder." The executory devise was at common law in the nature of a contingent remainder, but could be created only by will, and not by grant. One of the distinctions between an executory devise and a contingent remainder at common law was that a contingent remainder could not be created upon a fee, but under Code, § 773, providing that a fee may be limited on a fee, upon a contingency which, if it should occur, must happen within the period prescribed. A contingent remainder may be limited on a fee. *Jewell v. Pierce*, 52 Pac. 132, 133, 120 Cal. 79.

In *Beardsley v. Hotchkiss*, 96 N. Y. 201, 213, the court, in speaking of the limitation which created a contingent future estate and expectancy, said: "Before the Revised Statutes the limitation would have been called an 'executory devise.' Now it is more properly called a 'contingent remainder.' Future estates are contingent while the person to whom or the event upon which they are limited to take effect remains uncertain, and such estates are descendible, devisable, and alienable in the same manner as the estates in possession." *Pickert v. Windecker*, 28 N. Y. Supp. 437, 438, 73 Hun. 476.

#### As uncertainty of possession.

A contingent remainder is defined as a remainder limited to an uncertain person or on an uncertain event, or so limited to a certain person or on a certain event as not to possess the present capacity to take effect in

possession should the possession become vacant. *Wallace v. Minor*, 10 S. E. 423, 425, 86 Va. 550.

A contingent remainder is an estate which is not ready, from its commencement to its end, to come into possession at any moment when the prior estate may happen to end, and, if it is at any time ready to come into such possession, it becomes a vested remainder. The uncertainty which distinguishes it is not the uncertainty whether the remaindermen will ever enjoy it, but the uncertainty whether there will ever be a right to such enjoyment. If the person to take a remainder is in esse and ascertained, and it is to take effect by words of express limitation on the determination of the preceding particular estate, it will be vested. Citing *Scofield v. Olcott*, 120 Ill. 362, 11 N. E. 351. Thus, where a testator bequeathed property to a trustee to invest and use the income to support a son, the latter to have power to dispose of the property of the will in the family, and, if not so disposed of, the whole sum remaining on the death of the son to be divided among testator's other children, the latter took a vested remainder, subject to be divested by the execution of the power. *Harvard College v. Balch*, 49 N. E. 543, 544, 171 Ill. 275.

It is not the uncertainty of ever taking effect in possession that makes a remainder contingent, for to this extent every remainder is and must be liable, since the remainderman may die without heirs before the distribution of the particular estate. *Moore's Adm'r v. Sleet* (Ky.) 68 S. W. 642, 643; *Roe v. Davis* (Pa.) 1 Yeates, 332, 340.

An estate in remainder is not rendered contingent by the uncertainty of time of enjoyment. The right and capacity of the remainderman to take possession of the estate if the possession were to become vacant, and the certainty that the event upon which the vacancy depends must happen some time, and not the certainty that it will happen in the lifetime of the remainderman, determines whether or not the estate is vested or contingent. *Bruce v. Bissell*, 119 Ind. 525, 528, 22 N. E. 4, 12 Am. St. Rep. 436; *Hellman v. Hellman*, 28 N. E. 310, 311, 129 Ind. 59.

It is the uncertainty of the right of enjoyment, and not the uncertainty of its actual enjoyment, which renders a remainder contingent. *Smith v. Block*, 29 Ohio St. 488, 497 (citing 4 Kent, Comm. 206).

#### **Vested remainder distinguished.**

"The broad distinction between vested and contingent remainders is this: In the first, there is some person in esse, known and ascertained, who, by the will or deed creating the estate, is to take and enjoy the estate upon the expiration of the existing particular estate, and whose right to such remainder no

contingency can defeat. In the second, it depends upon the happening of a contingent event whether the estate limited as a remainder shall ever take effect at all." In re *Moran's Will*, 96 N. W. 367, 370, 118 Wis. 177.

A remainder is a remnant of an estate, depending upon a particular prior estate created at the same time and by the same instrument, and limited to arise immediately on the determination of that estate, and not an abridgment of it. It is a vested remainder where there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the precedent estate; and it is contingent when it is limited to take effect, either to a dubious and uncertain person, or upon a dubious or uncertain event. *Wood v. Griffin*, 46 N. H. 230, 234.

A future estate dependent upon a precedent estate is termed a "remainder." It is either vested or contingent. It is vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate. It is contingent whilst the person to whom, or the event upon which, it is limited to take effect, remains uncertain. *Dana v. Murray*, 26 N. E. 21, 24, 122 N. Y. 604.

In speaking of the test as to whether a remainder is vested or contingent, Chancellor Kent says: "It is the present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, that distinguishes a vested from a contingent remainder. When the event on which the preceding estate is limited must happen, and when it also may happen before the expiration of the estate limited in remainder, that remainder is vested—as, in the case of a lease to A. for life, remainder to B., during the life of A. the preceding estate determines on an event which must happen; and it may determine by forfeiture or surrender before the expiration of A.'s life, and the remainder is therefore vested. A remainder limited upon an estate tail is held to be vested, though it must be uncertain whether it will ever take place." *Smaw v. Young*, 20 South. 370, 371, 109 Ala. 528 (citing 4 Kent, Comm. 203); *Walters v. Crutcher*, 54 Ky. (15 B. Mon.) 2, 10; *Moore's Adm'r v. Sleet* (Ky.) 68 S. W. 642, 643; *Ralley v. Milam* (Ky.) 5 S. W. 367, 368; *Johnson v. Robertson* (Ky.) 45 S. W. 523, 524; *Roe v. Davis* (Pa.) 1 Yeates, 332, 340. Again, in defining a contingent remainder, the same author says: "It is not the uncertainty of enjoyment in the future, but the uncertainty of the right of that enjoyment, which marks the difference between a vested and contingent interest." *Smaw v. Young*, 20 South. 370, 371, 109 Ala. 528; *Paul v*

*Frierson*, 21 Fla. 529, 533; *Phinizy v. Foster*, 7 South. 886, 887, 90 Ala. 262.

The term "remainder" is a relative expression, and implies that some part of the thing is previously disposed of. Vested remainders are remainders executed whereby a present interest passes to a party, or where the estate is invariably fixed to remain to a determinate person after the particular estate is spent, and contingent or executory remainders are those whereby no present interest passes, or where the estate in remainder is limited to take effect either to a dubious and uncertain person or upon a dubious and uncertain event. *Hudson v. Wadsworth*, 8 Conn. 348, 359.

A vested remainder is an estate in present, although to be enjoyed in the future, while a contingent remainder is an estate to vest upon the happening of some future event. A contingent and not a vested remainder is created in the children of the devisees by a will in which the testatrix gives property to her sisters, to hold the same during their lives, and at their decease to descend to their children respectively, and to be equally divided among them or the survivors of them. *Spear v. Fogg*, 32 Atl. 791, 792, 87 Me. 132.

A contingent remainder is a remainder in which it "depends upon the happening of a contingent event whether the estate limited shall ever take effect at all. The event may either never happen, or it may not happen until after the particular estate upon which it depended shall have been determined, so that the estate in remainder will never take effect." It is distinguished from a vested remainder, which is a remainder limited to some person in esse known and ascertained, who, by the will or deed creating the estate, is to take and enjoy the estate, and whose right to such remainder no contingency can defeat. *Bunting v. Speak*, 21 Pac. 288, 296, 41 Kan. 424, 3 L. R. A. 690.

"A contingent remainder is where the estate in remainder is limited to a dubious and uncertain person, or upon the happening of a dubious and uncertain event." A vested remainder is where a present interest passes to a certain and definite person, but to be enjoyed in futuro. *Byrne v. France*, 33 S. W. 178, 180, 131 Mo. 639 (quoting *Poor v. Considine*, 73 U. S. [6 Wall.] 458, 18 L. Ed. 869).

By statute it is provided that where a future estate is dependent on a preceding estate it may be termed a "remainder," and may be created and transferred by that name. It is further declared that future estates are either vested or contingent. They are vested when there is a person in being who would have an immediate right to the possession of the lands upon the ceasing of the intermediate or precedent estate. They are con-

tingent while the person to whom, or the event upon which, they are limited to take effect, remains uncertain. *Palmer v. Dunham*, 6 N. Y. Supp. 46, 47, 52 Hun, 468.

### CONTINGENT RIGHT.

A vested right is an immediate, fixed right of present or future enjoyment. Rights are vested in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons, as a present interest. They are expectant when they depend on the continued existence of the present condition of things, until the happening of some future event. They are contingent when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting. *Pearsall v. Great Northern R. Co.*, 16 Sup. Ct. 705, 713, 161 U. S. 646, 40 L. Ed. 838.

It is said in *Mason v. Mason*, 140 Mass. 63, 3 N. E. 19, that an inchoate right of dower is a vested right of value; but it would seem that the word "contingent," which was used in *Bullard v. Briggs*, 24 Mass. (7 Pick.) 533, 537, 19 Am. Dec. 292, would more accurately describe the nature of the estate. *Flynn v. Flynn*, 50 N. E. 650, 651, 171 Mass. 312, 42 L. R. A. 98, 68 Am. St. Rep. 427.

### CONTINGENT TAX.

See "County Contingent Tax."

### CONTINGENT TRUST.

An express trust may depend for its operation upon a future event, and is then a contingent trust. Civ. Code Ga. 1895, § 3154.

### CONTINGENT USE.

Contingent uses are rights and estates which come into enjoyment or possession on the happening of some uncertain event. *Haywood v. Shreve*, 44 N. J. Law (15 Vroom) 94, 104. They are such as may by possibility happen in possession, reversion, or remainder. *Jemison v. Blowers* (N. Y.) 5 Barb. 686, 692.

### CONTINUANCE.

The continuance of a cause is an adjournment to a time certain. *Commonwealth v. Maloney*, 13 N. E. 482, 484, 145 Mass. 205.

"Continuance," as used in speaking of the continuance of legal proceedings, is synonymous with "postponement." *State v. Underwood*, 76 Mo. 630, 639.

**CONTINUANCE IN OFFICE.**

See "During Continuance in Office."

Const. art. 24, prohibits the Legislature from increasing the salary of any public officer during his continuance in office. Held, that the words "continuance in office" meant a continuing office under one appointment, or the term for which an officer was elected and held his office under a single appointment; and the fact that an officer became his own successor did not constitute him "continuing in office," within the Constitution, from the time he was appointed to the conclusion of his second term. *Smith v. City of Waterbury*, 7 Atl. 17, 54 Conn. 174.

Where the by-laws of a loan and building association provided that the officers should be elected annually and hold until their successors are elected and qualified, a treasurer's bond guarantying his good faith and honesty during his "continuance in office" does not mean that the sureties are bound for an indefinite period, if he should be re-elected or no successor should be elected, but only for the term for which he was elected, and such reasonable time as he should continue in office thereafter to enable his successor to qualify. *Mutual Loan & Building Ass'n v. Price*, 18 Fla. 204, 214, 216, 26 Am. Rep. 708.

A contract of security to answer for one during his "continuance in office" would require that it be under successive elections, and, if he ceased to be continuously re-elected, the liability of the surety was at an end. *Borough of Berwick Upon Tweed v. Oswald* 3 El. & Bl. 653, 671.

Under a constitutional provision that county commissioners shall be appointed by the Governor for two years, and continue in office until their successors are appointed, there is no doubt that an incumbent of such an office remains in office until his successor is duly qualified. The words "continue in office" imply, not the beginning of a new and different holding, but the prolongation of the one already existing. To continue in office means to remain in it, for the word "continue" means to remain in a given place or condition, to remain in connection with, to abide, to stay. *State v. Murphy*, 13 South. 705, 723, 32 Fla. 138.

**CONTINUANDO.**

An action is said to be laid with a continuando when the injuries are alleged to have been committed by continuation from one day to another, or at divers days and times between such day and such a day. The words in a declaration for assault and battery, "there afterwards continuing his said assault," does not constitute a continuando. The word "continuing" does not necessarily imply the technical sense of a continuando. *Benson v. Swift*, 2 Mass. 50, 52.

Bishop, in his *Criminal Procedure* (volume 1, § 394), defines a continuando as "an allegation in any appropriate form of words that an offense whereof a day of beginning is stated is continuing to another day stated." And in section 395 he says, "An allegation on such a day and on divers other days and times between that day and some other, which was held good in civil pleadings, \* \* \* is not a continuando." *People v. Sullivan*, 33 Pac. 701, 702, 9 Utah, 195.

**CONTINUE.**

At a time when there was no daily paper printed in the state, except in one city therein, a statute provided that notice to creditors of an intestate's estate should be published in one or more of the public newspapers of the state, and continued in such public newspapers for four weeks. The statute was general, and applied to the whole state, no distinction being made as to such city, and, while a daily continuance could not have been in the contemplation of the Legislature elsewhere than in such city, an objection that a notice published in a daily paper in such city should be continued daily for the full period of the four weeks is not without plausibility, and to obviate it the court recommended that administrators continue their notice daily for such period. *In re Smith* (Pa.) 1 Ashm. 352, 354.

Rev. St. § 2247, provides that nothing contained in the preceding sections (providing periods of limitations of actions) requiring the acknowledgment or promise to be in writing, in order to be "evidence of a new or continuing contract to take the case out of the operation of the statute," "shall alter, take away or lessen the effect of a payment or interest," etc. Held, that the word "continuing" was there used in its natural, ordinary sense, meaning perpetuating, protracting, or prolonging from one time to another. *Engmann v. Immel's Estate*, 18 N. W. 182, 185, 59 Wis. 249.

In the several provincial statutes of 1692, 1701, and 1767, in reference to settlements for the purpose of the poor laws, the terms "coming to sojourn or dwell," "being an inhabitant," "residing and continuing one's residence," and "coming to reside and dwell," are frequently and variously used, and we think they are used indiscriminately to mean the same thing, namely, to designate the place of a person's domicile. This is defined in Const. c. 1, § 1, for another purpose, to be the place where one dwelleth or hath his home. *Inhabitants of Abington v. Inhabitants of North Bridgewater*, 40 Mass. (23 Pick.) 170, 176.

**As extend.**

In an act authorizing a city to construct and continue a railroad from a certain fixed

point to another, "continue" obviously means "to extend." *City of Philadelphia v. Philadelphia & R. R. Co.*, 58 Pa. (8 P. F. Smith) 253, 263.

#### As obtain.

"Continuing," as used in an averment that a conspiracy was to prevent a certain person from obtaining work or employment or continuing in his said work and employment, he being already employed, is synonymous with "obtaining." The two words convey a conjunctive, and not a disjunctive, meaning. Any other signification than that the conspiracy was to prevent the person from having employment would be forced and unnatural. *State v. Dyer*, 32 Atl. 814, 818, 67 Vt. 690.

#### As remain.

"Continue," as used in Act Feb. 24, 1849 (P. L. p. 105), providing that the act should be commenced within 2 years, and continue in full force for the term of 50 years, should be construed in the sense of "remain," and as having no reference to any prior term to which the 50 years are to be added. *Grey v. Newark Plank Road Co.*, 46 Atl. 606, 607, 65 N. J. Law, 51.

An order denying a motion to dissolve an injunction is not an order "continuing" the injunction, within the statute authorizing an appeal from any judgment in which an injunction is granted or continued. *Dreutzer v. Frankfort Land Co.* (U. S.) 65 Fed. 642, 646, 13 C. C. A. 73.

#### As renew.

The word "continue," in a lease providing that, if this lease cannot be continued after the expiration of said 10 years by mutual agreement of the parties, the lessor shall pay for the improvements, is not used in the sense of "renewed," so as to signify a renewal of the original term of 10 years, but will be answered by holding over, thus creating a tenancy from year to year as well as by renewal. *Parker v. Page*, 69 Pac. 822, 824, 41 Or. 579.

#### As uninterrupted.

In a statute providing for the drainage of swamp lands, and authorizing the inspectors, should they find it necessary, "to continue such ditch or ditches through lands adjoining any such tracts of swamp for the purpose of draining the same more effectually," the word "continue" does not admit of any intervening substance to break the continuity. It implies uninterrupted connection, and, where a ditch empties into a pond at one end thereof, the deepening of the outlet of such pond at the other end, and a mile from the end of such ditch, is not a continuation of such ditch. *Belknap v. Belknap* (N. Y.) 2 Johns. Ch. 463, 466, 7 Am. Dec. 548.

"Continued and uninterrupted use," as applied to land, sufficient to give rise to a claim of right by adverse possession, means a use not interrupted by the act of the owner of the land or by a voluntary abandonment by the party claiming the right. It is not necessary that the use should have been continuous in the person asserting the right, but it will be sufficient if such use has been continuous in him and those under whom he claims. If there has been a use of an easement for the requisite time unexplained, it will be presumed to have been under a claim of right and adverse, and be sufficient to establish title by prescription. *Fankboner v. Corder*, 26 N. E. 766, 767, 127 Ind. 164.

### CONTINUED CHANGE OF POSSESSION.

See "Actual and Continued Change of Possession."

What is meant by "continued change of possession" has been the subject of much comment, and has never yet been nor ever can be reduced to any fixed, certain rule. What would be regarded in law as continued possession under one state of circumstances would not be under other conditions of fact. It was said in *Stevens v. Irwin*, 15 Cal. 503, 76 Am. Dec. 500, the word "continued" was designed to exclude the idea of a mere temporary change, but it never was the design of the statute to give such extension of meaning to the phrase "continued change of possession," and to require, upon penalty of the forfeiture of the goods, that the vendor should never have any control over or use of them. *Roberts v. Burr* (Cal.) 54 Pac. 849, 851; *Porter v. Bucher*, 33 Pac. 335, 336, 98 Cal. 454; *Dodge v. Jones*, 14 Pac. 707, 710, 7 Mont. 121. If such were the case, absurd results would follow; as, if a livery stable keeper hired a horse to the original vendor, it would, under such construction, become liable for the vendor's debts. *Dodge v. Jones*, 14 Pac. 707, 710, 7 Mont. 121. Thus, where it appeared that a husband and son composing a firm transferred to the wife certain property in payment of a debt, the mere fact that afterwards she permitted them to have temporary possession of it for the purpose of selling it did not prevent her possession from constituting a "continued change of possession," under the statute. *Roberts v. Burr* (Cal.) 54 Pac. 849, 851.

In the provision of the statutes providing that every transfer of personal property, if made by a person having, at the time, possession or control of the property, and not accompanied by an immediate delivery followed by an actual and continued change of possession of the thing transferred, is conclusively presumed to be fraudulent, the word "continued" was designed to exclude the mere idea of a mere temporary change. *Morris v. McLaughlin*, 64 Pac. 219, 221, 25 Mont. 151.

**CONTINUED DRUNKENNESS.**

"Continued drunkenness," as used in a statute making it a ground of divorce, signifies "gross and confirmed habits of intoxication." *Gourlay v. Gourlay*, 19 Atl. 142, 143, 16 R. I. 705.

**CONTINUED HABITS OF INTOXICATION.**

The terms "habitual drunkenness," "habitual intemperance," "habitual intoxication," and "continued habits of intoxication" are equivalent and capable of the same definition, and are defined as the fixed and irresistible habit of getting drunk. It is a habit of using intoxicating liquors to excess, and does not include excessive use of opiates and drugs. *Ring v. Ring*, 38 S. E. 330, 332, 112 Ga. 854 (citing 9 Am. & Eng. Enc. Law [2d Ed.] 813).

**CONTINUING CAUSE OF FORFEITURE.**

We think the phrase, "a continuing cause of forfeiture," found in some of the reported cases, is not strictly accurate, and is misleading. Leases may contain continuing covenants and continuing conditions—that is to say, covenants and conditions which are to continue throughout the term—which, being violated by the lessee at any time during the term, give to the landlord, under the re-entry clause, a right to terminate the lease. But any breach of the condition or covenant creating a forfeiture must consist of some specific act or omission, which act or omission is the cause of the forfeiture, and continues only until the landlord shall elect whether to affirm or disaffirm the lease. When committed by the lessee, if the lease gives the landlord the right to re-enter for such breach, he has a right of election. He may elect to terminate the lease because of the breach, or he may elect to affirm it notwithstanding the breach. If he elects to terminate it, the relation of landlord and tenant ceases. He is not entitled to claim or demand rent, for rent flows from the lease, and there is no lease. If he elects to affirm, the affirmation is equivalent to a new lease with the same continuing covenants and conditions. No past breach can be used upon which to hinge a right of re-entry. Such right can again arise only in case of a new and positive breach of the covenants or conditions of the lease occurring subsequent to its affirmation. *Conger v. Duryee* (N. Y.) 12 Abb. N. C. 43, 47; *Id.*, 90 N. Y. 594, 600.

**CONTINUING DEBT.**

Where a debt exists at the time a voluntary conveyance is made by the debtor, and subsequently the debtor gives a note for an account or in lieu of a note, the original debt still continues, and will hold preference

over the voluntary conveyance, as if no change in the debt had been made. *Bump, Fraud. Conv.* § 103; *Brown v. McDonald* (S. C.) 1 Hill, Eq. 297, 304. But the authorities are uniform to the effect that, where the debt existing at the making of the voluntary conveyance is in fact paid by the debtor, no debt subsequently created between the same parties, although in the transaction of the same character of business, will be considered as a debt existing at the date of the conveyance—that is, as a continuing debt. *Gonzales v. Adoue*, 58 S. W. 951, 952, 94 Tex. 120.

**CONTINUING GUARANTY.**

A guaranty relating to a future liability of the principal, under successive transactions, which either continue his liability, or from time to time renew it after it has been satisfied, is called a "continuing guaranty." *Civ. Code Cal.* 1903, § 2814; *Rev. Codes N. D.* 1899, § 4640; *Civ. Code S. D.* 1903, § 1984; *Civ. Code Mont.* 1895, § 3640; *Rev. St. Okl.* 1903, § 8106.

A continuing guaranty is an undertaking to be responsible for moneys to be advanced or goods to be sold to another from time to time. Such guaranty may, however, be terminated by a giving of notice on the part of the grantor that he will not be liable after a certain time. *Buck v. Burk*, 18 N. Y. 337, 340 (citing *Add. Cont.* 668).

A continuing guaranty is one in which the parties look to a future course of dealing for an indefinite time; hence, where the continuance of a guaranty is expressly limited, it is not a continuing guaranty. *German Sav. Bank v. Drake* (Iowa) 79 N. W. 121. In some cases the amount fixed in the instrument is a restriction upon the guarantor's liability only, and not upon the amount of credit that may be given to the debtor. Thus, a writing that, "in consideration that F. & Co. will and do sell to C. upon credit certain goods from time to time as she may purchase or order, I hereby guaranty and promise payment of all bills at their maturity, hereby waiving any and all notice of times or amount of sale or defaults and delays in payment therefor, not exceeding \$400," is a continuing guaranty to the amount of \$400. *D. B. Fisk & Co. v. Rickel*, 79 N. W. 120, 108 Iowa, 370.

A writing in the words, "I agree to be responsible for the price of goods purchased of you either by note or account by H. H. at any time hereafter to the amount of \$1,000," is a continuing guaranty to that extent for goods to be at any time sold to H. H. before the credit is recalled. *Bent v. Hartshorn*, 42 Mass. (1 Metc.) 24, 25.

**CONTINUING NUISANCE.**

By "continuing nuisance," "constantly recurring grievance," or "permanent injury"



is not meant the constant, unceasing nuisance or injury, but a nuisance which occurs so often and is so necessarily an incident of the use of property complained of that it can fairly be said to be continuing, although not constant or unceasing. *Farley v. Gate City Gaslight Co.*, 31 S. E. 193, 199, 105 Ga. 323.

### CONTINUING OFFENSE.

A continuing offense is a transaction or a series of acts set on foot by a single impulse, and operated by an unintermittent force, no matter how long a time it may occupy. *People v. Sullivan*, 33 Pac. 701, 704, 9 Utah, 195.

### CONTINUOUS.

The word "continuous" implies without interval or interruption. Railroads connected by intervening roads are not continuous, but if directly connected they are continuous. *Black v. Delaware & R. Canal Co.*, 22 N. J. Eq. (7 O. E. Green) 130, 402.

A claim for a pan having its perpendicular sides provided with a continuous loop, to form continuous parallel flanges, and an intermediate continuous zinc plate, is infringed by a vessel made of two tin plates and two zinc strips soldered together. Such strip is "continuous," in a mechanical and an electrical sense, and also according to the ordinary dictionary meaning of the word. Many pieces of twine may be tied together to form a continuous kite string, many different breadths may be united to form a continuous carpet, and surely two pieces of zinc may be soldered together to form a continuous strip. *Brown v. Reed Mfg. Co. (U. S.)* 81 Fed. 43, 49.

"Continuous," as used in Act April 14, 1855, relating to mechanics' liens, and declaring that mechanics shall have liens for work done in the erection of a building continuous to the work previously done, does not mean that the work must be prosecuted without delay or interruption from day to day, but requires merely that the work should be prosecuted with reasonable diligence from beginning to completion. Thus, where materials are furnished and work done in the erection of a building as ordered by the owner or contractor from time to time in the ordinary progress of the work, the work done later is continuous to that previously done, within the statute. *Appeal of Hofer*, 9 Atl. 441, 116 Pa. 360.

To render an act continuous, its performance must be carried on without interruption, for, when its performance ceases, the act is complete and distinct, and, if afterwards a similar act is performed, it cannot be regarded as a continuation of the former. To make it continuous it must be the result of a single impulse, and performed or carried

on without intermittence. *People v. Sullivan*, 33 Pac. 701, 702, 9 Utah, 195.

"Continuous," within the meaning of the rule that, to constitute title by adverse possession, the possession must be long, continuous, and peaceable, means, according to the doctrine of the law of England as cited by Lord Coke in *Bracton*, uninterrupted by any lawful possession. *Ingraham v. Hough*, 46 N. C. 39, 43.

### As consecutive.

While the term "consecutive days" primarily means that many days directly following one another, it is also defined as meaning successive; but, in cases of contracts, that significance should be given it which the parties evidently intended it should have. A contract providing for publication in a paper for 10 consecutive days must mean publication in consecutive numbers as such paper is published. We do not regard the word "consecutive" as any more forcible than the word "continuous." Both signify "unbroken," and the fact that the newspaper published no issue on Sunday did not render the publication other than consecutive. *City of El Paso v. Ft. Dearborn Nat. Bank (Tex.)* 71 S. W. 799, 802.

### CONTINUOUS ACCOUNT.

An account, to be continuous, must be without break or interruption, and the term "open" means something that is not closed, and "current" signifies running, passing, or connected series; and hence a "continuous open, and current account" is one which is not interrupted or broken, and not closed by settlement or otherwise, and is a running, connected series of transactions. *Tucker v. Quimby*, 37 Iowa, 17, 19; *Morse v. Minton*, 70 N. W. 691, 692, 101 Iowa, 603.

Where all the items of an account relate to one transaction, it constitutes a "continuous account," regardless of intervening statements of balance. *Lamb v. Hanneman*, 40 Iowa, 41, 43.

An account which has been closed by giving a note for the amount due is not a continuous, open, current account, so as to affect the running of the statute of limitations. *Morse v. Minton*, 70 N. W. 691, 692, 101 Iowa, 603.

### CONTINUOUS CRIME.

A continuous crime is one consisting of a continuous series of acts, which endures after the period of consummation, as the crime of carrying concealed weapons. In the case of instantaneous crimes the statute of limitations begins to run with the consummation, while in the latter it only begins with the cessation of the criminal conduct or

act. *United States v. Owen* (U. S.) 32 Fed. 534, 537.

### CONTINUOUS CURRENT.

An electric current which is periodically reversed by a commutator, which thus breaks the current between the changes in direction, and takes off the current in sections, is known as a "reversed" or "alternated" current. This distinction between an alternating and an alternated current should be carefully noted. An alternating current continues to act in opposite directions as originally generated. An alternated current has been so reversed that the whole flows in one direction, and is then known as a "continuous" current. Every mechanically generated current is naturally and originally an alternating current. *Westinghouse Electric & Mfg. Co. v. New England Granite Co.* (U. S.) 103 Fed. 951, 952.

### CONTINUOUS EASEMENT.

A continuous easement is an easement which is self-perpetuating, independent of human intervention, as the flow of a stream. *Lampman v. Milks*, 21 N. Y. 505, 516.

A continuous easement is one which may be enjoyed without any act on the part of the person entitled thereto; as, for instance, a water spout which discharges the water whenever it rains, a drain by which surface water is carried over land, windows through which light and air enter, etc. *Bonelli v. Blakemore*, 5 South. 228, 231, 66 Miss. 186, 14 Am. St. Rep. 550. A continuous easement is an easement to the enjoyment of which no act of the party is necessary; as, for instance, a water course, whether natural or artificial, and water pipes to bring water upon or carry it off of the premises. *Providence Tool Co. v. Corliss Steam Engine Co.*, 9 B. I. 564, 571.

A continuous easement is sometimes termed an "apparent easement," or one depending upon some artificial structure upon or natural formation of the servient tenement, obvious and permanent, which constitutes the easement or is the means of enjoying it; as the bed of a running stream, an overhanging roof, a pipe for conveying water, a drain or sewer. *Fetters v. Humphreys*, 18 N. J. Eq. (3 C. E. Green) 260, 262.

The word "continuous," as used in reference to a continuous and apparent easement, means no more than this: that the structure which produces the change in the tenement shall be of a permanent character and ready for use at the pleasure of the owner of the dominant tenement, without making an entry on the servient. *Larsen v. Peterson*, 30 Atl. 1094, 1097, 58 N. J. Eq. (8 Dick.) 88.

Easements are divided into two classes—those which are apparent and continuous,

and those which are not. The former will pass on the severance of the two tenements, as appurtenant, without the use of the word "appurtenant," but the latter will not be created unless the grantor uses language in the conveyance sufficient to create the easement *de novo*. An easement which is continuous, and is made apparent by a permanent structure by means of which the right is enjoyed, is an easement which will be created as an appurtenant without words of grant *de novo*; as, for instance, the flow of water through a trunk constructed and used for that purpose. *Whalen v. Manchester Land Co.*, 47 Atl. 443, 444, 65 N. J. Law, 206.

Easements or servitudes are divided by the Civil Code of France into continuous and discontinuous. "Continuous" are defined to be those of which the enjoyment is or may be continual without the necessity of any actual interference by man, as a water spout, or right to light or air. "Discontinuous" are those the enjoyment of which can be had only by the interference of man, as rights of way or a right to draw water. *Outerbridge v. Phelps*, 45 N. Y. Super. Ct. (18 Jones & S.) 555, 570; *Lampman v. Milks*, 21 N. Y. 505, 515.

### CONTINUOUS INJURY.

"A continuous injury is an injury recurring at repeated intervals, so as to be of repeated occurrence. It does not mean an injury that never ceases." *Wood v. Sutcliffe*, 8 Eng. Law & Eq. 217, 220.

### CONTINUOUS LINE.

Rev. St. Ohio, § 3379, authorizing the consolidation of railroad companies where the road so consolidated would form a "continuous line," means a line all of which must be necessarily used in order to complete transportation between terminal points. The lines, to be continuous, must not be in any sense competitive. "The phrase 'continuous line' does not suggest to the popular mind or to any class of persons the idea of any two or three sides of a triangle or square, or of a line turning back on its own general course, so as to duplicate the means of communication between the same termini." *State v. Vanderbilt*, 37 Ohio St. 590, 598.

"Continuous," as used in Act N. J. March 17, 1870, authorizing the United Railroads & Canal Companies of New Jersey to consolidate their respective capital stocks, or to consolidate with any other railroad or canal company whose works shall form with their own continuous lines, means without interval or interruption. The term "continuous" is not synonymous with "connected." Railroads can be connected, either directly or by intervening roads, and they can be connected by some intervening or connecting road without being continuous. *Black v. Dela-*

ware & R. Canal Co., 22 N. J. Eq. (7 O. E. Green) 130, 402.

"Continuous," as used in Laws 1875, c. 108, relating to the establishment of a continuous line of railroad, means a line without any interruption in space. Thus, where the routes of two roads were consolidated, and one joined the other, they were made continuous by a change of the terminus of one of the roads. *People v. Brooklyn, F. & C. L. R. R. Co.*, 12 Wkly. Dig. 375.

#### CONTINUOUS RIDE.

"Continuous ride," under Acts 1900, p. 468, c. 813, requiring the street car company of Baltimore City to give, on request, to each passenger paying a fare, a transfer for a continuous ride, does not mean a ride interrupted by considerable interval of time, and hence does not prohibit the company from limiting the time within which a transfer may be used. *Garrison v. United Railways & Electric Co.*, 55 Atl. 371, 372, 97 Md. 347.

#### CONTINUOUS ROUTE.

"Continuous route," as used in Act 1870, requiring the lessor and lessee railroads to form a continuous route, does not require an absolute passage of the same car from one road to the other without break or interruption. *Hampe v. Pittsburg & B. Traction Co.*, 30 Atl. 931, 932, 165 Pa. 468.

#### CONTINUOUS SERVITUDE.

Continuous servitudes are those whose use is or may be continual without the act of man. Such are aqueducts, drains, views, and the like. *Civ. Code La.* 1900, art. 727.

#### CONTINUOUS TRIP.

A railroad ticket obligates the holder to pursue his journey between the stations named in the ticket by a train which will carry him continuously from one station to the other, both in going and returning, and does not authorize him to stop at intermediate stations. *Johnson v. Philadelphia, W. & B. R. Co.*, 63 Md. 106, 109.

In a passenger check issued by a railroad company, and providing "that this check is good only for continuous passage on regular passenger trains and must be used before twelve o'clock midnight," the term "continuous passage" does not refer to a continuous passage of the railroad trains or of the check, but to a continuous passage of a passenger to whom it is issued. If it referred only to a continuous passage of the train or check, as many men could station themselves along the line of the railroad as there are stopping places between the point where such check is issued to the passenger and the point for which the check has been purchased. The

first holder of the check could get off at the first stopping place with his baggage, and hand the check to the man there in waiting, and he could get on the train with his baggage, ride to the next stopping place, leave the train with his baggage, hand the check to the man there in waiting, who might repeat the operation, and so on, from man to man, until the whole transit was completed; in the course of which 50 different passengers might be carried over 50 segments of the route, and the defendant's baggagemen might be obliged to handle baggage a hundred times. The continuous passage referred to in the check is the continuous passage of the person to whom it was first issued, and of no other person; and this person cannot, without the consent of the carrier, introduce a person in his stead. *Walker v. Wabash, St. L. & P. Ry. Co.*, 15 Mo. App. 333, 341.

#### CONTINUOUSLY.

The use of a stream of water continuously for more than the time requisite to acquire a prescriptive right thereto is not synonymous with the uninterrupted use of such stream, which is also essential to constitute the prescriptive right. The use might be continuous without being uninterrupted. *Alta Land & Water Co. v. Hancock*, 24 Pac. 645, 646, 85 Cal. 219, 20 Am. St. Rep. 217.

In the requirement of the act of 1902 authorizing corporations, and providing that no corporation shall take advantage of the act which has not continuously paid dividends on its preferred stock at a certain rate, the word "continuously" evidently means that dividends at such rate must be paid for a continuous period of one year, so that where dividends are paid quarterly, the quarterly dividend cannot be passed without losing the benefit of the act; and where a dividend at the statutory rate was paid for the first quarter, and a like dividend for the second, third, and fourth quarters, for the year next preceding the meeting of the stockholders, it was continuously paid. *United States Steel Corp. v. Hodge*, 54 Atl. 1, 6, 64 N. J. Eq. 807.

#### CONTRABAND.

"Against law or treaty; prohibited. Goods exported from or imported into a country against its law. Articles the importation or exportation of which is prohibited by law." *Black, Law Dict.*

#### CONTRABAND LIQUORS.

The word "contraband," as used in the state dispensary law, means any alcoholic liquors which have not been purchased at a dispensary, or, if imported for personal use, have not, attached to the vessels in which the liquors are poured—bottles or baskets or

jugs or boxes or crates or kegs, or the like—certificates which the state commissioner, under the law, is permitted to furnish, to throw the protection of the law around such liquors. *State v. McGee*, 33 S. E. 353, 354, 55 S. C. 247, 74 Am. St. Rep. 741.

Dispensary Act March 6, 1896, § 37, providing that "any person handling contraband liquors in the nighttime or delivering the same shall be guilty of misdemeanor," refers to any liquors other than dispensary liquors; and where one purchases liquors for his own use from persons outside the state and carries them into the state, and does not comply with the regulations of the dispensary law after his arrival in the state, such liquors are contraband. *State v. Holleyman*, 31 S. E. 362, 365, 55 S. C. 207, 45 L. R. A. 567.

### CONTRABAND OF WAR.

"The classification of goods as contraband or not contraband has much perplexed text-writers and jurists. A strictly accurate and satisfactory classification is perhaps impracticable, but that which is best supported by American and English decisions may be said to divide all merchandise into three classes. Of these classes, the first consists of articles manufactured and primarily and ordinarily used for military purposes in time of war; the second, of articles which may be and are used for purposes of war or peace, according to circumstances; and the third, of articles exclusively used for peaceful purposes. Merchandise of the first class, designed to the belligerent country or places occupied by the army or navy of the belligerent, is always contraband; merchandise of the second class is contraband only when actually designed to the military or naval use of the belligerent; while merchandise of the third class is not contraband at all, though liable to seizure and condemnation for violation of blockade or siege." *The Peterhoff*, 72 U. S. (5 Wall.) 28, 58, 18 L. Ed. 564.

Goods contraband of war are of two descriptions—munitions of war, the property of a neutral bound from a neutral port to a territory of either of the belligerents after the existence of the war is known; and every species of neutral goods bound from a neutral port to a port belonging to either of the powers at war, and known to be blockaded by the other power. The principle, therefore, on which the belligerent will capture and condemn as prize the goods of a neutral bound to a port known by him to be blockaded, arises from the consideration that all such goods are contraband of war. *Richardson v. Maine Fire & Marine Ins. Co.*, 6 Mass. 102, 114, 4 Am. Dec. 92.

#### Provisions.

A recent American author on international law says that "by the term 'contraband of war' we now understand a class of

articles of commerce which neutrals are prohibited from furnishing to either one of the belligerents, for the reason that, by so doing, injury is done to the other belligerent," and he treats the subject chiefly in its relation to commerce on the high seas. Halleck, *Int. Law*, 570, 592. What articles are contraband of war has not been ascertained or accurately defined by publicists. Wheaton says that "the almost unanimous authority of elementary writers, of prize ordinances and treaties, agrees to enumerate, among these, all warlike instruments or materials, by their own nature fit to be used in war." Kent says that "the modern established rule is that provisions are not generally contraband, but may become so under the circumstances arising out of the particular situation of the war, or the condition of the parties engaged in it." 1 Kent, *Comm.* (6th Ed.) pp. 138, 139. Halleck says, "It is universally admitted that provisions are not in their own nature contraband," but proceeds to show that, if adapted to military purposes, they may become so by their special destination and intended use. Halleck, *Int. Law*, 587. *Elrod v. Alexander*, 51 Tenn. (4 Helsk.) 342, 345.

Provisions, neutral property, but the growth of the enemy's country, and destined for the supply of the military and naval forces, are contraband, but provisions, neutral property, and the growth of a neutral country, destined for the general supply of human life in the enemy's country, are not contraband. *The Commercen*, 14 U. S. (1 Wheat.) 382, 4 L. Ed. 116 (quoted with approval in *The Benito Estenger*, 20 Sup. Ct. 489, 490, 176 U. S. 568, 44 L. Ed. 592).

### CONTRACT.

See "Accessory Contract"; "Aleatory Contract"; "Alternative Contract"; "Assessment Contract"; "Bilateral Contract"; "Building Contract"; "Commutative Contracts"; "Conditional Contract"; "Constructive Contract"; "County Contracts"; "Divisible Contract"; "Entire Contract"; "Executed Contract"; "Executory Contract"; "Existing Contract"; "Express Contract"; "Fraudulent Contract"; "Gambling Contract"; "General Contract"; "Government Contract"; "Gratuitous Contract"; "Illegal Contract"; "Implied Contract"; "Independent Contract"; "Joint Contract"; "Maritime Contract"; "Mutual Contracts"; "Optional Contracts"; "Oral Contract"; "Parol Contract"; "Personal Contract"; "Pooling Contract"; "Principal Contract"; "Private Contract"; "Public Contract"; "Quasi Contract"; "Scramming Contract"; "Separable Contract"; "Severable Contract"; "Simple Contract"; "Special Contract"; "Statutory Contract"; "Subcontract"; "Through Con-

tract"; "Unconditional Contract"; "Under Contract"; "Unilateral Contract"; "Unlawful Contract"; "Verbal Contract"; "Working Contracts"; "Written Contract."

See "Breach of Contract"; "Held by Contract"; "Matters of Contract"; "Obligation of Contract"; "Place of Contract"; "Specialty by Contract."

See "Debt Contracted."

Action arising on or founded on contract, see "Action on Contract."

All contracts, see "All."

Any contract, see "Any."

His contract, see "His."

Object of contract, see "Object."

Other contracts, see "Other."

Void contract, see "Void."

Wagering contracts, see "Wager—Wagering Contract."

A contract—from "contrahere, contractum"—is a bringing together or meeting of two minds to a common intent, of which the written instrument is the legal evidence. *Wilcox v. Cherry*, 81 S. E. 369, 370, 123 N. C. 79.

Blackstone defines a contract to be an agreement upon a sufficient consideration to do or not to do a particular thing. *Justice v. Lang*, 42 N. Y. 493, 496, 1 Am. Rep. 576; *Languille v. State*, 4 Tex. App. 312, 321; *Edwards v. Kearzey*, 96 U. S. 595, 599, 24 L. Ed. 793; *Brothers v. Brothers*, 66 Pac. 901, 29 Colo. 69; *Komp v. Raymond* (N. Y.) 67 N. E. 113, 115; *Bishop v. Wild's Adm'r* (Del.) 1 Har. 87, 102; *Canterberry v. Miller*, 76 Ill. 355, 357 (citing 2 Kent, Comm. 450); *Barlow v. Gregory*, 81 Conn. 261, 265. It is defined by Chitty as a mutual assent of two or more persons competent to contract, founded on a sufficient and legal motive, inducement, or consideration, to perform some legal act, or to omit to do anything, the performance of which is not enjoined by law. *Justice v. Lang*, 42 N. Y. 493, 497, 1 Am. Rep. 576; *Price v. Treat*, 45 N. W. 790, 792, 29 Neb. 536; Story defines a contract to be "a deliberate or voluntary agreement between competent parties, upon a legal consideration, to do or not to do some act." *Phelps v. Zuschlag*, 34 Tex. 371, 380; *Languille v. State*, 4 Tex. App. 312, 321; *Pelham v. State*, 30 Tex. 422, 426; *Miller v. Palmer*, 58 Md. 451, 460; *Hellams v. Abercrombie*, 15 S. C. 110, 113, 40 Am. Rep. 684. An agreement in which a party undertakes to do or not to do a particular thing. *Sturges v. Crowninshield*, 17 U. S. (4 Wheat.) 122, 197, 4 L. Ed. 529; *Charles River Bridge v. Proprietors of Warren Bridge*, 36 U. S. (11 Pet.) 420, 573, 9 L. Ed. 773; *Shuenfeldt v. Junkermann* (U. S.) 20 Fed. 357, 359; *Cincinnati, H. & D. R. Co. v. McKeen* (U. S.) 64 Fed. 36, 46, 12 C. C. A. 14; *Greeff v. Equitable Life Assur. Soc.*, 57 N. Y. Supp. 871, 878, 40 App. Div. 180; *Churchill v. Gronewig*, 46 N. W. 1063, 1065, 81 Iowa, 449;

*Barlow v. Gregory*, 81 Conn. 261, 265; *Haney v. Caldwell*, 43 Ark. 184, 189; *Platt v. Bright*, 81 N. J. Eq. (4 Stew.) 81, 87; *Wood v. Mallin*, 10 N. J. Law (5 Halst.) 208, 209; *Languille v. State*, 4 Tex. App. 312, 321; *McCormick v. Bonfils*, 60 Pac. 296, 299, 9 Okl. 605; *American Bridge & Contract Co. v. Bullen Bridge Co.*, 46 Pac. 138, 139, 29 Or. 549; *Baily v. Gentry*, 1 Mo. 164, 170, 13 Am. Dec. 484; *State v. Carew* (S. C.) 13 Rich. Law, 498, 508, 91 Am. Dec. 245; *State ex rel. Fisk v. Police Jury of Jefferson*, 34 La. Ann. 41, 45. Other definitions are: The result of an agreement with some other mind. *Thomas v. Kelly*, 3 S. C. (3 Rich.) 210, 212, 16 Am. Rep. 716. An agreement or covenant between two or more persons in which each party binds himself to do or forbear some act, and each acquires a right to what the other promises. *Edgerton v. Hodge*, 41 Vt. 676, 680. A bargain or agreement voluntarily made upon good consideration, between two or more persons capable of contracting, to do or forbear to do some lawful act. *Justice v. Lang*, 42 N. Y. 493, 497. An agreement between parties whereby one of them acquires a right to an act by the other, and the other assumes the obligation to perform that act. *Skelly v. Bristol Sav. Bank*, 63 Conn. 83, 87, 26 Atl. 474, 475, 19 L. R. A. 599, 38 Am. St. Rep. 340. An agreement by which one person obligates himself to another to give, to do, or permit, or not to do something expressed or implied by such agreement; a compact between two or more parties. *State ex rel. Fisk v. Police Jury of Jefferson*, 34 La. Ann. 41, 45. An engagement which results from negotiation. *Emery v. Clough*, 4 Atl. 796, 799, 63 N. H. 552, 56 Am. Rep. 543. A mutual agreement on consideration between two or more parties. *Arnold v. Scharbauer* (U. S.) 116 Fed. 492, 497. A promise made by one person, who is able by law to make a promise, to another person, who must be able by law to receive such promise, to do or forbear to do a certain particular thing, or it may be to do or to forbear to do several things; a transaction in which each party comes under an obligation to the other, and each reciprocally acquires a right to what is promised by the other. *State, to Use of Gentry, v. Fry*, 4 Mo. 120, 179 (citing *Powell*, Cont. 6); *Franklin County Grammar School v. Bailey*, 20 Atl. 820, 822, 62 Vt. 467, 10 L. R. A. 405. An agreement between two or more persons competent to contract, upon a sufficient consideration, to do or not to do some particular thing, the essential elements of which are the existence of two or more contracting parties, and meeting of their minds by which each party gives his voluntary assent to the thing agreed upon, and an obligation, either created or dissolved, which constitutes the subject-matter of the undertaking. *Cockrell v. McIntyre*, 61 S. W. 648, 650, 161 Mo. 39. Statutory definitions are: An agreement to do or not to do a certain thing. *Civ. Code Cal. 1903, § 1549; Civ. Code Mont. 1895, §*

2090; Rev. St. Okl. 1903, § 730; Rev. Codes N. D. 1899, §§ 3835, 3836; Civ. Code S. D. 1903, §§ 1188, 1189. An agreement between two or more parties for the doing or not doing of some specified thing. Civ. Code Ga. 1895, § 3631; *Western Union Tel. Co. v. Taylor*, 84 Ga. 408, 418, 11 S. E. 896, 8 L. R. A. 189.

A "contract," in its more extensive sense, includes every description of agreement or publication whereby one party becomes bound to another to pay a sum of money or to do or omit to do a certain act; or a contract is an act which contains a perfect obligation. *Quinn v. Shields*, 17 N. W. 437, 442, 62 Iowa, 129, 49 Am. Rep. 141 (citing *Bouv. Law Dict.*).

Contracts have a leading, primary obligation—to do a specified act, to perform a specified service, or to pay or deliver a specified thing of value. *Mobile Life Ins. Co. v. Randall*, 74 Ala. 170, 176.

A contract is a mutual consent of the minds of the parties concerned, respecting some property or right that is the object of the stipulation, or something that is to be done or foreborne; a transaction between two or more persons in which each party comes under an obligation to the other, and each reciprocally requires a right to whatever is promised or stipulated by the other; and any words manifesting that *congregatio mentium* are sufficient to constitute a contract. "'Contract' and 'compact' are convertible terms, and no technical words are necessary to constitute a contract or compact." *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co. (Md.)* 4 Gill & J. 1, 129.

The several stages and essentials of contract are perhaps nowhere more clearly expressed than in the interpretation clause of the Indian contract act of 1872, which will be found in *Pollock's Principles of Contracts*, 7, as follows: "(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal. (b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise. (c) The person making the proposal is called the 'promisor'; the person accepting the proposal is called the 'promisee.' (d) When, at the desire of the promisor, the promisee, or any other person, has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a 'consideration' for the promise. (e) Every promise, and every set of promises forming the consideration for each other, is an agreement." *Williams v. Rogan*, 59 Tex. 438, 440.

A contract is the meeting of two minds. It involves an offer and acceptance, and it

must bind both parties. The essentials of a contract are said to be a person able to contract, a person able to be contracted with, a thing to be contracted for, a good and sufficient consideration, clear and explicit words to express the contract, and the assent of both the contracting parties. *Durlacher v. Frazer*, 55 Pac. 306, 309, 8 Wyo. 58, 80 Am. St. Rep. 918; *Haney v. Caldwell*, 43 Ark. 184, 189; *Komp v. Raymond*, 67 N. E. 113, 115, 175 N. Y. 102; *Bristol v. Mente*, 80 N. Y. Supp. 52, 55, 79 App. Div. 67.

It is essential to the existence of a contract that there should be (1) parties capable of contracting; (2) their consent; (3) a lawful object; and (4) sufficient cause or consideration. Rev. Codes N. D. 1899, §§ 3835, 3836; Civ. Code S. D. 1903, §§ 1188, 1189.

A contract in writing contains, in express terms or by natural inferences, the stipulation into which the parties have thought proper to enter. *Wright v. Latham*, 7 N. C. 298, 301.

The intention of the parties, which is not communicated to either the one or the other, forms no agreement or contract, although they may correspond. *Coleman v. Roberts*, 1 Mo. 97, 101.

Three classes of obligations are known in the law as "contracts," and are so distinguished for the purpose of remedial justice, namely, express contracts, implied contracts, and constructive contracts. *Wickham v. Weil*, 17 N. Y. Supp. 518, 519.

#### **Agree synonymous.**

See "Agree"; "Vice Commercial Agent."

#### **Appointment distinguished.**

See "Appoint—Appointment."

#### **Application for life insurance.**

Propositions, negotiations, correspondence, or conversations do not make a contract unless the minds of the parties meet upon the same stipulations, and they consent to comply with them. An application for life insurance is not a contract. It is only a proposal to contract on certain terms, which the company to which it is presented is at perfect liberty to accept or to reject. *Travis v. Nederland Life Ins. Co. (U. S.)* 104 Fed. 486, 487, 43 C. C. A. 653.

#### **Assent or acceptance.**

A contract includes a concurrence of intention in two parties, one of whom promises something to the other, who on his part accepts such promise. *Gallagher v. White (N. Y.)* 31 Barb. 92, 99.

"An offer or proposal made by one party, and the acceptance thereof by the other, constitute a contract. In other words, a contract is thereby concluded so that it may be enforced." *Cochrane v. Justice Min. Co.*, 26

Pac. 780, 782, 16 Colo. 415 (quoting Pom. Spec. Perf. § 59).

It is an elementary principle of law that to constitute a legal contract there must be an agreement in the minds of the parties or the consent and harmony of their intentions; and they must propose and mean the same thing and in the same sense. *Lewis v. Wells* (U. S.) 85 Fed. 896, 900. It is essential that there must be reciprocal assent to a certain and definite proposition. A mere offer not assented to constitutes no contract. So long as a proposal has not been acceded to it is binding upon neither party, and may be rectified. The parties must assent to the same thing in the same sense, and the proposition must be met by an acceptance which corresponds with it entirely and adequately. *Blum v. Daly*, 49 N. Y. Supp. 136, 137, 22 Misc. Rep. 342. The minds of the parties must assent to the same thing in the same sense. There must be a mutual assent to all the propositions. The acceptance must be unequivocal, unconditional, and without any variance of any sort between it and the proposal. *Taylor v. Von Schraeder*, 107 Mo. 206, 16 S. W. 675. The rule is well settled that the acceptance to close a contract on an offer must be absolute, unambiguous, unequivocal, without condition or reservation, and in exact accordance with the offer. *Scott v. Davis*, 42 S. W. 714, 719, 141 Mo. 213. To constitute a contract by letters between two parties, a definite proposition must be made by one party, and an absolute and unconditional acceptance of it by the other party. There must be a meeting of two minds of one and the same intention. *Bowen v. Hart* (U. S.) 101 Fed. 376, 380, 41 C. C. A. 390. The gist and meaning of the word "contract" is that the minds of the parties must meet and agree upon a given proposition. One must make a definite and absolute offer, and the other an unconditional acceptance, before a legal contract can be made. *McCormick v. Bonfils*, 60 Pac. 296, 299, 9 Okl. 605. There must be a meeting of the minds of the contracting parties; and, where there is no express contract, the party sought to be charged must have such knowledge, or what is equivalent thereto, before his mind can act on the subject, and assent to the terms of the contract. *Atwater v. Lockwood*, 39 Conn. 45-49. A contract is made when, and not before, it has been executed or accepted by both parties, so as to become binding upon both. *Holder v. Aultman, Miller & Co.*, 18 Sup. Ct. 269, 272, 169 U. S. 81, 42 L. Ed. 669. It does not become such until the minds of the contracting parties meet. *Shuenfeldt v. Junkermann* (U. S.) 20 Fed. 357, 359. Wherever there is not an assent, expressed or implied, to the terms of the proposed contract by both parties, there is no mutuality and no contract. *Smith, Cont.* (3d Ed.) 171. So, where the inhabitants of a town voted to take stock in a railroad company, provided its railroad

should be located through that town, and upon the directors so establishing the line of road as not to pass through the town, rescinded their vote to take the stock, there was never any such proposition by one party, accepted unconditionally by the other, as to constitute a completed contract. *Belfast & M. L. Ry. Co. v. Inhabitants of Unity*, 62 Me. 148, 153. "Every contract, whether express or implied, includes a concurrence of intention between two parties, one of whom promises something to the other, who on his part accepts such terms." So, the mere occupancy of land does not of itself imply a lease, as a lease must be created by contract, express or implied. *Dixon v. Ahern*, 14 Pac. 596, 599, 19 Nev. 422 (citing 1 Wait, Act. & Def. 70, 72).

A binding contract, enforceable in equity, may be constituted by the proposal of one party and the acceptance of the other. Thus, where a contract provided that, in consideration of a certain rental, defendant agreed to let plaintiff certain premises, that the agreement should be binding for six months from date, and that defendant would give plaintiff a lease for 99 years on the terms specified, it was held that though such writing was a mere offer to contract, which defendant, before acceptance, could revoke at any time, acceptance by plaintiff within the time limited, and before notice of revocation, would bind defendant. *Pettibone v. Moore*, 27 N. Y. Supp. 455, 457, 75 Hun, 461.

The word "contract," as used in the Constitution of the United States forbidding state legislation impairing its obligation, is used in its ordinary sense, signifying agreement of two or more minds, for considerations proceeding from one to the other, to do or not to do certain acts. Mutual assent to its terms is of its very essence. *Livingston v. Livingston*, 66 N. E. 123, 127, 173 N. Y. 377, 61 L. R. A. 800, 93 Am. St. Rep. 600 (citing *Chase v. Curtis*, 113 U. S. 452, 464, 5 Sup. Ct. 554, 559, 23 L. Ed. 1038); *Louisiana v. City of New Orleans*, 3 Sup. Ct. 211, 213, 109 U. S. 285, 27 L. Ed. 936. Where the transaction is not based on any assent of parties, it cannot be said that any faith is pledged with respect to it, and no question arises for the operation of the constitutional prohibition. *Morley v. Lake Shore & M. S. R. Co.*, 13 Sup. Ct. 54, 57, 146 U. S. 162, 36 L. Ed. 925.

However imperfect and incomplete, as a legal obligation, an agreement might be when made, if the party subsequently acts upon it, and purchases and sales are made in accordance with it, it becomes, as to such transactions and dealings, the contract between them. *Holtz v. Schmidt*, 59 N. Y. 253, 256.

#### Award.

The term "contract" neither in technical parlance nor ordinarily includes an award. *Celley v. Gray*, 37 Vt. 136, 138.

The obligation to pay an award in proceedings for the condemnation of land does not rest on contract, but on necessity imposed by the Legislature and arising from constitutional prohibition. *Platt v. Bright*, 31 N. J. Eq. (4 Stew.) 81, 87.

#### Bequest.

A bequest falls under the term "contract," and, when the will is admitted to probate, it is to be regarded as a contract of record. *Quinn v. Shields*, 17 N. W. 437, 441, 442, 62 Iowa, 129, 49 Am. Rep. 141.

#### Bills and notes.

The term "contracts," as used in a statute requiring that both the president and the cashier of certain banking corporations sign contracts made by such association and all bills and notes by them issued, was employed in a limited sense, and did not include bills of exchange, which were binding though signed by the president only. *Allison v. Hubbell*, 17 Ind. 559, 564; *Jones v. Hawkins*, 17 Ind. 550, 553.

#### Bonds.

A bond is nothing more nor less than a contract, and the sureties on a bond are simply parties to a contract, within the rules governing constructions of instruments. *Eureka Sandstone Co. v. Long*, 39 Pac. 446, 11 Wash. 161.

A replevin bond is a contract, within the meaning of the clause in the federal Constitution which prevents states from passing laws impairing the obligation of contracts. *Lapsley v. Brashears*, 14 Ky. (4 Litt.) 47, 53.

Under Act Jan. 22, 1841 (*Hutchinson's Code*, p. 917, art. 17), exempting from seizure or sale, under any execution, judgment, or decree founded on any contract made, etc., certain property therein mentioned, a delivery bond is not a contract. The statute refers to a contract made between the parties, upon which judicial proceedings should be or had been instituted, and not to the legal steps or process which might be allowed the defendant in the course of suit, judgment, and execution to enforce that contract. *Smith v. Brown*, 28 Miss. (6 Cushm.) 810, 813.

When a state officer was elected and gave his bond, a contract was entered into between him and his sureties and the state. A state may contract with its citizens. *Woodruff v. State*, 3 Ark. 285, 301.

A bond is a contract to pay a certain sum of money, but having a clause that payment may be avoided by the performance by some one or more of the parties of certain acts. *In re Fitch* (N. Y.) 3 Redf. Sur. 457, 458.

#### Capacity to assent or accept.

The term "contract" implies the existence of a physical and moral power of as-

senting, as well as a deliberate and free exercise of such power. The absence of any of these capacities in either of the parties to a contract renders the person laboring under it incapable of binding himself thereby. *Leep v. St. Louis, I. M. & S. Ry. Co.*, 25 S. W. 75, 78, 58 Ark. 407, 23 L. R. A. 264, 41 Am. St. Rep. 109.

A contract is an agreement between two or more parties, each being capable of assenting to its terms; and, as one devoid of reason cannot assent, of course he cannot make a legal contract. *Ashley v. Holman*, 15 S. C. 97, 108.

#### Charter of corporation.

Ever since the case of *Dartmouth College v. Woodward* was decided by the national court, recognizing the charters of private corporations as contracts, protected from invasion by the Constitution of the United States, no other court in this country has disregarded the doctrine; and we consider it now as obligatory and settled beyond our reach either to deny or disregard, even if any of us should doubt its original propriety. *Washington Bridge Co. v. State*, 18 Conn. 53, 64.

"The generally accepted and technical meaning of the word 'contract' is given by Blackstone, vol. 2, p. 442. He thus defines the term: 'An agreement upon sufficient consideration to do or not to do a particular thing.' This was then, as now, its legal meaning. If this be true—and its correctness will not be questioned—where are the elements, or a single element, of a contract in the grant of a charter to a corporation? I fail to perceive any. I have said the government does not agree, promise, or covenant to perform a single act when a corporate body receives its charter, and it agrees to perform no duty. Then how can this charter or any other in any just sense be said to be a contract? Not by any rule or definition of which I am aware." Separate opinion by Walker, J., in *City of East St. Louis v. East St. Louis Gas, Light & Coke Co.*, 98 Ill. 415, 449, 38 Am. Rep. 97.

"A contract is a compact between two or more persons, and is either executory or executed. A charter of a corporation alterable at the will of the legislature is not a contract." *Jersey City & B. R. Co. v. Jersey City*, 81 N. J. Law (2 Vroom) 575, 581, 86 Am. Dec. 240.

Const. art. 1, § 10, prohibiting the states from passing any laws impairing the obligation of contracts, includes a charter granted by a state and accepted by a corporation. *Farmers' Loan & Trust Co. v. Stone* (U. S.) 20 Fed. 270; *New Orleans, J. & G. N. R. Co. v. Harris*, 27 Miss. (5 Cushm.) 517, 536.

The term "contract," within the constitutional rule forbidding the impairment of contracts, includes an act incorporating a



railroad company and exempting it from taxation. *State v. Baltimore & O. R. Co.*, 48 Md. 49, 70.

A charter incorporating a bank is a contract; but, unless an exemption from taxation is included therein, it will not be implied. *Providence Bank v. Billings*, 29 U. S. (4 Pet.) 514, 558, 7 L. Ed. 939.

The term "contract," as used in the federal Constitution, prohibiting states from passing laws impairing the obligation of a contract, includes a bank charter issued by the state, wherein the state either voluntarily tenders or grants, on the application of individuals, to an artificial or legal person, certain powers on condition of acceptance and investment for the purposes of carrying out the objects of the charter. When it is accepted and acted under, the privileges secured or granted are irrevocable—as much so as if they had been made by a private individual; and it is immaterial whether the benefit to the state or the public is actual or ideal, and it may even prove injurious. *Payne v. Baldwin*, 11 Miss. (3 Smedes & M.) 661, 675.

A charter given to a bridge company, authorizing it to build and maintain a toll bridge, is a "contract," within the meaning of that term as used in the federal Constitution, prohibiting states from passing any law impairing the obligation of contracts. As a property right it is, however, like all other property rights, subject to the power of eminent domain of the state. *West River Bridge Co. v. Dix*, 47 U. S. (6 How.) 507, 518, 12 L. Ed. 535.

The charter granted by the British crown to the trustees of Dartmouth College in New Hampshire is a "contract," within the clause of the Constitution declaring that no state shall make any law impairing the obligation of contracts. *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 527, 4 L. Ed. 629.

Where a county grammar school was incorporated and established under an act of the Legislature appropriating to the school lands in trust for the use of the school, an attempt by a subsequent act to place the lands in charge of the selectmen, and appropriating the rents to the support of a graded school, was void, as impairing the obligation of a contract. *Franklin County Grammar School v. Bailey*, 20 Atl. 820, 822, 62 Vt. 467, 10 L. R. A. 405.

A contract is an agreement between two or more competent parties touching a legal subject-matter for a valuable consideration; and the act of the Missouri Legislature repealing so much of a former act as appropriated fines, forfeitures, and penalties accruing to a certain county to the support of a seminary incorporated thereby was not unconstitutional, as impairing the obligation of a

contract, since the seminary was incorporated by public authority, and not by private incorporators, and the appropriation was of public funds, and the state not being able to make a contract with itself. *Watson Seminary v. Pike County Court*, 50 S. W. 880, 883, 149 Mo. 57, 45 L. R. A. 675.

A charter granting to certain individuals the right to organize and form a corporation, with power to construct a turnpike road, is a "contract," within the protection of the clause of the Constitution of the United States prohibiting the several states from passing laws impairing the obligation of contracts. *Backus v. Lebanon*, 11 N. H. 12, 22, 35 Am. Dec. 466.

The act of June 30, 1837, establishing a bridge company to build a toll bridge over a river, is a contract by which the state grants certain franchises to the corporators in consideration that they agree and bind themselves to erect the bridge and keep it in repair, and permit the passage of the citizens of the state and their property over it at certain specified rates of toll. Such a contract is within the constitutional provision against laws impairing the obligation of contracts. *Micou v. Tallassee Bridge Co.*, 47 Ala. 652, 656.

#### **Charter or resolution of municipality.**

The Supreme Court of the United States, in interpreting the clause of the Constitution forbidding states to pass any law impairing the obligation of contracts, has always held that the word "contract," as there used, meant a voluntary agreement of minds upon a sufficient consideration to do or not to do certain things. *Murray v. Charleston*, 96 U. S. 432, 24 L. Ed. 760; *Louisiana v. City of New Orleans*, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936; *Flisk v. Police Jury of Jefferson*, 116 U. S. 131, 6 Sup. Ct. 329, 29 L. Ed. 587. Under such definition a charter providing that, when a street has once been improved under the charter, such street shall not be again improved, but may be repaired, does not constitute a contract between a property owner on this street so improved and the public that his property shall for all time thereafter be exempt from special assessment. *Ladd v. City of Portland*, 51 Pac. 654, 655, 32 Or. 271, 67 Am. St. Rep. 526.

A charter of a municipal corporation and the legislative acts regulating the state property held by it do not constitute "contracts," within the meaning of that word as used in the Constitution. *City of Lexington v. Thompson (Ky.)* 68 S. W. 477, 479, 57 L. R. A. 775; *Coler v. City of Cleburne*, 131 U. S. 162, 9 Sup. Ct. 720, 33 L. Ed. 146; *Goodwin v. Town of East Hartford*, 38 Atl. 876, 884, 70 Conn. 18; *State v. Barker (Iowa)* 89 N. W. 204, 206, 57 L. R. A. 244.

The charter of a city is so far a contract between the state and the corporation

that its right to hold and enjoy its property cannot be impaired or destroyed by subsequent legislation. But the Constitution does not exempt municipal charters from remedial legislation or general laws. The state may make laws concerning chartered corporations so long as they remain publici juris. Consequently, *Laws 1855, c. 428*, providing for the recovery of damages against a city by those whose property had been destroyed by a mob within the city, but making no provision for the collection of such judgment, save by the exercise of the taxing power, did not impair the obligation of any contract existing between the state and city. *Davidson v. City of New York*, 25 N. Y. Super. Ct. (2 Rob.) 230, 245.

A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. Chief Justice Marshall, in *Sturges v. Crowninshield*, 17 U. S. (4 Wheat.) 122, 4 L. Ed. 529; *Pfaff v. Gruen* (Mo.) 69 S. W. 405, 406; *Beverly v. Barnitz*, 42 Pac. 725, 726, 55 Kan. 466, 81 L. R. A. 74, 49 Am. St. Rep. 257; *Swinburne v. Mills*, 50 Pac. 489, 490, 17 Wash. 611, 61 Am. St. Rep. 932.

"A government office is different from a government contract. The latter, from its nature, is necessarily limited in its duration and specific in its objects. The terms agreed upon define the rights and obligations of both parties, and neither may depart from them without the assent of the other." *United States v. Hartwell*, 73 U. S. (6 Wall.) 385, 393, 18 L. Ed. 830, 832 (cited with approval in *Vincenbeller v. Reagan*, 64 S. W. 278, 284, 69 Ark. 460); *Moll v. Sblsa*, 25 South. 141, 142, 51 La. Ann. 290.

The charter of the board of commissioners known by the name of "The Mobile School Commissioners," an irregular quasi corporation, public in its nature, created for public ends and purposes, and not for private benefit or emolument, the corporators of which had no property therein, and paid nothing to the state amounting to a valuable consideration for such charter, did not constitute a contract between the state on the one hand and the said school commissioners on the other, the obligation of which is secured and protected from impairment by the Constitution of the United States. *Mobile School Com'rs v. Putnam*, 44 Ala. 506, 509, 528.

A proposition made by one contracting party and accepted by the other constitutes a contract. It evidences the meeting of their minds upon the terms of their agreement, and binds them both. Thus, a resolution of a city council that the waterworks erected by the company under an ordinance "be and are hereby accepted by the city," the same having been finished and ready for operation,

and that "the company, its successors and assigns, be, and are hereby released from the bonds and all liabilities under such ordinance," constitutes a contract. *Illinois Trust & Sav. Bank v. Arkansas City* (U. S.) 76 Fed. 271, 285, 22 O. C. A. 171, 34 L. R. A. 518.

#### Compact between states.

The term "contract," in the clause of the federal Constitution prohibiting the states from impairing contracts, includes a compact between different states. In the case of *Green v. Biddle*, 21 U. S. (8 Wheat.) 1, 5 L. Ed. 547, this court held that a law of the state of Kentucky, which was in violation of a compact between Virginia and Kentucky, that the navigation of the Ohio should always be free, was void, and they say that this court has authority to declare a state law unconstitutional upon the ground of its impairing the obligation of a compact between different states of the Union. *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U. S. (13 How.) 518, 566, 14 L. Ed. 249.

#### Conditional acceptance.

To constitute a valid contract there must be a mutual assent of the parties thereto, and they must assent to the same thing in the same sense. Therefore an absolute acceptance of a proposal, coupled with any qualification or condition, will not be a complete contract, because there at no time exists the requisite mutual assent to the same thing in the same sense. *Egger v. Nesbitt*, 27 S. W. 385, 386, 122 Mo. 667, 43 Am. St. Rep. 596.

"To constitute a valid contract of sale, it is always essential that the parties mutually assent to its terms. An offer to sell or to buy does not become a contract until it is approved or accepted unconditionally, upon the exact terms by the other party; thus an order for goods subject to approval at your office does not constitute a contract." *Reid v. Northwestern Implement & Wagon Co.*, 82 N. W. 672, 79 Minn. 369.

#### Constitution and laws of state.

The clause of the Federal Constitution prohibiting the states from passing laws impairing the obligation of contracts does not include a state constitution. *Church v. Kelsey*, 7 Sup. Ct. 897, 898, 121 U. S. 282, 30 L. Ed. 960.

The entire stock of the Bank of Arkansas was owned by the state. It furnished the capital and received the profits, and, in addition to the credit given to the notes of the bank by the capital provided, the state declared in the charter that they should be received in all payments of debts due to it. Is this a contract? A "contract" is defined to be an agreement between competent persons to do or not to do a certain thing. The undertaking on the part of the state was to receive the notes of the bank in payment from its debtors. This comes within the definition

of a contract. It is a contract founded upon a good and valuable consideration—a consideration beneficial to the state, as its profits were increased by sustaining the credit, and consequently extending the circulation of the paper of the bank. With whom was this contract made? We answer, with the holders of the paper of the bank. The notes were made payable to the bearer; consequently every bona fide holder had a right under the charter to pay to the state any debt he owed it in the paper of the bank. *Woodruff v. Trapnall*, 51 U. S. (10 How.) 190, 205, 13 L. Ed. 383.

The clause in the Constitution of the United States which prohibits the passage of state laws "impairing the obligation of contracts" applies only to contracts which impose obligations under the general principles of law. It does not extend to those which are void in their origin under the state constitution, nor to those entered into without authority from the parties sought to be bound. A statute of the state exempting \$500 worth of property from taxation when belonging to persons who had served seven years in the militia was unconstitutional; hence the statute repealing such law was not a law impairing the obligation of the contract. *People v. Roper*, 35 N. Y. 629, 631.

#### As contract in issue.

In a statute providing that where an original party to a "contract or cause of action" is dead, or where an executor is a party to the suit, action, or other proceeding, either party may be called as a witness by his opponent, the terms "contract or cause of action" mean the contract or cause of action in issue and on trial. *Robertson v. Mowell*, 8 Atl. 273, 274, 66 Md. 530.

#### Conveyance.

A conveyance is a contract under seal. There is often a difference between a power to contract and the power of making conveyances. But the power to contract given under the section, providing that contracts may be made by the wife in the same manner and to the same extent as if she were unmarried, will not be held to be limited to such contracts as are included in a section providing that a conveyance, transfer, or lien, executed by either husband or wife to or in favor of the other, shall be valid to the same extent as between other persons, and a section providing that a husband or wife may constitute the other his or her attorney in fact to control or dispose of his or her property for their mutual benefit, and under such first section the wife is authorized to enter into parol contracts with her husband. *Grubbe v. Grubbe*, 88 Pac. 182, 185, 26 Or. 363.

The term, "contract or cause of action in issue and on trial," in the provision that where one of the original parties to such con-

tract or cause of action is dead or is shown to be insane the other party shall not be admitted to testify either in his own favor or in favor of any party to the action claiming under him, includes a deed relied upon by one of the parties in an action of ejectment. *Davis v. Wood*, 61 S. W. 695, 697, 161 Mo. 17 (citing *Chapman v. Dougherty*, 87 Mo. 617, 56 Am. Rep. 469; *Messimer v. McCray*, 113 Mo. 382, 21 S. W. 17).

#### As creation of debt.

The word "contracted," in a statute providing that a homestead shall not be liable to forced sale "for any death or liability contracted after the first day of January," etc., does not mean "founded upon a contract," but was used in its more general sense, as equivalent to "incurred." *Smith v. Omans*, 17 Wis. 395, 397.

The word "contracted," in Bill of Rights, § 22, providing that "all privileges of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws, exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted," is to be understood as referring to contracts in the legal sense of that word. Mr. Webster, in his *Unabridged Dictionary*, gives the legal definition of the word "contract" as being "the agreement of two or more persons, upon a sufficient consideration or cost, to do or abstain from doing some act; an agreement in which a party undertakes to do or not to do a particular thing; a formal bargain and compact." To give this word its broadest signification would extend this section to every moneyed liability whatever, either criminal or civil. This section applies only to debts growing out of contracts express or implied. It does not apply to a penal statute. *Lower v. Wallick*, 25 Ind. 68, 70.

The word "contracted," in Gen. Mfg. Act 1848, § 12, as amended by Laws 1875, c. 510, providing that every such company shall within 20 days from the first day of January in each year make a report of its assets and liabilities, and if any such company shall fail so to do the trustees shall be held jointly and severally liable for the debts then existing, and for all that shall then be contracted before any such report is made, means the same as "incurred," and the statute covers every debt for which the corporation may become bound. *Allen v. Clark*, 15 N. E. 387, 389, 108 N. Y. 269.

The word "contract" is not used with reference to liabilities, but to debts. Men contract debts and incur liabilities. In the one case they act affirmatively; in the other the liability is incurred or cast upon them by act or operation of law. *Crandall v. Bryan* (N. Y.) 5 Abb. Prac. 162, 169.

To "contract a debt," in its general sense, is to incur a liability for the payment of mon-

ey. *Rodman v. Munson* (N. Y.) 13 Barb. 188, 197.

The purchase of stock by a married woman is not a contract, within the terms of the statute providing that no woman during coverture shall be capable of making any contract to affect her real and personal estate without the consent of her husband. The contract intended by such statute is a contract charging such property with a debt or liability specifically ascertained at the time it is entered into. *Robinson v. Turrentine* (U. S.) 59 Fed. 554, 559.

#### **Definiteness and certainty.**

The fundamentals of a legal contract are parties, subject-matter, consideration, and assent. There can be no contract, if any of these three is lacking. Thus, where a promise is made to give terminal rates, to a city it will not constitute a contract, the parties being indefinite and uncertain. *Clark v. Great Northern Ry. Co.* (U. S.) 81 Fed. 282, 283.

"Every contract, in order to be enforced, must be intelligible. It must express the intention of the parties with a reasonable degree of certainty. If the terms of the agreement be so vague or indefinite, or its provisions be so defective, that the intention of the parties cannot be ascertained, the contract is void for uncertainty." *Rue v. Rue*, 21 N. J. Law (1 Zab.) 369, 375.

Where two writings, relied upon by the parties to constitute a contract, disclosed an agreement by the vendor to sell to himself certain live stock, and by the vendee to buy of himself the same stock, there was no contract, as it is no part of the duty of courts to make contracts for parties, and there is no rule of construction by which the writings could be held to be a contract by the vendor to sell, and the vendee to buy, the stock. *Canterberry v. Miller*, 76 Ill. 355, 357.

An agreement to deliver rock at a certain price, but in which no quantity is fixed that the one party is to furnish, or the other is obliged to accept, does not constitute contract. *American Bridge & Contract Co. v. Bullen Bridge Co.*, 46 Pac. 138, 139, 29 Or. 549.

A contract is an agreement which creates an obligation, an offer to sell, not certain as to quantity nor capable of being made certain, does not constitute a contract. *Ashcroft v. Butterworth*, 136 Mass. 511, 514.

Act Cong. Feb. 28, 1885, imposes a penalty for assisting or encouraging the immigration of laborers under contract. Held, that the word "contract," as there used, meant a binding engagement to employ the laborers on their arriving in the United States, which agreement was made previous to their immigration or migration, and that the mere fact

that a manufacturer in the United States replied to a letter asking for employment in a certain business from a laborer in England, by inclosing tickets from Liverpool to St. Louis, and stating that he could give the applicant steady work, nothing being said on either side as to time or compensation, did not constitute a contract prohibited by the statute. *United States v. Edgar* (U. S.) 48 Fed. 91, 93, 1 C. C. A. 49.

#### **As executory contract.**

Act 1861, § 10, concerning railroad corporations, and providing that no contract shall be binding on a company unless made in writing, is limited to contracts wholly executory, and cannot refer to those liabilities which the law itself implies from benefits received and actually enjoyed, where the services have been performed on the one side and received and enjoyed on the other. *Foulke v. San Diego & G. S. P. R. Co.*, 51 Cal. 365, 367.

#### **Exemption statute.**

A legislative act requiring that certain lands which should be purchased for the Indians should not thereafter be subject to any taxes constitutes a contract which could not be rescinded by subsequent legislative act, such attempted rescission being void under the constitutional prohibition against impairing the obligations of contracts. *State of New Jersey v. Wilson*, 11 U. S. (7 Cranch) 164, 166, 3 L. Ed. 303.

"Contracts," within the meaning of the prohibition in the federal Constitution against laws impairing the obligation of contracts, meant contracts by which perfect rights—certain, definite, fixed, private rights—of property are vested. These are clearly distinguished from measures or engagements adopted or undertaken by the body politic or state government for the benefit of all, and from the necessities of the case, and according to the universal understanding, to be varied or discontinued as the public good shall require; and the term as so used would not include a provision in a general militia act, extending limited immunity from taxation to members of certain volunteer companies. *People v. Roper*, 35 N. Y. 629, 638.

#### **As formal contract.**

Pub. St. c. 191, § 1, in relation to mechanics' liens, provides that the lien shall not be of force against a mortgage actually existing and duly recorded prior to the date of the contract under which the lien is claimed. Held, that the word "contract" includes not only formal bilateral contracts, oral or written, but also contracts created by an agreement on one side and action under it on the other, such as to bring the parties into a contractual relation before the mortgage is recorded. *Batchelder v. Hutchinson*, 37 N. H. 452, 453, 161 Mass. 462.

The charter of an insurance company, requiring its contracts, bargains, agreements, policies, and other instruments to be in writing and executed by certain officers, has reference only to executed contracts or policies of insurance by which the company is legally bound to indemnify against loss, not to those initial or preliminary arrangements which necessarily precede the execution of the formal instrument by the officers of the company. *Franklin Fire Ins. Co. v. Colt*, 87 U. S. (20 Wall.) 500, 567, 22 L. Ed. 423.

#### Franchise.

See "Franchise."

#### Government contracts.

The clause of the federal Constitution prohibiting the states from impairing the obligation of contracts covers the obligation of its own contracts as well as the obligation of the contracts of individuals. *Buckner v. Finley*, 27 U. S. (2 Pet.) 586, 589, 7 L. Ed. 528.

#### Imprisonment for debt as part of contract.

A contract "is an agreement by one or more persons to do or not to do some particular thing. Imprisonment for debt is no part of the contract to pay, and may be abolished without impairing its obligation." *Mason v. Halle*, 25 U. S. (12 Wheat.) 370, 379, 6 L. Ed. 600; *Wood v. Malin*, 10 N. J. Law (5 Halst.) 208, 209.

#### Injuries from breach as part of contract.

The term "contracts," as used in the rule of law that one of the classes of acts or admission of which the law takes cognizance is contracts, includes agreements and the injuries resulting from their breach. *Louisville & N. R. Co. v. Spinks*, 30 S. E. 968, 970, 104 Ga. 692.

#### Insurance policy.

In an insurance policy wherein it was provided that "this policy is made and accepted on the express terms herein, and no part of this contract can be waived except in writing," the term "contract" was used synonymously with "policy." *Wilkins v. State Ins. Co.*, 45 N. W. 1, 43 Minn. 177.

#### Judgment.

Though a judgment is said by Bouvier to be a contract of the highest obligation, a judgment cannot with strict accuracy be regarded as a contract. It is not an agreement or covenant between two or more persons; it is not a mutual promise upon mutual consideration, creating obligations; it is not an agreement between two or more to do or not to do a particular thing. A judgment or decree by consent comes nearer to a contract than any other, but even such is only the result of an antecedent contract, liability,

or penalty. *Sprott v. Reid* (Iowa) 3 G. Greene, 489, 494, 56 Am. Dec. 549.

A judgment "is a contract in the sense that it may be sued upon in another judicial tribunal, but it is not a contract in that it can only be rendered against a party then capable of contracting a specialty debt. It is not true that a judgment rests either upon the will or the capacity to contract of the party against whom it is rendered. *Freem. Judgm.* § 4. If a judgment is a contract, and can only be rendered against one who is then capable of contracting, by the laws of the forum there could not be a judgment on a contract made in another state, unless by the law of the forum that contract would be valid. This would destroy the rule of comity and international law which makes the validity of a contract and the capacity of the contractor depend on the place where the contract is made or is to be performed, or the domicile of the contractor, as the case may be, and not upon the law of the forum." *Wadsworth v. Henderson* (U. S.) 16 Fed. 447, 451.

A judgment is essentially different from a contract in its nature and elements, and is deemed in law an obligation of record. *Wells v. Edmison*, 22 N. W. 497, 499, 4 Dak. 46.

A decree or judgment at law is not a contract. Contracts are made between the willing; judgments and decrees are rendered against the unwilling, and they extinguish the contract. Contracts must be statuted to be made with reference to the remedies the Legislature may from time to time afford to enforce them. *Williams v. Waldo*, 4 Ill. (3 Scam.) 264, 269.

A judgment, when it is granted upon a contract, determines what the contract is, and closes it, giving the party in whose favor the judgment is rendered the means of enforcing the contract thus determined, or redress for its breach. A judgment of this sort involves two ideas, the contract upon which it is rendered and the judgment itself. The one is the act of the party, the other is the act of the court. They are entirely separate and distinct, so that, a statute authorizing a penalty for the taking of usury under any contract for the hiring of money, etc., will not be held to apply to a judgment on a contract allowing a usurious rate of interest. *Ryan v. Southern Mut. Bldg. & Loan Ass'n*, 27 S. E. 618, 620, 50 S. C. 185, 62 Am. St. Rep. 831.

In *Morse v. Toppan*, 3 Gray, 411, it is said that a judgment is in the nature of a contract. It is a specialty, and creates a debt, and to have that effect it must be taken against one capable of contracting a debt. A judgment is a contract in the sense that it may be sued upon in another judicial tribunal, but it is not a contract in that it can

only be rendered against a party then capable of contracting a specialty debt. *Wadsworth v. Henderson* (U. S.) 18 Fed. 447, 451.

A judgment is properly classified as a "contract" with reference to actions or remedies upon it, and is a "contract" within the meaning of a statute authorizing an attachment in an action on a contract, expressed or implied. *Meyer v. Brooks*, 44 Pac. 281, 282, 29 Or. 203, 54 Am. St. Rep. 790.

It has been stated by many judges and text-writers that a judgment is a "contract," but we think that is true only, as stated in an Alabama case, in a very recondite and remote sense of the term. *Keith v. Estill* (Ala.) 9 Port. 669. In this sense all men, as members of society, enter into a "contract" to perform whatever the laws prescribe, and a judgment inflicting a punishment and a judgment for money are alike "contracts" in this sense. But it cannot be properly said that one convicted of a felony serves a term of imprisonment in performance of a contract, or that a pardon of the executive is a mere release of his contract to serve such term. A judgment does not come within the definition of a "contract" as the term is used in our Constitution and statutes. It is lacking in the elements of an agreement or convention of parties, the meeting of the minds of the parties, which is essential to a valid contract, for, usually at least, a judgment is against the will of the defendant. A judgment is not a contract in such a sense that the rate of interest thereon cannot be reduced by a subsequent statute. *Wyoming Nat. Bank v. Brown*, 53 Pac. 291, 292, 7 Wyo. 494, 75 Am. St. Rep. 935.

"A domestic judgment is a contract of record. It is the highest form of obligation. In one sense it may be termed a 'contract by specialty.' 1 Pars. Cont. \*7; *Walker v. Powers*, 104 U. S. 245, 248, 26 L. Ed. 729. In another, it may be regarded as raising an implied contract. *Denison v. Williams*, 4 Conn. 402, 403." But a judgment is not a contract under seal, nor implied contract, within the meaning of Gen. St. § 1371, limiting actions on simple or implied contract to six years. *Barber v. International Co. of Mexico*, 51 Atl. 857, 858, 74 Conn. 652, 92 Am. St. Rep. 246.

In the accepted text-books contracts are divided into three classes: First, contracts of record, such as judgments, recognizances, and statutes staple; second, specialties which are under seal, such as deeds and bonds; third, simple contracts, or contracts in parol. So that "An act entitled an act relating to contracts and promises" is broad enough to embrace judgment debts. *Hager v. McDonald* (U. S.) 65 Fed. 200, 202.

Sometimes the word "contract" would include a judgment, sometimes not. Generally it does not include a judgment. *Louis-*

*ana v. City of New Orleans*, 109 U. S. 285, 3 Sup. Ct. 211, 27 L. Ed. 936. But in the definition of contracts the books include as contracts, contracts of record, such as judgments, recognizances, and statutes staple. 1 Story, Cont. §§ 1, 2. "When a specific sum is adjudged to be due from the defendant to the plaintiff in an action or suit at law, this is a contract of the highest nature." 2 Bl. Comm. p. 465. Under this authority we can readily say that in the construction of Code 1899, c. 125, § 46, allowing plaintiff a judgment on affidavit in "actions for the recovery of money arising out of contract," the word includes a judgment. *Marsteller v. Ward*, 43 S. E. 178, 181, 52 W. Va. 74.

A judgment for money is not, *stricti juris*, a "contract." *Bank of United States v. Dallah*, 34 Ky. (4 Dana) 574, 578.

Aik. Dig. 270, declares that all actions on contract, without specialty, shall be commenced within six years after a cause of action shall have accrued. Held, that the word "contract" as used in the statute is employed in its popular signification, and hence does not embrace a judgment rendered in another state. *Keith v. Estill* (Ala.) 9 Port. 669, 670. So, also, under a similar statute, *Burnes v. Simpson*, 9 Kan. 658, 664.

Code, § 2523, providing that the assignee of a "contract for the payment of money" shall be entitled to maintain an action thereon in his own name, does not include a judgment. *Johnson v. Martin*, 54 Ala. 271, 273. See, also, under Code, § 2540, *Johnson v. Maxey*, 43 Ala. 521, 538.

As the term is used in Code Civ. Proc. § 51, providing that a promise in writing, etc., shall be received as evidence of a new and continuing "contract" to repel the statute of limitations, it does not include a judgment, there being nothing in a judgment from which a voluntary payment, etc., could be inferred, and a judgment for money is not strictly a contract at all, but is a judicial imposition of a civil liability, and is a more conclusive evidence of an indebtedness than a contract by specialty. A judgment is not an agreement, contract, or promise in writing, nor is it in a legal sense a specialty; therefore an action thereon is not within the statute of limitations. *McDonald v. Dickson*, 87 N. C. 404, 408. So, also, under a like statute, Rev. St. 1876, p. 128, *Niblack v. Goodman*, 67 Ind. 174, 180.

A judgment is properly classified as a "contract" with reference to actions or remedies upon it, and is a contract within the meaning of a statute authorizing an attachment in an action on a contract, expressed or implied. *Meyer v. Brooks*, 44 Pac. 281, 282, 29 Or. 203, 54 Am. St. Rep. 790.

The term "contract," as used in Rev. St. § 2647, subd. 2, providing that several

causes of action may be united when they arise out of contract, express or implied, is used in its enlarged sense, and as so used includes a judgment, an action on which, by such construction, may be joined with an action for breach of an express contract. *Childs v. Harris Mfg. Co.*, 32 N. W. 43, 68 Wis. 231 (citing *Barnes v. Smith* [N. Y.] 16 Abb. Prac. 420; *Mahaney v. Penman*, 11 N. Y. Super. Ct. [4 Duer] 603).

An action upon a judgment in another state is an action arising on "contract," within the meaning of the provision of the Code of Oregon providing that in such action any other cause of action arising also on contract and existing at the commencement of the action may be pleaded as a counterclaim. *Rose v. Northwest Fire & Marine Ins. Co.* (U. S.) 71 Fed. 649, 651. So, also, under statutes which provide only for a set-off of claims founded on contract. *Sawyer v. Vilas*, 19 Vt. 43, 47.

Laws 1879, c. 538, reduced the rate of legal interest to 6 per cent., but provided "that nothing herein contained shall be so construed as to in any way affect any contract or obligation made before the passage of this act." Held, that the words "contract or obligation" meant those which rested on the voluntary mutual agreement of the parties, and hence did not embrace a judgment. *O'Brien v. Young*, 95 N. Y. 428, 435, 47 Am. Rep. 64; *Wyoming Nat. Bank v. Brown* (Wyo.) 53 Pac. 291, 292, 75 Am. St. Rep. 935. Contra, see *Prouty v. Lake Shore & M. S. R. Co.* (N. Y.) 26 Hun, 546, 549.

Act March 3, 1876 (18 Stat. 470, c. 437), providing that no Circuit or District Court of the United States shall have cognizance of any "suit founded on contract" in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, should be construed to include a suit on a judgment. *Metcalf v. City of Watertown*, 9 Sup. Ct. 173, 128 U. S. 586, 32 L. Ed. 543.

The word "contract" in 2 Rev. St. 3, §§ 1, 2, authorizing an attachment to be issued against persons indebted on contract, means and includes a judgment. *Oakley v. Aspinwall*, 8 N. Y. Super. Ct. (1 Duer) 1, 45.

Const. art. 8, § 35, providing that "no citizen of the state who aided or participated in the late rebellion shall be liable in any proceedings, civil or criminal, nor shall his property be seized or sold under final process issued upon judgments or decrees heretofore rendered, or otherwise, because of any act done according to the usages of civilized warfare in the prosecution of said war by either of the parties thereto," does not impair the "obligation of contract," a judgment founded on tort not being a contract. *Peerce v. Kitzmiller*, 19 W. Va. 564, 578.

In order to constitute a contract, there must be an agreement between parties for the doing or not doing of some specific thing. Code, § 2714. It is essential to a contract that the parties assent to its terms. Id. §§ 2720-2727. A judgment rendered in an action for a tort, growing out of the wrongful conversion of personal property, is not a contract within the meaning of that clause of the federal Constitution forbidding the state to pass any law impairing the obligation of a contract. *McAfee v. Covington*, 71 Ga. 272, 273, 51 Am. Rep. 263.

A judgment, whether founded on tort or contract, is a contract within New York Code, § 635, providing that judgment may be granted in actions for money, as damages for "breach of contract," express or implied. *Gutta-Percha & Rubber Mfg. Co. v. City of Houston*, 108 N. Y. 276, 15 N. E. 402, 403, 2 Am. St. Rep. 412.

#### License.

"A license is merely an authority to do an act or a series of acts on the land of the licensor. It needs no consideration to support it, and transfers no interest in the land, and is from its nature revocable at the will of the licensor. A contract, on the other hand, requires a consideration to support it, and confers rights which may be enforced by law." *Baltimore & H. R. Co. v. Algire*, 63 Md. 319, 322.

A license to practice law is not a contract investing the person to whom it is granted with rights which cannot be interfered with by the state. None of the essential elements of a contract are to be found in the grant of a license to practice law. There is no engagement between the state and the individual that he will follow the practice of law for a livelihood, and no legal consideration paid for the license. The grant of the license is a mere naked privilege without consideration, and which the applicant may or may not, at his option, avail himself of. *Languille v. State*, 4 Tex. App. 312, 320 (quoting *Simmons v. State*, 12 Mo. 268, 49 Am. Dec. 131).

An annual license fee imposed by a state on corporations is not a contract, express or implied, within the meaning of Bankr. Act, § 63, cl. 4, and provable as such. In re *Danville Rolling Mill Co.* (U. S.) 121 Fed. 432, 433.

A license to retail liquor is nothing more than a mere permit. It is not a contract nor a grant. The person who receives it takes it with the tacit condition and the full knowledge that the matter is at all times within the control of the sovereign power of the state. *Shea v. City of Muncie*, 46 N. E. 138, 142, 148 Ind. 14. The license by a town for the sale of intoxicating liquors therein is not a contract. A license confers a right to do that which without the

license would be unlawful. *People v. Raima*, 39 Pac. 841, 842, 20 Colo. 489.

#### **As making and contents of contract.**

The phrase "as to such contract," as used in Gen. St. 1866, c. 3, § 8, providing that, when the original parties to one side of a contract are dead, the other parties thereto shall not be allowed to testify as to such contract, is equivalent to the words "as to what took place between the parties to the contract at the time of making the same," and includes, with perhaps other things, the making and contents of the contract. *Johnson v. Coles*, 21 Minn. 108, 109.

#### **Marriage or promise of marriage.**

See, also, "Marriage."

Const. art. 13, prohibiting negroes or mulattoes from coming into the state, and providing that all contracts made with those coming in, contrary to such prohibition, shall be void, will be construed to include marriage. *Barkshire v. State*, 7 Ind. 389, 390, 65 Am. Dec. 738.

Code Civ. Proc. Cal. § 442, providing that whenever the defendant seeks affirmative relief against any party, relating to the "contract on which the action is brought," he may file, in addition to his answer, a cross-complaint, is not confined to suits affirming the validity of a contract and seeking to enforce it. A cross-complaint may be filed in a suit for divorce, for it relates to the contract on which the action is brought, though the marriage state is a status, for such status results from a contract, and when the status is dissolved the contract is certainly not left in force, and, not being left in force, it is dissolved by decree making the suit, at least in part, for the dissolution of a contract. *Wadsworth v. Wadsworth*, 22 Pac. 648, 650, 81 Cal. 182, 15 Am. St. Rep. 38.

"Contract," as used in Const. U. S. 14th Amend., prohibiting the states from impairing the obligation of a contract, means contracts with respect to property, or some object of value, which confer rights capable of being asserted in a court of justice, and as so defined does not include a contract of marriage, so as to preclude the state from passing an act prohibiting white and colored persons intermarrying. *State of Georgia v. Tutty* (U. S.) 21 Fed. 753, 757, 7 L. R. A. 60.

"Contract," as the term is used in the clause of the Constitution forbidding laws impairing the obligation of contracts, includes marriage, which is a civil contract, though it is also a relation, and hence a legislative divorce is invalid. *State, v. Use of Gentry, v. Fry*, 4 Mo. 120, 180.

2 Rev. St. 138, providing "that marriage, so far as its validity in law is concerned, shall continue in this state a civil contract

to which the consent of parties capable in law of contracting shall be essential," does not attempt to define the nature, attributes, or distinguishing features of marriage. Marriage is more than a contract. It partakes more of the character of an institution regulated and controlled by public authority for the benefit of the community. Judge Story says: "It is rather to be deemed an institution of society, founded upon the consent and contract of the parties." It has been held not to be a contract within the provision of the United States Constitution prohibiting states from passing laws impairing the obligations of contracts. *White v. White* (N. Y.) 5 Barb. 480; *Fuller v. Trustees of Plainfield Academic School*, 6 Conn. 540; *Maguire v. Maguire*, 37 Ky. (7 Dana) 181; *Ditson v. Ditson*, 4 R. I. 87. Moreover, in actions on contract the motives for violation are immaterial, while in an action for breach of promise of marriage the motives of the defendant and other intrinsic circumstances may be given in mitigation or aggravation of damages. In view of these principles, an action for breach of promise of marriage is not an action on a contract, within the meaning of the statute providing that actions upon contract may be maintained by and against executors whenever they might have been maintained by or against their respective testators. *Wade v. Kalbfleisch*, 58 N. Y. 282, 284, 17 Am. Rep. 250.

#### **Necessity of consideration.**

"A contract is a promise made on a consideration. Without a consideration there can be no contract, express or implied. There must be a subject-matter in respect to which there has been a meeting of the minds of the parties. A contract involves an offer and an acceptance." *Davis v. Town of Seymour*, 21 Atl. 1004, 59 Conn. 531, 13 L. R. A. 210.

A contract is said by Mr. Parsons to be "an agreement between two or more parties for the doing or not doing of some particular thing." Such an agreement, to be a contract, must be based on a sufficient consideration, and this is made a part of the definition by many elementary writers. *Trustees of Howard College v. Turner*, 71 Ala. 429, 432, 46 Am. Rep. 326.

"A contract is an agreement between two or more persons whereby, in consideration of something done or promised to be done by the party on one side, the party on the other side undertakes to do or not to do a particular thing. A valuable consideration is an essential element." *Wheeler v. Glasgow*, 11 South. 758, 760, 97 Ala. 700; *Price v. Treat*, 45 N. W. 790, 792, 29 Neb. 586.

A contract implies the assent of two minds. The parties must understand that



one party has made an offer and the other has accepted it. But if A. promised B. to pay him a certain sum of money if he would call for it at a particular time, and B. calls accordingly, the promise is binding, the calling for the money being a sufficient consideration. It is not necessary that the consideration should exist at the time of making the promise, for if a person to whom the promise is made should incur any loss or liability in consequence of the promise, and relies upon it, the promise thereupon becomes obligatory. *People v. Taylor*, 2 Mich. 250, 253.

The word "contract," as used in the statute of frauds, requiring every contract for the sale of lands, tenements, and hereditaments, etc., to be in writing (Laws 1869, p. 363), may be said to be a broader term in this regard than "agreement," and to more imperatively demand the construction that it embraces the consideration. A contract would seem to import something more than an agreement. It is defined to be "an agreement, upon sufficient consideration, to do or not to do a particular thing." A consideration is a necessary element to the contract. Under this statute the consideration, as well as the promise itself, must appear in writing in a contract for the sale. *Patmor v. Haggard*, 78 Ill. 607, 610.

Three things must concur to constitute a valid and binding contract, namely, competent parties, subject-matter, and a valuable consideration. A contract for the sale of a mileage book, which provided that it would be good only when presented to the train conductor with a passage ticket issued in exchange for coupons detached from the book, and reciting as a consideration that the book was sold at a reduced price, whereas it was sold at the price fixed by law, is not a valid contract. *Corcoran v. New York Cent. & H. R. R. Co.*, 45 N. Y. Supp. 861, 863, 20 Misc. Rep. 197.

#### **Obligations implied by law or quasi contracts.**

Though, in its popular signification, the word "contract" is generally limited to actual agreements between determinate contracting parties, it has in law a much more extended signification, and embraces not only the agreements of parties actually to do or refrain from doing something lawful, but also many other legal applications which the law creates or implies from certain relations of the parties to each other. *Umlauf v. Umlauf*, 103 Ill. 651, 654.

The word "contract," strictly speaking, does not include obligations imposed by law as quasi contract, such as the obligation of a trustee to pay over moneys in his hands, which obligation grows out of a duty which the law imposes. Quasi contracts are not contracts at all, but are mere obligations

based on the doctrine of unjust enrichment, which the law imposes on a person who has received money or property of another, which he in equity and good conscience ought not to retain to his own use, to repay the same to the person equitably entitled thereto. *Appeal of Pierce*, 103 Pa. 27, 31.

An action on contract includes not only actions on contracts in fact, but also actions on quasi or implied contracts which arise by operation of law. Thus an action to recover money due from an insurance agent to a city fire department for a percentage of insurance premiums received by him under a liability imposed by statute to pay the sum was clearly an action on contract. Chitty says: "Though a statute may in some respects be considered as a specialty, yet assumpsit may be supported for money, etc., accruing, due to the plaintiff under the provisions thereof, he not being thereby restricted to any other particular remedy." *Fire Department of the City of Oshkosh v. Tuttle*, 50 Wis. 552, 7 N. W. 549 (citing 1 Chit. Pl. [16th Am. Ed.] 118).

The word "contract" is almost universally employed to denote an undertaking voluntarily entered into between the parties, not drawing into contemplation any creation of the law. *Bish. Cont.* § 191. All true contracts grow out of the mutual intention of the parties; and if in a particular instance there is evidence arising from the situation, conduct, or family relationship of the parties tending to show that the service was rendered without expectation of any payment, or without other payment than such as was received as the service progressed, it cannot be said as a matter of law that a contract is implied on the part of the defendant to pay for such services." *Saunders v. Saunders*, 38 Atl. 172, 173, 90 Me. 284 (citing *Cole v. Clark*, 85 Me. 336, 338, 27 Atl. 186, 21 L. R. A. 714, and authorities there cited).

#### **Obligation included.**

A contract consists not only of the stipulations which the parties have expressed in words, but also of the obligations that are reasonably implied as concomitants of those stipulations. *Bloomfield v. New York & N. J. Tel. Co.*, 52 Atl. 240, 241, 68 N. J. Law, 207.

#### **Obligation of contract distinguished.**

A well-recognized distinction is drawn between a contract itself and its obligation. The contract is the agreement of the parties; the obligation is the remedy which the law affords for its enforcement. *Moore v. Collins*, 16 S. C. 15, 29.

A contract "is an agreement between two or more persons to do or not to do a particular thing. The obligation of the contract is founded in the terms of the agreement, sanctioned by moral and legal principles."

Charles River Bridge v. Warren Bridge, 36 U. S. (11 Pet.) 420, 572, 9 L. Ed. 773, 998.

**Parties.**

A contract is an agreement, upon sufficient consideration, to do or not to do a particular thing. A man cannot pass a consideration from himself to himself, and hence no man can make a contract with himself; the thing is impossible. *Allin v. Shadburne's Ex'r*, 31 Ky. (1 Dana) 68, 80, 25 Am. Dec. 121.

**Partnership.**

The word "contract," in its ordinary legal sense, implies two opposite parties or sets of parties, each having in the subject-matter of the contract a right distinct and different from that of the other. Indeed, so marked is the difference, the right of the one is the duty of the other. If one is the vendor, the other is the vendee; if one is bailor, the other is bailee; and the law of contract was first developed through the allowance of actions for the breach. A right of action is often the test of the existence of a legal contract. The word "contract," as used in a statute allowing a married woman to make a contract with her husband, does not include a business partnership between them. *Haggett v. Hurley*, 40 Atl. 561, 562, 91 Me. 542, 41 L. R. A. 362.

**Patent.**

See "Patent."

**Pawnbroker's ticket.**

Under Internal Revenue Act 1864, § 170 (13 Stat. 297), providing for the taxation of contracts and agreements, a pawnbroker's ticket, given under the statute of California, containing the names of the parties, a description of the property pledged, the sum loaned, the length of time for which the loan is made, and the rate of interest which it bears, is a contract. *United States v. Smith* (U. S.) 27 Fed. Cas. 1174.

**Political relations or functions.**

The word "contract," in its largest sense, would comprehend political relations between the government and its citizens, would extend to offices held within a state for state purposes, and to many of those laws concerning civil institutions which must change with circumstances and be modified by ordinary legislation, together with all agreements between one man and another, based on mutual promises or promises based on consideration; but as the term is used in the federal Constitution, prohibiting the state from passing a law impairing the obligation of contracts, the word "contract" must be understood in a more limited sense to mean simply contracts respecting property under which some individual could claim a right to something beneficial to himself, and includes merely agreements between individuals and corpora-

tions. *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 627, 4 L. Ed. 629.

"Contracts," as used in Const. U. S. art. 1, § 10, means contracts "by which perfect rights, certain, definite, fixed, and private rights of property, are vested. These are to be distinguished from measures or engagements adopted or undertaken by the body politic or state government for the benefit of all, and from the necessity of the case, and according to universal understanding, to be varied or discontinued as the public good shall require." A statute providing that, before a county seat may be moved an assessment must be made for the owners of the lots at such county seat for their lots and improvements, is not a contract between the state and such owners. *Moses v. Kearney*, 31 Ark. 261, 265.

**As property.**

See "Property."

**Public office.**

Public offices are delegations of portions of the sovereign power of the state for the welfare of the public. They are created for the purposes of government. They are not the subjects of contract, but are agencies for the state, revocable at pleasure by the authority creating them, unless such authority be limited by the power which conferred them. As stated by Judge Cooley in *Wyandotte v. Drennan*, 46 Mich. 478, 480, 9 N. W. 500: "Nothing seems better settled than that an appointment or election to a public office does not establish a contract relation between the person appointed or elected and the public." *Attorney General v. Jochim*, 58 N. W. 611, 613, 99 Mich. 358, 23 L. R. A. 699, 41 Am. St. Rep. 606.

Public office is not a contract; it is in the nature of a trust or agency. The distinction between a "contract" and a "public office" is marked. If the former is not fully executed, the delinquent is liable, and must respond in damages; while in the latter the officer may lay aside his office by resignation, at pleasure, and with it all further liability. A county officer accepts his office subject to whatever regulations the Legislature may afterwards make respecting it. New duties may be imposed upon an incumbent without additional compensation, and his compensation, as fixed by law when elected, may be either increased or decreased. It is settled that public office is accepted cum onere. *Sudbury v. Monroe County Com'rs*, 62 N. E. 45, 48, 157 Ind. 446.

The words "public or fiducial office, trust or employment," in St. § 3752, providing that the recovery on a bond required by law for the discharge or performance of any public or fiducial office, trust, or employment shall not be limited by the amount of the penalty named, does not include the relation arising

between a county and one contracting with it, and therefore that portion of the statute has no application to a bond executed by a road contractor for the faithful performance of his contract, and the obligors in such a bond are liable only according to its terms and to the actual extent of the amount specified therein. *Moss v. Rowlett*, 65 S. W. 153, 154, 112 Ky. 121.

The distinction between a contract and a public office is marked. If the former is not fully executed, the delinquent is liable, and must respond in damages; while in the latter the officer may lay aside his office by resignation at pleasure, and with it all further liability. A county officer accepts his office subject to whatever regulations the Legislature may afterwards make respecting it. New duties may be imposed upon an incumbent without additional compensation, and his compensation, as fixed by law when elected, may be either increased or diminished. It is settled that public office is accepted cum onere. *Sudbury v. Moore County Com'rs (Ind.)* 62 N. E. 45, 48.

#### Same—Compensation and term of office.

The term "contracts," within the meaning of the clause of the federal Constitution prohibiting the states from impairing obligation of contracts, does not include a law by which an existing officer is to receive a certain compensation, and therefore the reduction of his compensation during his term is not in violation of the clause. "The contracts designed to be protected are contracts by which perfect rights, certain, definite, fixed, private rights of property, are vested." *Butler v. Pennsylvania*, 51 U. S. (10 How.) 402-416, 13 L. Ed. 472.

An obligation to pay the salary of an officer is not a contract between the officer and the municipality, but arises by operation of law. *State v. Police Jury of Jefferson*, 34 La. Ann. 41, 45.

The term "contract," within the meaning of the rule that the obligations of contracts cannot be avoided by the state, includes an employment by the board of water commissioners of a city of a general superintendent for a term of years at a fixed salary, and therefore the commissioners cannot terminate the relation, and defeat the superintendent's right to compensation, before the expiration of the term, on the ground that the employment created a public office and not a mere contract of employment. Speaking of the compensation of municipal officers, Judge Dillon, in his work on *Municipal Corporations* (section 171), says: "But where the services to be performed are professional or private, rather than public or official, an employment under an ordinance for a fixed time, at a fixed sum for the period, has been held to be a contract, and subject to be impaired by the corporation." *Cramer v. Water Com'rs of*

*New Brunswick*, 31 Atl. 384, 385, 57 N. J. Law (28 Vroom) 478.

It has been well settled that public officials are merely agents of the state for the carrying out of public purposes, and that their election and the fixing of the length of time for which they shall serve are matters of public convenience or necessity, and do not fall within the scope of the term "contract," as applied to transactions between individuals, out of which definition a voter's rights of property arise. *Duer v. Dashiell*, 47 Atl. 1040, 1041, 91 Md. 660.

#### Railway tickets.

Act April 19, 1835, requiring owners of railroads and steamboats to provide each ticket agent with a certificate of authority to redeem tickets which are wholly or partly unused, and forbidding persons not having such certificate to sell such tickets, except that any one who has bought a ticket from a certified agent with a bona fide intention of traveling on same may sell it, is not unconstitutional as depriving any person of property without due process of law, or as impairing the obligation of contracts; for even if it be conceded that a ticket is a contract, notwithstanding the fact that it has been held that it is merely the evidence of a contract, or a mere receipt taken, or voucher, adopted for convenience to show that a passenger has paid his fare from one place to another, the statute would only be inoperative and of no effect as to contracts existing at the time of its passage, and it would be valid and constitutional as to future contracts. *Burdick v. People*, 149 Ill. 600, 36 N. E. 948, 950, 24 L. R. A. 152, 41 Am. St. Rep. 329.

Railway tickets for passage over several routes, which do not purport to be contracts, are not contracts, but are rather in the nature of receipts for the separate portions of the passage money, and their office is to serve as tokens to enable the persons having charge of the vessel and carriages of the company to recognize the bearers as parties who were entitled to be received on board. *Quimby v. Vanderbilt*, 17 N. Y. 306, 313, 72 Am. Dec. 469.

#### Recognizance.

A recognizance is not a contract between individuals to which the statute of frauds will apply; neither is it a contract of any kind. *Gay v. State*, 7 Kan. 394, 402.

"Contracts," as used in Comp. Laws 720, c. 146, § 2, providing that a minor shall be bound on his contracts unless he disaffirms them within reasonable time after attaining his majority, will not be construed to include a recognizance, and hence he cannot disaffirm such instrument. *State v. Weatherwax*, 12 Kan. 463, 465.

**Remedy as part of contract.**

The doctrine that the remedy provided by law to enforce a contract is part of the contract and incorporated into it has long been exploded. A decree or judgment at law is not a contract. Contracts are made between the willing; judgment and decrees are rendered against the unwilling, and they extinguish the contract. Contracts must be statuted to be made with reference to the remedies the Legislature may from time to time afford to enforce them. Accordingly, an act providing that in mortgage foreclosure proceedings the lands must be valued before sale, and that the premises shall be subject to redemption in the manner allowed for the redemption of lands sold by virtue of executions, though applicable to prior mortgages, did not take away from those holding such mortgages any rights secured to them by contract. *Williams v. Waldo*, 4 Ill. (3 Scam.) 264, 269.

**Simple and special contracts included.**

"Contract," in its widest sense, includes records and specialties, but the term is usually employed to designate only simple or parol contracts. *Pelham v. State*, 30 Tex. 422, 426.

"Though the term 'contract' is usually employed to designate either special or simple contracts, yet custom has affixed to the term all species of obligation, and in *Sturges v. Scrwinshield*, 4 Wheat. 122, Justice Marshall has defined a contract to be an agreement in which a party undertakes to do or not to do a particular thing. In this definition the consideration is omitted, and it was no doubt intended to embrace all kinds of contracts, whether by record, special, or parol." *Sawyer v. Villas*, 19 Vt. 43, 47.

"The term 'contract' comprises, in its full and more liberal significance, every description of agreements, obligations, or legal ties whereby one party binds himself or becomes bound, expressly or impliedly, to pay a sum of money, or perform or omit to do a certain act." *Woodruff v. State*, 3 Ark. (3 Pike) 285, 301.

**Special assessment.**

The term "contract," as used in a clause of the Constitution prohibiting the states from passing laws impairing the obligation of contracts, does not include a special assessment. *Essex Public Road Board v. Shinkle*, 11 Sup. Ct. 790, 792, 140 U. S. 334, 35 L. Ed. 446.

**Statutory penalty.**

"A 'contract' is defined to be a deliberate engagement between competent parties, on a legal consideration, to do or to abstain from doing some act." "A drawing together of minds until they meet, and an agreement is made to do or not to do some particular thing." As so defined, a liability imposed by

statute is not a contract, since it wants all the elements to it, viz., consideration, and mutuality, as well as the assent of the parties. *McCoun v. New York Cent. & H. R. R. Co.*, 50 N. Y. 176, 180; *Furber v. McCarthy*, 7 N. Y. Supp. 613, 614, 54 Hun, 435.

A contract is an agreement between two or more to do or not to do a particular thing. An obligation arising under a statute giving a penalty for bringing negro slaves into the county and selling the same is not an obligation arising by contract, and therefore the Legislature may enact a law releasing such penalty, as it is not the impairment of a contract. *Coles v. Madison County*, 1 Ill. (Breese) 154-157, 12 Am. Dec. 161.

A contract is a drawing together of minds until they meet, and an agreement is made to do or not to do some particular thing. It may be express, or it may be implied or inferred from circumstances, and this implication is but the record of the ordinary and universal experience of mankind. If A. borrows money of B., the courts may imply a promise to repay the money, for the universal experience is that in such a case a promise is exacted and made. An implied promise or contract is but an express promise proved by circumstantial evidence. An action to recover a penalty imposed by statute upon telegraph companies for undue delay in the transmission and delivery of messages is not one for a breach of contract. *Western Union Tel. Co. v. Taylor*, 84 Ga. 408, 418, 11 S. E. 396, 397, 8 L. R. A. 189.

**Stipulation distinguished.**

See "Stipulate."

**Stockholder's liability.**

The obligation which the stockholders of a corporation recognize in law which makes them liable for an amount equal to the amount of stock owned constitutes a contract with the creditors of the corporation. *Pfaff v. Gruen* (Mo.) 69 S. W. 405, 406.

**Subscription.**

See "Subscribe—Subscription."

**Tort distinguished.**

See "Tort."

**Transaction distinguished.**

See "Transaction."

**Will.**

See "Will."

**As written contract.**

The word "contract" does not necessarily import that there is a written instrument evidencing it. *Pierson v. Townsend* (N. Y.) 2 Hill, 550, 551.

"A 'contract' (con-traho) is a drawing of minds till they meet. Agreement to do a par-

ticular thing is a contract." The writing in which the agreement of the party is expressed is frequently called the "contract," but, more properly speaking, it is but the evidence thereof. *McNulty v. Prentice* (N. Y.) 25 Barb. 204, 207.

"Contract" is a term which may mean either "an agreement between two parties, upon valid consideration, to do or not to do a certain thing, or a written instrument which embodies the agreement." *Starkey v. City of Minneapolis*, 19 Minn. 203, 207 (Gil. 186).

#### CONTRACT FOR PAYMENT OF MONEY ONLY.

Kan. Gen. St. 739, providing that in an action arising on "contract for the payment of money only," notwithstanding the execution of the undertaking to stay proceedings, if the defendant in error gives adequate security to make restitution in case the judgment is reversed or modified, or may, on leave obtained from the court or a judge thereof, proceed to enforce the judgment, cannot be construed to include a contract by which one agreed to repay another for letting a certain person and his family have whatever they might want for their support. A promissory note is a contract for the payment of money only; so also would any other contract be a contract for the payment of money only, if nothing was to be done under it by either party except to pay money; but where something else is also to be done under the contract, the contract can hardly be called a "contract for the payment of money only," and this is especially true where the payment of money depends on whether this something is done or not. *Grant v. Dabney*, 19 Kan. 390, 392.

Prac. Act, § 120, declaring that a plaintiff may have an attachment in an action on a contract, express or implied, for the "direct payment of money," means where the debt is liquidated. *Hathaway v. Davis*, 33 Cal. 161, 166.

A judgment is not a contract, express or implied, "for the payment of money," according to Code 1852, § 2129 (Rev. Code, § 2523). *Masterson v. Gibson*, 56 Ala. 56, 57 (citing *Smith v. Harrison*, 33 Ala. 706).

#### CONTRACTS FOR REAL ESTATE.

A contract for real estate is defined as "an agreement to sell or convey an interest, title, or estate in lands," and does not include an agreement for something in relation thereto. Hence, Gen. St. 1889, par. 4854, declaring that justices shall not have cognizance of any action on any "contracts for real estate," did not preclude the justice from taking jurisdiction of an action for

money which the vendee in a contract for the sale of real estate had promised to pay to liquidate expenses incident to the sale, which he failed to complete. *Duff v. Morrison*, 24 Pac. 1105, 1106, 44 Kan. 562.

Actions for the purchase price of real property, when founded on a contract of sale, are actions "on contracts for real estate," within the meaning of Rev. St. § 591, providing that justices of the peace shall not have cognizance of actions on contracts for real estate. Such actions are not limited to actions to compel a conveyance of the land, or for damages for the failure to execute the conveyance or other breach of a contract by the seller, but include all matters founded on any stipulation of a contract, whether to be performed by the seller or purchaser. An action for the purchase price of the land is therefore within the class of actions named in the statute, and is not taken out of such class by the fact that the seller has executed a conveyance and fully performed his part of the contract. It is nevertheless necessary to resort to the contract for the terms of the purchaser's obligation, which is the foundation of the action. We do not hold that actions on promissory notes given for the purchase price of land are within the operation of the section. On the contrary, we think they are not, for such action would be founded on the note, and not on a contract. *Crafts v. Prior*, 36 N. E. 1070, 1071, 51 Ohio St. 21.

#### CONTRACT IMPLIED IN FACT.

The terms "express contract" and "contract implied in fact" are used to indicate a difference in the character of the evidence by which a simple contract is proved. The source of the obligation in each case is the intention of the parties. *Keener, Quasi Cont. 5*; *Bliss v. Hoyt's Estate*, 41 Atl. 1026, 1027, 70 Vt. 534.

#### CONTRACT IMPLIED IN LAW.

A "contract implied in law" denotes, not the evidence, but the source of the obligation. *Keener, Quasi Cont. 5*. It is a quasi contract created by the law without the intent of the parties to the contract, and even against their intention. *Bliss v. Hoyt's Estate*, 41 Atl. 1026, 1027, 70 Vt. 534.

#### CONTRACT IN ISSUE.

The phrase "contract in issue," in a statute enabling parties to testify as to such contracts, should not be restricted to contracts formally put in issue by the pleadings. The words mean, in such statute, the same as "contract in dispute," and relate to the substantial issues made by the evidence, as well as to the issues joined by the pleading. *Hollister v. Young*, 42 Vt. 403, 408.

**CONTRACT IN RELATION TO LAND.**

"Contract in relation to land," as used in Pasch. Dig. § 4989, providing that every title bond or other written contract in relation to land may be proved, certified, or acknowledged and recorded in the same manner as deeds for the conveyance of land, will be construed to include purchase-money notes given for land, and dated on the day of the execution of the deed, and which show on their face that they were given for the purchase price, and which expressly retain a vendor's lien on the land. *Saunders v. Hartwell*, 61 Tex. 679, 685.

**CONTRACT IN RESTRAINT OF TRADE.**

See "Restraint of Trade."

**CONTRACT IN WRITING.**

See "Written Contract."

**CONTRACT JUDGMENT.**

A "contract judgment," as a consent judgment is sometimes called, is where the parties agree upon the terms of the judgment—that is, as to what shall be put in the judgment—but an agreement between the parties that an award of arbitrators shall be filed in another county than that in which the case was tried does not constitute such a judgment. *Henry v. Hilliard*, 27 S. E. 130, 132, 120 N. C. 479.

**CONTRACT OF AFFREIGHTMENT.**

See "Affreightment."

**CONTRACT OF AGENCY.**

A contract which exists between the principal and agent is called a "contract of agency," while the right of the agent to act in the name or on behalf of the principal is termed his "authority" or "power." *Frank v. Roe*, 11 Pac. 820, 824, 70 Cal. 298.

**CONTRACT OF BOTTOMRY.**

See "Bottomry."

"Contracts of bottomry" are so called because the bottom or keel of the vessel is figuratively used to express the whole body thereof. *Maitland v. The Atlantic* (U. S.) 16 Fed. Cas. 522, 523.

**CONTRACT OF CARRIAGE.**

A contract of carriage is a contract for the conveyance of property, persons, or messages from one place to another. Civ. Code Cal. 1903, § 2085; Rev. Codes N. D. 1899, § 4174; Rev. St. Okl. 1903, § 650.

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**CONTRACT OF HIRING.**

A contract of hiring is not a sale of the thing for the period of hiring. The property remains as it did before. It is a contract for the use of the thing hired. The hirer is a mere bailee or locum tenens for the owner, and only holds the property for him; but the owner retains such a possession that he may either sell or give the property. *Whitaker v. Whitaker*, 12 N. C. 310, 311.

**CONTRACT OF INSURANCE.**

See "Insurance."

**CONTRACT OF MARRIAGE.**

The terms "contract of marriage" and "contract to marry" are used to express the same idea, though perhaps it may not be strictly accurate to so use them. There is no reason for distinguishing the "contract of marriage," if by that term is meant the marriage relation, from all other contracts, that does not equally apply to the contract of marriage which precedes and is the foundation of the consummated agreement. *Lewis v. Tapman*, 45 Atl. 459, 461, 90 Md. 294, 47 L. R. A. 385.

**CONTRACT OF RECORD.**

A "contract of record" is one which has been declared and adjudicated by a court having jurisdiction, or which is entered of record in obedience to, or in carrying out, the judgment of a court. Rev. Code, § 2674; *Hardeman v. Downer*, 39 Ga. 425, 451.

**CONTRACT OF SALE.**

See "De Facto Contract of Sale."

A contract of sale is an agreement by which one gives a thing for a price in current money, and the other gives the price in order to have the thing itself. Three circumstances concur to the perfection of the contract, to wit, the thing sold, the price, and the consent. Civ. Code La. 1900, art. 2439.

Inasmuch as a sale is a contract or agreement, it is frequently spoken of as a "contract of sale" or an "agreement of sale," two phrases which in the law mean no more and no less than the word "sale." No amount of offering to sell will make a contract of sale unless some one accepts the offer by agreeing to buy, so that a call or memorandum or writing executed for a valuable consideration, giving the bearer a right to call upon the subscriber for a certain share of stock therein within a stated time and at a given price, is not a contract or agreement to sell. *White v. Treat* (U. S.) 100 Fed. 200, 291.

A "contract on sale and return" is an agreement by which goods are delivered by a wholesale dealer to a retail dealer, to be paid for at a certain rate if sold again by the latter, and, if not sold, to be returned. *Story, Sales, § 249.* If the vendee returns the goods, the contract of sale is at an end. If he does not, the sale of the goods becomes absolute, and the price of the goods may be recovered in an action for goods sold and delivered. *House v. Beak, 30 N. E. 1065, 1068, 141 Ill. 290, 33 Am. St. Rep. 307.*

Assumpsit to pay for land is not a contract for the sale of land. Neither the letter, policy, nor object of the statute of frauds and perjuries should be deemed to embrace or apply to a promise, express or implied, to pay for land which the vendor had conveyed or covenanted to convey. *Lewis v. Grimes, 30 Ky. (7 J. J. Marsh.) 336.*

The phrase "contract for sale," in a clause of the statute of frauds requiring contracts for the sale of any goods, wares, and merchandise to be in writing, except, etc., embraces all contracts for the sale of goods, wares, and merchandise, including sales at auction. *Davis v. Robertson (S. C.) 1 Mill, Const. 71, 72, 12 Am. Dec. 611.*

A "contract for the sale of goods," within the statute of frauds, is an absolute sale where the vendor is to receive payment and the vendee the goods purchased, and hence a chattel mortgage in which it is not intended that the mortgagee shall pay anything nor take possession until the security requires it is a contract in which neither payment nor delivery is accepted, and hence not a "sale" within the meaning of the statute. *Gleason v. Drew, 9 Me. (9 Greenl.) 79, 82.*

A contract is not deprived of its character as a contract of sale by the fact that the goods must be transferred from one place to another merely for the purposes of delivery. *Downs v. Ross (N. Y.) 23 Wend. 270, 275.*

Where a contract is, in its essential character, not a bailment, but a contract of sale, a provision therein that it shall not be considered a sale is of no effect. *Ott v. Sweatman, 15 Pa. Co. Ct. R. 97, 115.*

A contract by which the plaintiffs undertook to make for the defendants 10 stove machines, and find the material therefor, for the price of \$150 each, to be paid therefor by the defendants, is an agreement for the furnishing of labor and materials, and not a contract of sale. It was therefore not required by the statute of frauds to be in writing. *Spencer v. Cohen, 42 Mass. (1 Metc.) 283, 284.*

#### **Bailment distinguished.**

Where one agrees with another to send him goods for the latter to sell or return, it is often difficult to determine whether the contract constitutes a sale or a bailment.

The contract may not constitute a sale, but be a bailment, with an option on the part of the bailee to buy; or it may be a sale with an option on the part of the vendee to return the goods, such a contract being termed a "contract of sale or return." An option to purchase if he like is essentially different from an option to return a purchase if he should not like. In one case the title will not pass until the option is determined; in the other the property passes at once, subject to the right to rescind and return. *Hunt v. Wyman, 100 Mass. 198.* If the owner of goods deliver them to another with the understanding that there is to be no sale until the happening of a certain condition, this is a bailment, and the title does not pass until the condition happens. If the goods be delivered with the understanding that under certain circumstances the vendee may return them, this is a conditional sale, and title immediately passes, although under the contract the vendee may have the right to rescind and return the goods. In the one case the condition is precedent, in the other subsequent. Under a contract of sale or return the title passes and remains in the vendee until the option to return is exercised. A bailee with an option to purchase does not become a purchaser until he exercises such option. *Furst Bros. v. Commercial Bank, 43 S. E. 728, 729, 117 Ga. 472.*

#### **As contract of sale or contract to manufacture.**

The phrase "contracts for the sale of goods, wares, and merchandise," as used in statutes of frauds, requiring contracts for the sale of goods, wares, and merchandise to be reduced to writing, should be construed to mean contracts for such articles ready for delivery, and not to include contracts for the sale of goods on which work and labor is to be performed, notwithstanding by the terms of the agreement the goods are not to be delivered until a future day. *Winship v. Buzard, 9 S. C. (9 Rich. Law) 103, 105.* It should be construed to mean goods already manufactured and in a condition for present sale and delivery, and not to include goods to be thereafter manufactured, that being a contract for work and labor. A contract for the purchase of articles deliverable on a future day, to be manufactured by the vendor, is not a "contract for the sale of goods, wares, and merchandise," within the meaning of the statute, but is a contract for work and labor even though all the materials are furnished by the manufacturer. *Robertson v. Vaughn, 7 N. Y. Super. Ct. (5 Sandf.) 1, 5.* It cannot be construed to include an article not existing at the time, but which is to be made according to order, and is distinguished from the general business of a maker. *Finney v. Appar, 31 N. J. Law (2 Vroom) 266, 268.* It applies only to sales of property actually in existence at the time the sale was made, and does not include an agreement with a work-

man to put materials together and construct an article, whether at an agreed price or not. *Mixer v. Howarth*, 38 Mass. (21 Pick.) 205, 207, 32 Am. Dec. 256. As distinguished from "contracts for work and labor," they are such contracts as tend primarily to contemplate work and labor to be done, the material furnished by the seller at the instance of the purchaser and for his use and benefit, and in which work and labor are not the essential consideration, although work and labor may be necessary to make the goods, or to fit and prepare them for delivery. *Cason v. Cheely*, 6 Ga. 554, 555. The phrase may include a contract for the sale of goods not yet manufactured. "The distinction, we believe, is now well understood, when a person stipulates for the future sale of articles which he is habitually making, and which at the time are not made or finished, it is essentially a contract of sale, and not a contract for labor; otherwise when the article is made pursuant to the agreement." *Lamb v. Crafts*, 53 Mass. (12 Metc.) 353, 356. A contract for the sale of articles not in existence at the time of the contract, where the labor and skill of a workman are of the essence of the contract, is not a contract for the sale of "goods, wares, and merchandise" within the statute of frauds, although the labor and skill are to be expended in the production of goods, wares, and merchandise, and from the workman's own raw materials. *Pitkin v. Noyes*, 48 N. H. 294, 303, 97 Am. Dec. 615, 2 Am. Rep. 218. If the article which is the subject of a verbal sale exist at the time in the condition in which it is to be delivered, the contract is a sale of "goods, wares, and merchandise"; but if labor and skill are to be applied to existing materials, it is a contract for the manufacture of articles to which the labor and skill are to be applied, and is not a "contract for the sale of goods, wares, and merchandise" within the statute of frauds. *Hight v. Ripley*, 19 Me. (1 App.) 137, 139. So a contract, for delivery at a future date, of an article to be thereafter manufactured, is not a "contract for the sale of goods, wares, and merchandise" within the statute of frauds, and void because not in writing. *Donovan v. Willson* (N. Y.) 26 Barb. 138, 140. An agreement to manufacture certain articles and furnish materials is not "a contract for the sale of the goods, wares, and merchandise" within the second section of the statute of frauds and perjuries. *Allen v. Jarvis*, 20 Conn. 38, 52. And it has been held that an agreement to purchase gin, to be manufactured and to be delivered at a future date (*Winship v. Buzzard*, 9 S. C. [9 Rich. Law] 103, 105); a contract for the sale of a marble monument, consisting of several pieces, standing in the vendor's shop, which the vendor agreed to polish, letter, and finish (*Mead v. Case* [N. Y.] 33 Barb. 202); a contract to procure and deliver at a certain time and place one-half of a frame for a vessel, to be hewn and fash-

ioned according to certain moulds (*Abbott v. Gilchrist*, 38 Me. 260); a contract by which the plaintiffs undertook to make for the defendants 10 stove machines, and find the material therefor, for the price of \$150 each, to be paid therefor by the defendants (*Spencer v. Cone*, 42 Mass. [1 Metc.] 283, 284); an application made to a mechanic or manufacturer for articles in his line of business, where the mechanic or manufacturer undertakes to prepare and furnish them within a given time (*Cummings v. Dennett*, 26 Me. [13 Shep.] 397, 401); an agreement to raise three acres of potatoes and deliver them to the other party at a fixed price per bushel (*Pitkin v. Noyes*, 48 N. H. 294, 303, 97 Am. Dec. 615, 2 Am. Rep. 218); a contract providing that plaintiff was to furnish material for, and prepare and fit for putting up at defendant's mill, four portable, patent houses of certain dimensions, for a specified price (*Phipps v. McFarlane*, 3 Minn. 109, 116 [Gil. 61] 74 Am. Dec. 743)—were not contracts for the sale of goods, wares, and merchandise, so as to require them to be in writing. On the other hand, it has been held that a contract which, though nominally a bill of sale of lumber, discloses that the lumber was to be thereafter sawed from specified logs, and in such manner as the vendee in the bill of sale should direct (*Cain v. Weston*, 26 Wis. 100, 103); an agreement to take all the wood another would put on the line of a road that season, at the same price paid to him for wood theretofore (*Edwards v. Grand Trunk Ry. Co.*, 48 Me. 379, 380); a contract to sell all the broom corn which should be raised on 25 acres, at the rate of \$60 per ton (*Bowman v. Conn*, 8 Ind. 58, 59); a contract to sell and deliver cider at a future time, which the seller is to procure from farmers, and refine to fit for market (*Seymour v. Davis*, 4 N. Y. Super. Ct. [2 Sandf.] 239); a contract for the purchase of candles at 21 cents a pound, to be made and delivered (*Gardner v. Joy*, 50 Mass. [9 Metc.] 177, 179); a contract for the sale of a quantity of wheat, part of which was threshed and in the bin, the other being unthreshed, the vendor agreeing to get ready and deliver the same, together with the wheat in the granary (*Downs v. Ross*, 23 Wend. 270, 275); a sale of flour by a miller, although not yet ground when the bargain was made (*Garbutt v. Watson*, 5 Barn. & Ald. 613); an agreement for the sale of a chariot not yet manufactured (*Towers v. Osborne*, 1 Strange, 506); an agreement for the sale of timber, the trees from which it was to be cut then standing on the vendor's land (*Smith v. Surman*, 9 Barn. & C. 561)—were contracts for the sale of goods, wares, and merchandise, and void unless in writing. See, also, *Smith v. N. Y. Cent. Ry. Co.*, 43 N. Y. (4 Keyes) 180, 200.

**As conveyance.**

See "Conveyance."



**License distinguished.**

From contract for sale of land, see "License."

**Option distinguished.**

The distinction between a "contract of sale or lease" and an "option" is broad and plain. An option is an unaccepted offer. It states the terms and conditions on which the owner is willing to sell or lease his land, if the holder elects to accept them within the time limited. If the holder does so elect, he must give notice to the other party, and the accepted offer thereupon becomes a valid and binding contract. If an acceptance is not made within the time fixed, the owner is no longer bound by his offer, and the option is at an end. A contract of sale or lease fixes definitely all the relative rights and obligations of both parties at the time of its execution. The offer and the acceptance are concurrent, since the minds of the contracting parties meet in the terms of the agreement. *McMillan v. Philadelphia Co.*, 28 Atl. 220, 159 Pa. 142.

**CONTRACT OF SURETYSHIP.**

See "Suretyship."

**CONTRACT PRICE OR VALUE.**

Gen. St. 1878, c. 90, relating to mechanics' liens, and providing that every mechanic or other person performing any work or furnishing materials for the erection of any building shall have a lien "for the value or contract price" of such labor and material, could not mean that the owner's contract carried with it an implied consent that the contractor should bind him to pay whatever he might promise for labor and materials, or more than a reasonable price or value. The words must be limited to meaning the reasonable value of the labor or materials furnished. *Laird v. Moonan*, 20 N. W. 354, 456, 32 Minn. 358.

**CONTRACT RATE.**

Where a statute provides for 6 per cent. interest, but that the rate may be made 8 per cent. by contract, the former is generally termed the "legal rate," and the latter the "contract rate." *Arbuthnot v. Brookfield Loan & Bldg. Ass'n*, 72 S. W. 132, 134, 98 Mo. App. 382.

**CONTRACT SYSTEM.**

The "contract system" of labor in prisons is a system whereby the profits of the labor of convicts were secured by contractors or private parties. *People v. Hawkins*, 51 N. E. 257, 260, 157 N. Y. 1, 42 L. R. A. 490, 48 Am. St. Rep. 736.

**CONTRACT WITH THE PUBLIC.**

The expression "contract with the public," as relating to such obligations as were imposed on a canal and navigation company by statute, was metaphorical. The obligation in these cases is a duty rather than a contract. *Reg. v. York & N. M. Ry. Co.*, 1 EL & BL 178, 197.

**CONTRACTING.**

"Contracting," as used in Gen. St. 1878, c. 82, § 76, relating to liens on logs and timber, and providing that the act shall not inure to the benefit of any person interested in "contracting, cutting, hauling, banking, or driving logs by the thousand," should be read "contracting for." *King v. Kelly*, 25 Minn. 522, 524.

**CONTRACTING MARRIAGE.**

"Contracting marriage," as used in How. St. § 5209, declaring males of 18 and females of 16 legally capable of contracting marriage, means the actual form of the marriage relation, and does not empower infants to make executory contracts of marriage that will sustain a breach of promise suit. *Frost v. Vought*, 37 Mich. 65, 66.

**CONTRACTOR.**

See "General Contractor"; "Independent Contractor"; "Original Contractor"; "Subcontractor."

A person who enters a charitable hospital is not a contractor; neither is the hospital a contractor with that person. The person who enters is a mere licensee, and like a guest who enters one's house, and must take the service as he finds it. No person who accepts the bounty of a charitable corporation, or accepts the bounty of any charity, can maintain a suit on account of the method of the administration of the bounty which is accepted. This is putting into the law the homely but expressive phrase, "You must not look a gift horse in the mouth." It is absolutely inconsistent with the underlying idea of charity, as recognized by the law, to hold that the same rule applies to a person employed for compensation to do a certain service as to the distribution of charity, and a patient in a public hospital chartered as a charitable corporation cannot recover from such corporation for injuries resulting from the negligence of a nurse employed therein. *Powers v. Massachusetts Homeopathic Hospital (U. S.)* 101 Fed. 896, 898.

"Although in a general sense every one who enters into a contract may be called a 'contractor,' yet that word has come to be used with special reference to a person who, in pursuit of an independent business, under-

takes to do specific jobs of work for other persons without submitting himself to their control with respect to all petty details of the work." *McCarthy v. Second Parish in Town of Portland*, 71 Me. 318, 322, 36 Am. Rep. 320 (citing S. & R. on Neg. § 76); *Knoxville Iron Co. v. Dobson*, 75 Tenn. (7 Lea) 367, 373; *Carey-Lombard Lumber Co. v. Jones* (Ill.) 58 N. E. 347, 349. The true test, as it seems to us, by which to determine whether one who renders services to another does so as a "contractor" or not, is to ascertain whether he renders the services in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is to be accomplished. One who contracts to do a specific piece of work, furnishing his own assistants, and executing the work, either entirely according to his own ideas or in accordance with a plan previously given him by the person for whom the work is done, without being subject to the latter with respect to the details of the work, is clearly a "contractor," and not a servant. *McCarthy v. Second Parish in Town of Portland*, 71 Me. 318, 322, 36 Am. Dec. 320 (citing S. & R. on Neg. § 77); *Knoxville Iron Co. v. Dobson*, 75 Tenn. (7 Lea) 367, 373.

Within a materialman's lien statute providing that every contractor, builder, or person having in charge, either in whole or in part, any building or improvement, shall be held to be the agent of the owner for the purposes of this chapter the term "contractor" is ordinarily and prima facie understood to be descriptive of a person having charge or superintendence of the construction work. *Pacific Rolling-Mill Co. v. Hamilton* (U. S.) 61 Fed. 476, 477.

A contractor is one who contracts or covenants, either with a public body or private parties, to construct works or erect buildings at a certain price or rate. *Brown v. German-American Title & Trust Co.*, 34 Atl. 335, 343, 174 Pa. 443 (citing Cent. Dict.).

Within Laws 1872, c. 136, relating to a recovery for services rendered by "contractors" aiding in the construction of a railroad, a bridge builder who worked on one of the railroad's bridges, upon estimates made by the companies' agents as the work progressed, is a "contractor." *Atchison, T. & S. F. R. R. Co. v. McConnell*, 25 Kan. 370, 372.

The term "contractor," as well as the term "mechanic," in a suit giving liens to mechanics and contractors, applies to a carpenter building a storehouse under a contract with the owner of real estate, and therefore he is entitled to a lien in either capacity. *Thrumman v. Pettitt*, 72 Ga. 38, 39.

A contractor who does not perform any work or labor personally does not come within the statute providing a lien for "every

mechanic, builder, artisan, workman, laborer or other person who shall do or perform any work or labor" on a railroad. *Little Rock, H. L. & T. Ry. Co. v. Spencer*, 65 Ark. 183, 194, 47 S. W. 196, 197, 42 L. R. A. 334 (citing Sand. & H. Dig. § 6521).

"It is not altogether easy to give an accurate definition of the word 'contractor' as it is used in the reports, and as we shall use it hereafter. \* \* \* The true test, as it seems to us, by which to determine whether one who renders service to another does so as a contractor or not, is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished." *Shearman & Redfield on Negligence*, §§ 76, 77. A person employed by the agent of the owner of a street railway at a stipulated sum per month to run a car and furnish a driver, the car and the road being controlled and the work directed by the agent, is not an independent contractor, and the owner is liable for the negligence of such employé's servants. *Jensen v. Barbour*, 15 Mont. 582, 591, 39 Pac. 906, 909.

Under Pub. Acts 1891, No. 179, § 4, providing that a contractor shall furnish the owner a statement of laborers and materialmen under his contract, with the amounts due each, before he shall have a right of action to enforce a mechanic's lien therefor, etc., one whose lien statement shows the furnishing of a large number of articles and materials entering into the construction of parts of a building, and the construction of such parts by his skilled workmen, is a "contractor." *Sterner v. Haas*, 108 Mich. 488, 66 N. W. 348.

Any person rendering personal services for wages or otherwise, or by the use of machinery, teams, or otherwise, shall be deemed a "contractor" or "subcontractor" of either degree, as the case may be, as well as any person doing work by the job or piece. *Mills' Ann. St. Colo.* 1891, § 2867.

The word "contractor," as used in the mechanic's lien laws, means one who by contract or agreement, express or implied, with the owner or the one who acts for the owner, plans or superintends the structure or other improvement, or any part thereof, or furnishes labor, skill, or superintendence thereto, or supplies or hauls materials reasonably necessary for and actually used therein, or any or all of them, whether as an architect, superintendent, builder, or materialman. *P. & L. Dig. Laws Pa.* 1897, vol. 4, col. 1150, § 3.

The word "contractor," as used in an act relating to municipal liens, means the person or persons who, under contract with the legal plaintiff, performed the work for

which the lien is given. P. & L. Dig. Laws Pa. 1897, vol. 4, col. 1269, § 55.

Whoever shall do work or furnish materials by contract, express or implied, with the owner as provided in the mechanic's lien law, shall be deemed an original contractor, and all other persons doing work or furnishing materials shall be deemed subcontractors. Rev. St. Utah, 1898, § 1383.

**As agent, laborer, mechanic, etc.**

See "Agent"; "Employé"; "Laborer"; "Mechanic"; "Trader — Tradesman"; "Workman."

As a business, see "Business."

As an occupation, see "Occupation (Vocation)."

**Materialman as.**

The term "contractor," as used in a mechanic's lien statute authorizing liens in favor of contractors performing labor, etc., in building a house, and in favor of materialmen, but distinguishing between the two as to the matter of remedy, only includes persons who work on the house, and does not include those furnishing materials without performing labor thereon, though the latter may be "contractors" in the general sense of the term. *Mulrine v. Washington Lodge*, No. 5, I. O. O. F. (Del.) 6 *Houst.* 350, 353.

The term "contractor," in the mechanic's lien law authorizing liens for services or materials performed or furnished under a contract with the owner or with a contractor, does not include one who merely furnishes lumber or other materials toward the erection of a building. There is no privity between him and the owner through which those from whom he may purchase the materials may subject the building to a lien. *Brown v. Cowan*, 1 *Atl.* 520, 521, 110 *Pa.* 588.

A person who has a contract of sale and delivery of goods to a street railway company is not a "contractor" within the statute giving contractors a lien on the structure. *Pacific Rolling-Mills Co. v. James Street Const. Co.* (U. S.) 68 *Fed.* 966, 971, 16 *C. C.* A. 68.

One who agrees to sell machinery, to be delivered free on board cars at his factory and set up by the buyer, is a materialman, and not a "contractor" for the furnishing thereof, so as to entitle the person from whom he subsequently buys the machinery, and who delivers it to him, to a mechanic's lien as a subcontractor under *Burns'* Rev. St. 1894, § 7255, the lien in favor of a materialman not applying to a person from whom the materialman buys the machinery furnished by him, where the materialman is not authorized by the owner to purchase it or place it in the factory, and does not place it therein. *Caulfield v. Polk*, 46 *N. E.* 932, 933, 17 *Ind. App.* 429.

**Subcontractors.**

A "contractor," within the meaning of the Kentucky lien act, is one who does work or furnishes material for the owner, and upon a contract with the owner for the payment of the contract price. Thus, where a railroad let the contract for building its road to a contracting company, which let out a portion of said contract to a construction company, resolutions of the railroad company which did not obligate the railroad company to pay the construction company for the work and materials which it was to do and furnish, and for the lien claims which it was to purchase and hold, did not constitute the construction company a contractor in relation to the railroad company. *Richmond & I. Const. Co. v. Richmond, N. I. & B. R. Co.* (U. S.) 68 *Fed.* 105, 109, 15 *C. C. A.* 289, 34 *L. R. A.* 625.

The term "contractor," in the mechanic's lien law, which provides that a person who contracts with the owner of lands to furnish material, machinery, etc., to be used in erecting buildings on the land or improving the same, shall be known as a "contractor," includes one who contracts to furnish an engine to be placed in a lighting plant constructed by a private individual on his own land, to be conveyed to the city when the plant is completed. *City of Salem v. Lane & Bodley Co.*, 60 *N. E.* 37, 39, 189 *Ill.* 593, 82 *Am. St. Rep.* 481.

A "contractor" is one who agrees to do anything for another; and this general term has been held to include either those who have made contracts directly with the owner of the premises or those who have contracted with the contractor. *Lester v. Houston*, 8 *S. E.* 366, 369, 101 *N. C.* 605.

"The word 'contractor,' when standing alone or not restrained by the context or particular words, may mean a subcontractor, or any person remotely engaged under contract and doing the work, as well as the original contractor. Such a person is a contractor as well as the original contractor. This has been frequently so decided, and such is the generic or more comprehensive meaning of the term." *Mundt v. Sheboygan & F. du L. R. Co.*, 31 *Wis.* 451, 457.

The term "contractor," as used in a bond given by a railroad contractor conditioned to pay all laborers, mechanics, and materialmen, and persons who supply such contractor with provisions or goods of any kind, will not be construed to include subcontractors. *Wells v. Mehl*, 25 *Kan.* 205, 206.

Act April 9, 1872, pl. 47, provides that those employed by a contractor in any work on an oil well shall be entitled to a lien for their services. Held, that the word "contractor" meant only persons employed by the owner or lessees of the well, and did not embrace those who undertake to perform some

special service in the construction of the well or opening of the same. Appeal of Gibbs & Sterrett Mfg. Co., 100 Pa. 528, 531.

Within Laws 1850, c. 140, § 12, providing that, as often as any contractor for the construction of any part of a railroad which is in progress of construction shall be indebted to any laborer for 30 or less number of days' labor performed in constructing the road, the laborer may fix liability by giving certain notice, the term "contractor" means any one who may enter into a contract to construct a portion of a railroad, though he may not have entered into a contract with the company, though the statute does not use the term "subcontractor." Kent v. New York Cent. R. Co., 12 N. Y. (2 Kern.) 628, 630. In other words, the word "contractors" is to be understood to embrace all who have employed laborers, whether they be original contractors or subcontractors. Warner v. Hudson R. Co. (N. Y.) 5 How. Prac. 454, 456.

#### CONTRACTOR'S LIEN.

A contractor's lien, per se, is one that arises by operation of law independently of the expressed terms of a contract. It springs out of the obligation to pay for the stipulated labor and the promised materials when furnished, provided the contractor shall give the notice required by statute. McMurray v. Brown, 91 U. S. 286, 23 L. Ed. 321. Thus, a resolution of a railroad company providing that a construction company which was a subcontractor should have a contractor's lien upon the railroad for work done and material furnished and claims purchased, implies simply a lien by contract, and not a contractor's lien. Richmond & J. Const. Co. v. Richmond, N. I. & R. R. Co. (U. S.) 68 Fed. 105, 110, 15 C. C. A. 289, 34 L. R. A. 625.

#### CONTRARY TO EVIDENCE; CONTRARY TO LAW; CONTRARY TO STATUTE.

See pages 1547, 1548, 1549, post.

#### CONTRIBUTE—CONTRIBUTION.

In a statute authorizing a religious body to take and hold subscriptions or contributions in money or otherwise, only a power to take by gift is given, and not power to take by will. Brown v. Tompkins, 49 Md. 423, 431.

"Contribution is the act of giving to a common stock, or in common with others; that which is given to a common stock or purpose." Parks' Adm'r v. American Home Missionary Soc., 20 Atl. 107, 109, 62 Vt. 19.

"Contribute," as used in an agreement by which the parties recited that they subscribed and contributed, implied that the donations of each were parts, the whole of which was to form a common fund. Murray v. McHugh, 63 Mass. (9 Cush.) 158, 166.

"Contributed," as used in Rev. St. 1893, § 1169, providing that any person who shall receive bodily injury or damage to his person or property from a defect of the highway, causeway, or bridge may recover, in an action against a county, the amount of actual damages sustained by him, provided such person has not in any way brought about such injury or damage by his own act or negligently contributed thereto, necessarily implies that there was another cause to which the plaintiff's negligence might contribute, and though plaintiff's negligence might not alone be sufficient to cause the injury, yet if it contributed to such other cause—for example, the defendant's negligence—then the plaintiff could not, under the second contingency, recover; and in an action against a county for injuries received on a highway it was error for the judge to instruct the jury that, if "the injury resulted immediately from the defendant's negligence, then the defendant would be held liable in damages, even though to a certain degree the plaintiff has been negligent." McFail v. Barnwell County, 35 S. E. 562, 567, 57 S. C. 294.

The word "contribute" means to give to a common stock or for a common purpose; to give or supply a part; to lend assistance; to have a share in any act or effect. Webst. Int. Dict. It is in the latter sense that it and the word "contributory" are used when applied to the negligence of a plaintiff; and necessarily contributory or assisting negligence can only be the partial, and not the entire, cause of an injury. Citizens' R. Co. v. Creasy (Tex.) 27 S. W. 945.

#### As dues.

In the by-laws of an insurance company providing that contributions of the members should not be less than a certain sum per year, and in a subsequent section providing that every member shall pay his monthly dues on or before a certain date, "contributions" will be held to mean the same thing as the word "dues." Mueller v. Grand Grove, U. A. O. D., 72 N. W. 48, 50, 69 Minn. 236.

#### Loan implied.

"Contribute," as used in an agreement by the manager of a certain business to contribute certain money to the business in consideration of a percentage of the profits, which were guaranteed to amount to a certain sum annually, does not mean "loan," so as to entitle the manager to recover the same on severance of his connection with the business. Mack v. Wurmster, 36 S. W. 221, 223, 135 Mo. 58.

#### As substantial assistance.

Under a statute providing that no person shall be permitted to vote at a meeting of an incorporated church unless he shall have contributed to the support of such church is meant that he must contribute to its support according to the usages and customs thereof. This undoubtedly means substantial and vita-

aid and support. Personal attendance and countenance might in one sense contribute to the support of such an organization, but this is not the contribution intended by this statute. The statute means the necessary material support, without which the organization cannot exercise its ordinary functions and perform its customary and appropriate duties and ministrations. It means the parting with, and contribution of, a portion of one's worldly substance, in the usual and customary way, to be used in meeting and defraying the expenses incurred by the church in the support of public and divine worship. Merely attending as a worshiper, or taking a leading or a subordinate part in the exercises, or rendering some special gratuitous service, will not answer this requirement of the statute. If the service rendered, however, is such as is usually and customarily hired and paid for by such organizations, and is by some understanding or agreement, express or implied, rendered as an equivalent or in lieu of a contribution in money or property, such service would undoubtedly be a contribution to the support of the church, within the sense and meaning of the statute. The test is, does the contribution, whatever it may be, go immediately and directly to the support of the public worship maintained by the church? In this view, contributions made, not for the support and maintenance of the religious incorporation, but for the support or promotion of some other object or enterprise in which the church may be engaged, however valuable or praiseworthy, as Sunday schools, missions, and the like, will not be sufficient. *People v. Tuthill*, 81 N. Y. 550, 561.

#### CONTRIBUTE TO INTOXICATION.

Under St. 1872, c. 63, § 4, providing that "every wife, child, parent, etc., or other person who shall be injured in person, property, etc., by any intoxicated person, or by reason of the intoxication of any person, shall have a right of action \* \* \* against any person \* \* \* who shall, by selling or giving any intoxicating liquors, \* \* \* have caused or contributed to the intoxication of the person by whom an injury has been done," refers to the direct and immediate result of the selling or giving the intoxicating liquors by which the intoxication was caused. The liability attaches to the person selling or giving, and to no one else, and the selling or giving must be to the person intoxicated, by whom the injury to the person or property was done, and must cause his intoxication. *Bush v. Murray*, 66 Me. 472.

#### CONTRIBUTING CAUSE.

A contributing cause of an accident "is one which under the same circumstances would always be an element aiding in the production of the accident." *Broschart v.*

*Tuttle*, 21 Atl. 925, 929, 59 Conn. 1, 11 L. R. A. 33.

In commenting on an instruction that, if the person's negligent act solely contributed to bring about the injury of which he complained, he cannot recover, the court say: "The criticism is in the use of the word 'solely,' and the contention is that the court should have told the jury that, if both plaintiff and the company were negligent, the plaintiff could not recover. To give to the word 'contribute' its legal signification would make the charge unintelligible, as one act cannot contribute solely to effect a given result, but only in connection with some other act, and there can be no sole contributory cause of an accident. We may assume, therefore, that the trial judge meant, if the negligent act of the plaintiff produced or was the sole cause of the injury, she could not recover." *Memphis St. R. Co. v. Shaw*, 75 S. W. 713, 714, 110 Tenn. 467.

#### CONTRIBUTING MEMBER.

In the certificate of membership of a mutual benefit association declaring that the member, having complied with the conditions, is entitled to the benefit of said association in the sum of one dollar for each "contributing member," such term meant members in good and regular standing who had not forfeited their membership. *Neskern v. Northwestern Endowment Ass'n*, 15 N. W. 683, 684, 30 Minn. 406.

#### CONTRIBUTING WRONG.

A wrongdoer is not necessarily an outlaw, but may justly complain of wanton and malicious mischief. Therefore, where one was shot and killed while attempting to rob a chicken roost, his wrong in so doing did not constitute contributing negligence or wrong, so as to release the person shooting from liability therefor. *Marks v. Borum*, 60 Tenn. (1 Baxt.) 87, 93, 25 Am. Rep. 764.

#### CONTRIBUTION (In Practice).

See "Voluntary Contributions."

"Contribution" is defined as a payment made by each, or by any, of several having a common interest of liability of his share in the loss suffered, or in the money necessarily paid by one of the parties in behalf of the others. It is well settled that for the purposes of an action to recover the proportion of the debt, whether at law or in equity, the right of one is regarded as maturing when he has paid more than his share of the debt, and until that time there is neither equitable obligation nor implied contract to make contribution. *Canosia Tp. v. Grand Lake Tp.*, 83 N. W. 346, 347, 80 Minn. 357.

The right and duty of contribution is founded in the doctrine of equity. The doc

trine of contribution is not founded on contract, but comes from the application of the principles of equity to the condition in which the parties to the contract are found in consequence of some of them, as between themselves, having done more than their share in performing the common obligation. That principle was first recognized and enforced in courts of equity, and it was only after it had been long and firmly established in those courts that the courts of law undertook to enforce it. *Dysart v. Crow*, 70 S. W. 689, 691, 170 Mo. 275.

The doctrine of contribution rests on the principle that, when the parties stand in equal *juri*, the law requires equality, which is equity, and one of them shall not be obliged to bear the burden in ease of the rest. It is not founded on contract, but on the principle that equality of burden as to common right is equity, and the obligation to contribute arises from the nature of the relation between the parties. The claim for contribution has its foundation in the clearest principles of natural justice and in morals, since no one ought to profit by another's loss where he himself has incurred a like liability; and it seems but just that, where all are equally bound and are equally released, all should contribute in proportion toward a benefit obtained by all. *Aspinwall v. Sacchi*, 57 N. Y. 331, 336; *Campbell v. Mesler* (N. Y.) 4 Johns. Ch. 334, 342, 8 Am. Dec. 570. The right of contribution lies where there are tenants in common, who jointly hold a mill and take the profits only, and the mill falls into decay, and one of them will not repair it again. *Campbell v. Mesler* (N. Y.) 4 Johns. Ch. 334, 337, 8 Am. Dec. 570.

It is a doctrine well established that, when land is charged with a burden, the charge ought to be equal, and one part ought not to bear more than its due proportion; and equity will preserve this equality by compelling the owner of each part to a just contribution. *Stevens v. Cooper* (N. Y.) 1 Johns. Ch. 425, 431, 7 Am. Dec. 499.

Contribution is the division which is made among the heirs of the succession of the debts with which the succession is charged, according to the proportion which each is bound to bear. *Civ. Code La.* 1900, art. 1420.

Contribution is said of the partition by which the creditors of an insolvent debtor divide among themselves the proceeds of his property, proportionably to the amount of their respective credits. *Civ. Code La.* 1900, art. 3556, subd. 9.

The mere paying of money one hour into a firm towards its capital, and receiving it back the next by a check of the firm, cannot be said to be a "contribution" to the capital stock of a limited partnership in any legitimate sense of the word. To satisfy the statute, the special partner must pay his money

into the common stock, and leave it there at the risk of the business. On payment the devotion must be actual and absolute, not apparent and illusory. *Moorhead v. Seymour*, 77 N. Y. Supp. 1050, 1059.

#### **Indemnity distinguished.**

The doctrine of contribution is not founded on contract, but on the principle that equality of burden as to a common right is equity; that wherever there is a common right the burden is also common. Indemnity, on the contrary, springs from contract, express or implied, and in a general way may be defined as the obligation or duty resting on one person to make good any loss or damage which another has incurred while acting at his request or for his benefit. *Vandiver v. Pollak*, 19 South. 180, 181, 107 Ala. 547, 54 Am. St. Rep. 118.

#### **Between joint tortfeasors.**

Contribution is allowed only between defendants standing in equal *juri*; and there is no contribution, either at law or in equity, between joint trespassers. *Peck v. Ellis* (N. Y.) 2 Johns. Ch. 131, 136.

Contribution is the sharing of a loss or payment among several; but among tortfeasors who are knowingly such there can be no contribution. This rule applies to persons directly participating in or authorizing any willful trespass or any wrongful acts, or acts obviously of an unlawful character; but the rule is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act. *The Hudson* (U. S.) 15 Fed. 162, 167.

Contribution is the sharing of a loss or payment among several. But there can be no contribution between trespassers or wrongdoers. The exception is where the act is not clearly illegal in itself. Where a tort is a known, meditated wrong there can be no contribution, but where the party is acting under the supposition of innocence, and the tort is one by construction or inference of law, there may be contribution. *Bailey v. Bussing*, 28 Conn. 455, 460.

Wrongdoers are not entitled to claim contribution against each other, although the party injured obtains full satisfaction for his damages from a part of them only. *Miller v. Fenton* (N. Y.) 11 Paige, 18, 20.

Contribution is bottomed and fixed on general principles of natural justice, and does not spring from contract. *Dering v. Earl of Winchelsea*, 1 Cox, 318. Where a traveler, in passing over a bridge which was maintainable by two counties, was injured by its breaking down, and recovered damages in an action for negligence against one of the counties, the other county was liable for contribution. The rule that there cannot be contribution between wrongdoers is confined

to cases where the plaintiff must be presumed to know that he was doing an unlawful act. *Armstrong County v. Clarion County*, 66 Pa. (16 P. F. Smith) 218, 222, 5 Am. Rep. 368.

#### Between sureties.

"Contribution," as the term is applied to sureties, means that all sureties must contribute to the payment of the obligation in case of a default of a principal. "The right of contribution among sureties is founded, not in the contract of suretyship, but is the result of a general principle of equity, which equalizes burdens and benefits. The common law has adopted and given effect to this equitable principle, on which a surety is entitled to contribution from his co-surety. This equitable obligation to contribute having been established, the law raises an implied assumpsit on the part of the co-surety to pay his share of the loss, resulting from a concurrent liability to pay a common debt. This jurisdiction by an action at law is therefore resorted to when the case is not complicated, and the more extensive and efficient aid of a court of equity is thus rendered unnecessary." *Russel v. Fallor*, 1 Ohio St. 327, 329, 59 Am. Dec. 631.

The right of one security to call upon his co-security for contribution, like the right of all the securities to call upon the principal for indemnity, arises from the principle of equity growing out of the relation which the parties have assumed toward each other. The equity springs up at the time of entering into that relation, and is fully consummated when the security is compelled to pay the debt. *Wayland v. Tucker* (Va.) 4 Grat. 267, 268, 50 Am. Dec. 78.

Sureties have the right to claim contribution from each other in proportion to the amount paid by each upon the common debt, and this right is the result, not of any implied contract between the parties, but of an acknowledged principle or natural justice which requires that those who voluntarily assume a common burden should bear it in equal proportions. *Burge*, Sur. 384; *Story*, Eq. § 493. It is upon this principle that sureties are entitled to the benefit of all securities which have been taken by any one of them to indemnify himself against the principal debt; but, if one surety should obtain indemnity for a consideration paid by him, the other could not claim the benefit of such indemnity without paying his proportion of the consideration. *White v. Banks*, 21 Ala. 705, 712, 56 Am. Dec. 283.

The liability of co-sureties for contribution originally grew out of a rule of equity which at length ripened into a principle of law, so that at this day courts of law and chancery entertain concurrent jurisdiction in giving a remedy to the surety paying the

debt. *Hickman v. McCurdy*, 30 Ky. (7 J. J. Marsh.) 555, 559.

#### CONTRIBUTION PLAN.

A "contribution plan," as used in life insurance, is a plan by which the policy holder is allowed as a dividend the amount contributed by his policy to the surplus. *Continental Life Ins. Co. v. Currier*, 4 Atl. 866, 58 Vt. 229.

#### CONTRIBUTORY INFRINGEMENT.

Contributory infringement is the intentional aiding of one person by another in the unlawful making or selling of a patented invention. *Thomson-Houston Electric Co. v. Kelsey Electric Railway Specialty Co.* (U. S.) 72 Fed. 1016, 1017. And this is usually done by making or selling a part of the patented invention with the intent and purpose of so aiding. The essence of contributory infringement lies in concerting or planning with others in an unlawful invasion of the patentee's rights. A contributory infringer necessarily only makes or sells a part of the patented invention, so that contributory infringement cannot be predicated on the rebuilding or replacing of the parts of a patented machine by a purchaser for his own use. *Goodyear Shoe Mach. Co. v. Jackson* (U. S.) 112 Fed. 146, 148, 50 C. C. A. 159, 55 L. R. A. 692.

One who makes and sells an element of a combination covered by a patent with the intention and for the purpose of bringing about its use in such a combination is guilty of contributory infringement, and equally liable to the patentee with him who in fact organizes the complete combination. *Thomson-Houston Electric Co. v. Ohio Brass Co.* (U. S.) 80 Fed. 712, 721, 26 C. C. A. 107.

A person who sells, to a licensee of a patent on a machine for setting lacing studs, studs of his own manufacture, knowing that they are to be used in the patented machine in violation of the license, and intending that they shall be so used, is guilty of contributory infringement. *Tubular Rivet & Stud Co. v. O'Brien* (U. S.) 93 Fed. 200, 203.

#### CONTRIBUTORY NEGLIGENCE.

See "Imputable Contributory Negligence."

The rule of contributory negligence is based not so much upon considerations of what is just to the defendant as upon those of public policy, which require that every one shall take reasonable care of his own person and property; and, upon the fundamental principle that both parties are at fault, the law, as a general rule, will withhold its aid, and leave them to the consequences of their own wrong. *St. Louis &*

*S. F. Ry. Co. v. Herrin*, 26 S. W. 425, 427, 6 Tex. Civ. App. 718 (citing *Houston & T. C. R. Co. v. Smith*, 52 Tex. 184).

Contributory negligence is nothing more or less than negligence on the part of a person injured, and the laws applicable to negligence of a defendant are applicable thereto. *Pitman v. City of El Reno*, 37 Pac. 851, 853, 2 Okl. 414.

The rule that there is no fixed standard in the law by which a court is enabled to say arbitrarily in every case where the line must be drawn between negligence and ordinary care; that what may be deemed ordinary care in one case may under different circumstances be gross negligence—applies equally to the question of contributory negligence, as there is no more of an absolute standard of ordinary care and diligence by which the conduct of the plaintiff is to be judged as a contributing cause to its injury than in the case of the negligence of the defendant. *Tacoma Ry. Co. v. Hays* (U. S.) 110 Fed. 496, 499, 49 C. C. A. 115.

The general statement that contributory negligence is such negligence on the part of plaintiff as helped to produce the injuries complained of includes the idea of both acts and omissions, and is not a misstatement of the law. *Baltimore & O. S. W. R. Co. v. Young*, 54 N. E. 791, 793, 153 Ind. 163.

Contributory negligence that will bar a recovery for injury by the plaintiff is such negligence as amounts to an absence of ordinary care on the part of plaintiff. *Johnson v. International & G. N. R. Co.*, 57 S. W. 869, 870, 24 Tex. Civ. App. 148; *Dell v. Phillips Glass Co.*, 82 Atl. 601, 602, 169 Pa. 549.

The "contributory negligence" which will prevent a recovery is nothing more than the absence of proper care—such care as a person of ordinary prudence would exercise under similar circumstances. *Fowler v. Randall*, 73 S. W. 931, 933, 99 Mo. App. 407 (citing *Barton v. St. Louis & I. M. R. Co.*, 52 Mo. 253, 14 Am. Rep. 418).

Negligence has been defined to be absence of care according to the circumstances, and that applies to negligence on the part of the defendant as well as to contributory negligence on the part of plaintiff. *Stokes v. Ralpho Tp.*, 40 Atl. 958, 961, 187 Pa. 333.

#### **Assumption of risk distinguished.**

An assumption of risk is a matter of contract. Contributory negligence is a question of conduct. If a servant would be defeated of a right of recovery for an injury by the rule of assumed risk, it would be because he agreed, long before the accident happened, that he would assume the very risk from which his injury arose. If he were to be defeated by the rule of contributory negligence, it would be because his conduct at the time of the accident, and under all the at-

tendant circumstances, fell short of ordinary care. If the one circumstance of the employé's knowledge of the employer's failure to provide the statutory safeguards were held, as a matter of law, always to overcome the other circumstances characterizing the employé's conduct at the time of the accident, assumption of risk would be successfully masquerading in the guise of contributory negligence. If assumption of risk is the issue, knowledge of defective conditions and acquiescence therein are fatal. If contributory negligence is the issue, knowledge of defective conditions and acquiescence therein may be fatal or may not be, depending upon whether a person of ordinary prudence, under all the circumstances, would have done what the injured person did. If the risk is so great and immediately threatening that a person of ordinary prudence, under all the circumstances, would not take it, contributory negligence is established. *D. H. Davis Coal Co. v. Pollard*, 62 N. E. 492, 497, 158 Ind. 607.

The doctrine of "assumption of risk" by a servant is that it is a term of the contract of employment, expressed or implied. Assumption of risk in such cases is the acquiescence of an ordinarily prudent man in a known danger—the risk which he assumes by contract. It is distinguished from contributory negligence, which is that action or nonaction in regard to personal safety by one who, treating the known as a condition, acts with respect to it without due care of its consequences. Thus, in *Hesse v. Columbus S. & H. R. Co.*, 58 Ohio St. 167, 169, 50 N. E. 355, it is said that "acquiescence with knowledge is not synonymous with contributory negligence. One having full knowledge of defects in machinery with which he is employed may yet use the utmost care to avert the danger which they threaten." Assumption of risk and contributory negligence approximate where danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom. But where the danger, though present and appreciated, is one which many men are in the habit of assuming, and which prudent men who must earn a living are willing to assume for extra compensation, one who assumes the risk cannot be said to be guilty of contributory negligence, if, having in view the risk of danger assumed, he uses care reasonably commensurate with the risk to avoid injurious consequences. One who does not use such care, and who by reason thereof suffers such injury, is guilty of contributory negligence. *Narramore v. Cleveland, C., C. & St. L. Ry. Co.* (U. S.) 96 Fed. 298, 304, 37 C. C. A. 499, 48 L. R. A. 68.

Contributory negligence rests in the law of torts as applied to negligence, and, when such defense is established, the plaintiff's action is defeated, not because of any agreement, express or implied, but because his own



misconduct was the proximate cause of the injury. *Bodie v. Charleston & W. C. Ry. Co.*, 61 S. C. 478, 39 S. E. 715. The defenses of assumption of risk and contributory negligence are so similar that they may fit into each other. Nearly every case of contributory negligence on the part of an employé involves, in a general sense, some assumption of risk, because, in order to be guilty of contributory negligence, there must be the risk of apparent danger. *Barksdale v. Charleston & W. C. Ry. Co.*, 44 S. E. 743, 745, 66 S. C. 204.

Contributory negligence and assumption of risk are entirely different, although the two questions may arise under the facts of the same case. Every person suing for a personal injury must show that he was in the exercise of ordinary care and caution for his own safety, so that the question of contributory negligence may arise in every case. But an employé may have assumed a risk by virtue of his employment, or by continuing in such employment with knowledge of the defect and danger; and if he is injured thereby, although in the exercise of the highest degree of care and caution, and without any negligence, yet he cannot recover. *Chicago & E. I. R. Co. v. Heerey*, 68 N. E. 74, 77, 203 Ill. 492.

Contributory negligence implies the existence of negligence of an injured servant, co-operating with that of the master, and thus aiding in producing the injury. It is distinguished from the doctrine of assumed risk, which is that, if the servant, with knowledge of the defect in the master's premises and the danger and risk incident thereto, continues in the service of the master without proper notice to the latter, he assumes the risk incident to the service and growing out of the existence of the defect, and this without regard to the degree of care which he may exercise in the performance of his labor. *Texas & P. Ry. Co. v. Bryant*, 27 S. W. 825, 826, 8 Tex. Civ. App. 134.

Contributory negligence is a breach of the legal duty imposed by law upon the servant, however unwilling or protesting he may be; and it differs in this respect from assumption of risk, which is not a duty, but purely voluntary on the part of the servant. *Dempsey v. Sawyer*, 49 Atl. 1035, 1036, 95 Me. 295.

#### **As confession and avoidance.**

Contributory negligence on the part of the plaintiff necessarily implies negligence on the part of the defendant. It implies that the concurring negligence of the two parties caused the injury, and but for this concurrence it would not have occurred. Contributory negligence is therefore a plea of confession and avoidance; a defense which confesses and avoids the plaintiff's cause of action as stated in the complaint. *Watkins v. Southern Pac. R. Co.* (U. S.) 38 Fed. 711,

713, 4 L. R. A. 239; *Kentucky Cent. R. Co. v. Thomas' Adm'r*, 79 Ky. 160, 164, 42 Am. Rep. 208.

The term "contributory negligence," instead of implying such a denial of the material allegations in a complaint for damages caused by the negligence of the defendant as is made by pleading the general issue, implies just the contrary. The theory of this special defense is that the defendant was negligent, but that the negligence of the plaintiff conducted to the injury complained of. The defense is in the nature of a confession and avoidance. *Kansas City, M. & B. R. Co. v. Crocker*, 11 South. 262, 267, 95 Ala. 412; *McDonald v. Montgomery St. Ry.*, 20 South. 317-321, 110 Ala. 161, 176.

Contributory negligence is a defense which confesses and avoids the plaintiff's case. *McDonald v. International & G. N. R. Co.* (Tex.) 21 S. W. 774, 777.

Though a plea of contributory negligence is a plea of confession and avoidance, admitting the negligence on the part of defendant, and seeking to avoid liability therefor by alleging that plaintiff was guilty of negligence which contributed to his injury, yet under the Code, permitting a defendant to set up as many defenses, whether of law or of fact, as he may see fit, a defendant may plead a general denial and a plea of contributory negligence. *Leavenworth Light & Heating Co. v. Waller*, 70 Pac. 365, 366, 65 Kan. 514.

#### **Contributory act.**

Negligence implies something more than mere disobedience of the master's commands when injury results to the servant. It implies a disregard of proper care for one's safety. It is contributory negligence, not a contributory act, which defeats a recovery. *Skaarup v. Stover*, 9 N. Y. Supp. 92, 94, 56 Hun, 86.

#### **Contributing or proximate cause.**

"Contributory negligence," in its legal signification, is an act or omission on the part of a plaintiff amounting to a want of ordinary care, or concurring or co-operating with the negligent act of the defendant as a proximate cause or occasion of the injury complained of. To constitute contributory negligence there must be a want of ordinary care on the part of the plaintiff and a proximate connection between that and the injury. Perhaps, besides these two, there are no other necessary elements. *Plant Inv. Co. v. Cook* (U. S.) 74 Fed. 503, 505, 20 C. C. A. 625 (citing 1 Beach, *Contrib. Neg.* § 7); *Southern Bell Telephone & Telegraph Co. v. Watts* (U. S.) 66 Fed. 460, 466, 13 C. C. A. 579; *Heckman v. Evenson*, 73 N. W. 427, 429, 7 N. D. 173; *Wardlaw v. California R. Co.* (Cal.) 42 Pac. 1075, 1076; *Redmond v. Maitland*, 49 N. Y. Supp. 123, 130, 23 App. Div. 104; *Arthur v. City of Charleston*, 32 S. E.

1024, 1026, 46 W. Va. 88; *Thackston v. Port Royal & W. C. Ry. Co.*, 18 S. E. 177, 178, 40 S. C. 80; *Martin v. Texas & P. Ry. Co.*, 28 S. W. 1052, 1054, 87 Tex. 117; *Paris, M. & S. P. R. Co. v. Nesbitt (Tex.)* 38 S. W. 243, 244; *Texas & P. R. Co. v. Phillips (Tex.)* 37 S. W. 620, 622; *Galveston, H. & S. A. R. Co. v. Henning (Tex.)* 39 S. W. 302, 304; *St. Louis S. W. Ry. Co. of Texas v. Casseday*, 50 S. W. 125, 126, 92 Tex. 525; *International & G. N. R. Co. v. Anchonda (Tex.)* 75 S. W. 557, 559; *Paris, M. & S. P. R. Co. v. Nesbitt (Tex.)* 38 S. W. 243, 244; *Texas Cent. Ry. Co. v. Yarbrough (Tex.)* 74 S. W. 357, 358; *St. Louis, I. M. & S. Ry. Co. v. Rice*, 11 S. W. 699, 700, 51 Ark. 467, 4 L. R. A. 173; *Groves v. Louisville Ry. Co.*, 58 S. W. 508, 515, 109 Ky. 76, 52 L. R. A. 448; *Montgomery & E. R. Co. v. Chambers*, 79 Ala. 338, 344; *Montgomery Gaslight Co. v. Montgomery & E. Ry. Co.*, 5 South. 735, 737, 86 Ala. 372; *Wastl v. Montana Union Ry. Co.*, 61 Pac. 9, 15, 24 Mont. 159; *Schweinfurth v. Cleveland, C., C. & St. L. Ry. Co.*, 54 N. E. 89, 90, 60 Ohio St. 215; *St. Louis Nat. Stock Yards v. Godfrey*, 65 N. E. 90, 93, 198 Ill. 288; *Krenzer v. Pittsburg, C., C. & St. L. Ry. Co.*, 52 N. E. 220, 223, 151 Ind. 587, 68 Am. St. Rep. 252 (citing *Whart. Neg.* §§ 300, 322); *Ferris v. Hershheim*, 51 La. Ann. 178, 180, 24 South. 771.

Contributory negligence is a want of ordinary care upon the part of the person injured by the actionable negligence of another, combining and concurring with that negligence and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred. Contributory negligence must have in it the element of being a proximate cause—not a remote cause, but a proximate cause from which the accident or the injury, in whole or in part, directly and immediately resulted, and but for which, either by itself or by the presence of the negligence of the defendant, the injury would not have occurred. *Cooper v. Georgia, C. & N. Ry. Co.*, 39 S. E. 543, 545, 61 S. C. 345; *Id.*, 34 S. E. 16, 17, 56 S. C. 91; *Bodie v. Charleston & W. C. Ry. Co.*, 39 S. E. 715, 719, 61 S. C. 463; *Easler v. Southern Ry. Co.*, 37 S. E. 938, 941, 59 S. C. 311; *Bowen v. Southern Ry. Co.*, 36 S. E. 590, 592, 58 S. C. 222; *Emission v. Owyhee Ditch Co.*, 62 Pac. 13, 14, 37 Or. 577; *O'Brien v. McGlinchy*, 68 Me. 552, 557; *Moakler v. Willamette Val. Ry. Co.*, 22 Pac. 948, 949, 18 Or. 189, 6 L. R. A. 656, 17 Am. St. Rep. 717; *San Antonio & A. P. Ry. Co. v. Manning*, 50 S. W. 177, 178, 20 Tex. Civ. App. 504; *Zumwalt v. Kansas City Suburban Belt R. Co.*, 74 S. W. 1015, 1021, 175 Mo. 288 (citing *Montgomery Gaslight Co. v. Montgomery & E. Ry. Co.*, 86 Ala. 372, 5 South. 735; *Woodell v. West Virginia Imp. Co.*, 38 W. Va. 23, 17 S. E. 386). The test of contributory negligence is whether or not it contributed in any degree to produce

the injury complained of. *Little Rock & Ft. S. Ry. v. Miles*, 40 Ark. 298, 322, 48 Am. Rep. 10.

A failure to use ordinary care by the party injured, if the same contributed to the injury received, would make him guilty of contributory negligence, and be an absolute bar to the recovery of damages for such injuries. *Gulf, C. & S. F. Ry. Co. v. Shieder (Tex.)* 26 S. W. 509, 510. The term "contributory negligence" means the negligence of the party injured which contributed to the injury. *Jung v. City of Stevens Point*, 43 N. W. 513, 514, 74 Wis. 547. Contributory negligence is a want of care by the party injured through the negligence of another, which contributes to the injury. *Young v. Detroit, G. H. & M. Ry. Co.*, 23 N. W. 67, 69, 56 Mich. 430. "Contributory negligence" means a failure to exercise ordinary care for one's own safety, helping to cause his own injury. *Missouri, K. & T. Ry. Co. of Texas v. Lyons (Tex.)* 53 S. W. 96, 97.

By "contributory negligence" is meant such a want of reasonable care and caution on the part of the person injured as directly contributed to cause the injury, and without which such injury would not have occurred. *Fritz v. Western Union Tel. Co.*, 71 Pac. 209, 215, 25 Utah, 263.

"Contributory negligence" means the failure to observe that degree of care which ordinarily careful and prudent persons usually observe under the same or similar circumstances to protect themselves from harm, which failure helped or caused the injury. *McLaughlin v. Louisville Electric Light Co.*, 37 S. W. 351, 100 Ky. 173, 18 Ky. Law Rep. 693, 699, 34 L. R. A. 812.

"Contributory negligence" is defined as being negligence of plaintiff concurring with that of the defendant to bring about the injury complained of; and an instruction that plaintiff cannot recover for the negligent killing of her husband unless the jury find that he was not guilty of any negligence which contributed to his death contains no error. *Galveston, H. & S. A. Ry. Co. v. Gormley (Tex.)* 35 S. W. 488, 489.

"Contributory negligence" is such negligence on the part of the plaintiff as directly contributes to and in part causes the injury. *Riley v. West Virginia Cent. & P. Ry. Co.*, 27 W. Va. 145, 164; *Woodell v. West Virginia Imp. Co.*, 17 S. E. 386, 392, 38 W. Va. 23. It is such negligence, strictly speaking, as operates with other negligence in producing the injury. *McKelvy v. Burlington, C. R. & N. Ry. Co.*, 51 N. W. 172, 173, 84 Iowa, 455.

Contributory negligence is the want of ordinary care on the part of the plaintiff, and a proximate connection between that and the alleged injury. *Henry v. Cleveland, C., C. & St. L. R. Co. (U. S.)* 67 Fed. 426.

429; Chicago G. W. Ry. Co. v. Bailey, 71 Pac. 246, 247, 66 Kan. 115; Russell v. Town of Monroe, 21 S. E. 550, 551, 116 N. C. 720, 47 Am. St. Rep. 823.

To constitute contributory negligence it is necessary that the act of negligence must be the proximate cause of the injury. Central Texas & N. W. R. Co. v. Hoard (Tex.) 49 S. W. 142, 143; Gerlach v. Edelmeyer, 47 N. Y. Super. Ct. (15 Jones & S.) 292, 296.

Contributory negligence is where one so acts as to contribute by direct consent to or any participation in the wrong complained of. Bryant v. Detroit, L. & N. R. Co., 104 Mich. 307, 316, 62 N. W. 365 (citing Mooney v. Peak, 57 Mich. 259, 23 N. W. 804).

Contributory negligence on the part of plaintiff is a bar to an action only when it approximately contributes to the infliction of the injury; and if the damage is not the necessary or ordinary or likely result of such contributory negligence, but is due to some wholly unlikely fact and unexpected event, which could not reasonably have been anticipated or regarded as likely to occur, such contributory negligence is too remote to be set up as a bar to an action. East Tennessee, V. & G. Ry. Co. v. Hull, 12 S. W. 419, 88 Tenn. 33.

The act or omission of a party injured, which amounts to what is called "contributory negligence," must be a negligent act or omission, and in the production of the injury it must operate as a proximate cause, or one of the proximate causes, and not merely as a condition. Smithwick v. Hall & Upson Co., 21 Atl. 924, 925, 59 Conn. 261, 12 L. R. A. 279, 21 Am. St. Rep. 104.

Contributory negligence is where the evidence shows that the negligence of both parties contributed to the cause of the action, and this defeats the right of recovery upon the part of the person injured. This doctrine is based upon the principle that the law does not attempt to separate the consequences of an act which has been brought about by the combined negligence of the two parties. Grant v. Union Pac. R. Co. (U. S.) 45 Fed. 673, 675.

If an accident which occasioned an injury would have happened, and would have been attended with the same results to the passenger, if he had been in his proper place on the train, then his negligence is not contributory negligence in a sense that would preclude a recovery, because it in no manner or degree contributed to the injury, and is therefore wanting in the element of proximate cause essential to constitute contributory negligence. Kansas & A. V. R. Co. v. White (U. S.) 67 Fed. 481, 482, 14 C. C. A. 483.

In order that the contributory negligence of plaintiff should defeat his recovery, it must be the proximate cause of his injury; and if, without certain remote negligence, he still would have suffered damage, the same was not contributory in a legal sense. O'Connor v. North Truckee Ditch Co., 30 Pac. 882, 886, 17 Nev. 245.

The term "contributory negligence" means such negligence as contributed to the injury. If the accident would have happened irrespective of negligence on the part of the plaintiff, then there can be a recovery. Hatfield v. Chicago, R. I. & P. Ry. Co., 16 N. W. 336, 338, 61 Iowa, 434.

By "contributory negligence" is meant any negligence upon the part of the person injured which proximately or naturally contributed to his injury. McLeod v. City of Spokane, 67 Pac. 74, 76, 26 Wash. 346.

To constitute contributory negligence the negligence must not be a remote cause in the chain of circumstances resulting in the injury. Lowrimore v. Palmer Mfg. Co., 38 S. E. 430, 436, 60 S. C. 153 (citing Disher v. South Carolina & G. R. Co., 83 S. E. 172, 55 S. C. 192).

Contributory negligence is taking such part in an act of injury to person or property, either by action, or omission to act when required by common prudence to act as is a cause of resultant mischief. But it must be what the law calls the "proximate cause" of it; that is, that it produced it. If it did not, then if the plaintiff's negligent act was the remote or nonproducing, and not the efficient, cause, operating at the time or then existing, it was only a remote cause of the trouble, and does not bar him of his claim to a verdict. Jones v. Carey (Del.) 31 Atl. 976, 978, 9 Houst. 214.

To constitute contributory negligence it is necessary that the act of negligence must be the proximate cause of the injury, though not necessarily the nearest cause thereto. So, where a party alights from a moving train and is injured, the alighting from the train is the immediate cause of the injury. No question of proximate cause would be involved. Central Texas & N. W. Ry. Co. v. Hoard (Tex.) 49 S. W. 142, 143.

Contributory negligence of a servant consists in the performance of some negligent act or the negligent omission to perform some duty which materially contributed to, and in conjunction with the negligence of the master was one of the elements of the proximate cause of, the injury to the servant. Faulkner v. Mammoth Min. Co., 66 Pac. 799, 801, 23 Utah, 437.

In order to constitute contributory negligence on the part of the plaintiff which will bar his recovery, it must have been so far an efficient cause of the injury that unless

he had been negligent the injury would not have happened; or, as the rule is often expressed, although there must have been negligence on the part of the plaintiff, yet unless he could, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover. To disentitle the plaintiff to recover, two things must concur: (1) A want of ordinary care on his part; (2) a proximate connection between this ordinary care and the injury. *Williams v. Northern Pac. R. Co.*, 14 N. W. 97, 99, 3 Dak. 168; *Montgomery Gaslight Co. v. Montgomery & E. Ry. Co.*, 5 South. 735, 737, 86 Ala. 372.

#### Degree of negligence.

If plaintiffs are guilty of some act which in itself is negligent and contributed to the injury they received, or the death complained of, it would make no difference how slight the negligence may be. If it contributed to the result, it is such contributory negligence as defeats recovery absolutely. *Benedict v. City of Port Huron*, 83 N. W. 614, 616, 124 Mich. 600.

To constitute contributory negligence there must be a want of ordinary care on the part of plaintiff, and it must be a proximate cause of the injury—that is, a concurring cause; or, in other words, plaintiff must be guilty of want of ordinary care, and this want of care must proximately contribute to the injury. If such negligence was slight, and contributed only remotely it would not be contributory negligence in such sense as to prevent a recovery, providing there was negligence on the part of a defendant that was the immediate and direct cause of the injury. *Gulf, C. & S. F. Ry. Co. v. Dan-shank*, 25 S. W. 295, 297, 6 Tex. Civ. App. 385.

"Contributory negligence is the want of such care as a prudent man would ordinarily take under similar circumstances, and must, in its natural results, immediately concur in producing the injury. The degree of care required would depend upon the peculiar circumstances in each case, since, as is said in *Grand Trunk Ry. Co. v. Ives*, 12 Sup. Ct. 679-683, 144 U. S. 408, 36 L. Ed. 485, what may be deemed ordinary care in one case may, under different surroundings and circumstances be gross negligence." *McLamb v. Wilmington & W. R. Co.*, 29 S. E. 894, 898, 122 N. C. 862.

#### Error of judgment in extremis.

Where the acts complained of as contributory negligence are done in the excitement of the moment and in extremis, for the purpose of extricating the person charged from the dangerous position in which he has been placed by defendant's fault, contributory negligence cannot be based thereon. If the acts were unwise, they were error, and not false, and the law in its wisdom will give absolution. *The City of Paris*, 76 U. S. (9 Wall.)

634, 639. Under these principles the act of a passenger on board a river steamer, in leaping through a window as the boat capsized, cannot be attributed to him as contributory negligence, though it afterward proved that, had he remained on the boat, he would have escaped the injury complained of. *Ladd v. Foster* (U. S.) 81 Fed. 827, 831.

The term "contributory negligence" does not include errors in judgment on the part of a plaintiff in trying to escape imminent danger brought about by the defendant's negligence, if the acts done were such as ordinarily prudent persons might have been expected to do under like circumstances, even though the injury would not have happened if the acts had not been done. So, the act of a passenger, who, apprehending a collision, rushes out of the car, where he would have been safe, and goes upon the platform, where he is hurt, does not constitute contributory negligence. Nor is it contributory negligence for one lawfully on a railway track, when a train suddenly appears, to jump the wrong way in the excitement of the moment. *Baumler v. Narragansett Brewing Co.*, 50 Atl. 841, 843, 23 R. I. 430.

A mere error of judgment is not of itself contributory negligence; and where an automobile came upon deceased under circumstances calculated to produce fright or terror, and such fright or terror was produced thereby, and this caused an error in judgment, by which the boy ran in front of the automobile, it was not contributory negligence. *Thies v. Thomas*, 77 N. Y. Supp. 276, 278.

#### Failure to avoid danger.

"It has been a rule of law from time immemorial that there can be no recovery for an injury caused by the mutual fault of both parties. When it can be shown that it would not have happened except for the negligence of the party injured concurring with that of the other party, no action can be maintained, and what is such contributory negligence as will defeat a recovery is a question of law and fact to be determined by the jury; but, where the undisputed facts show that by the exercise of ordinary care a party might have avoided injury, he cannot recover. *Norfolk & W. R. Co. v. Ferguson*, 79 Va. 241, 249 (citing *Baltimore & P. R. R. Co. v. Jones*, 95 U. S. 439, 24 L. Ed. 506, 17 Am. Ry. Dec. p. 123).

When the question of contributory negligence depends on a variety of circumstances, from which different minds may arrive at different conclusions as to whether plaintiff exercised proper care and caution, the question should be submitted to the jury under proper instructions. The plaintiff's right of recovery in an action for injuries is not precluded in all cases where he omits to employ his senses to discover and avoid injury, even

though the omission be regarded as negligence. It does so apply only when the omission contributes to the injury; that is, when by their employment he might have avoided the injury. *Cleveland, C. & C. R. v. Crawford*, 24 Ohio St. 631, 638, 15 Am. Rep. 633; *Baltimore & O. R. Co. v. Whitacre*, 35 Ohio St. 627, 630.

Contributory negligence is the doing or the omitting to do that which, under the circumstances, a reasonable man would not have done or would not have omitted to do to avoid any injury resulting to himself from the negligence of the defendant. If the plaintiff or party injured by the exercise of ordinary care, under the circumstances, might have avoided the consequences of the defendant's negligence, but did not, the case is one of mutual fault. *Hubbard v. New York, N. H. & H. R. Co.*, 43 Atl. 550, 551, 72 Conn. 24.

The term contributory negligence is properly applied to cases where one injured through the negligence of another failed to take steps to avoid the danger, although it was apparent. Such a person is held in law to have contributed to the damage he sustains, and is barred from all remedy. *Robinson v. Simpson* (Del.) 32 Atl. 287, 8 Houst. 398.

The term "contributory negligence," in an action for personal injuries, means negligence on the part of the plaintiff such as contributed to cause the accident, which by ordinary care plaintiff could have avoided. *Cook v. Wilmington City Electric Co.* (Del.) 32 Atl. 643, 644, 9 Houst. 306.

Contributory negligence is negligence in not avoiding the consequences arising from the negligence of some other person when means and opportunity are offered to do so. *Illinois Cent. R. Co. v. Jones* (U. S.) 95 Fed. 870, 873, 37 C. C. A. 106.

A servant is charged with actual notice as to the matters concerning which it is his duty to inquire, and, when the circumstances make it his duty to inquire, it is contributory negligence on his part not to inquire. *Wright v. Pacific Coast Oil Co.* (Cal.) 53 Pac. 1086, 1090; *Magee v. Northern Pac. C. R. Co.*, 21 Pac. 114, 116, 78 Cal. 430, 12 Am. St. Rep. 69.

One who in broad daylight, with abundant means to ascertain his situation, steps into a descending elevator and is injured, is guilty of contributory negligence so as to prevent his recovery. *Hutchins v. Priestly Express Wagon & S. Co.*, 28 N. W. 85, 61 Mich. 252.

#### Joint negligence.

"Contributory negligence," as the designation itself implies, can only exist where the injury is the result of the combined negligence of plaintiff and defendant. Where

plaintiff's negligence is the sole cause of the injury, it is not contributory. *Connor v. Chicago, R. I. & P. R. Co.*, 59 Mo. 285, 305.

"Contributory negligence," as the words import, implies the concurring negligence of both plaintiff and defendant. The phrase is defined by Beach as follows: "Contributory negligence in its legal significance is such an act or omission on the part of plaintiff amounting to an ordinary want of care as, concurring or co-operating with the negligent act of the defendant, is a proximate cause or occasion of the injury complained of." The definition given by *Shearman & Redfield* is in substance and effect the same. If the negligence of either defendant or plaintiff alone is the sole cause of the injury, there can be no contributory negligence. It is clear that there can be no contributory negligence unless there was also negligence to which that of plaintiff could contribute. Unless the negligence of plaintiff was the proximate cause of the injury, his action on the ground of contributory negligence could not be defeated. *Payne v. Chicago & A. R. Co.*, 31 S. W. 885, 888, 129 Mo. 406.

Contributory negligence consists of negligence by the party inflicting the injury and negligence on the part of the injured person, when the negligence of each contributed proximately to the injury, and when the injury would not have occurred, notwithstanding the negligence of the party inflicting the injury, if the injured person had not been negligent. *Houston & T. C. R. Co. v. Patterson*, 48 S. W. 747, 748, 749, 20 Tex. Civ. App. 255.

Contributory negligence is negligence not only upon the part of the one committing the injury, but also on the part of the one who is killed or injured, and by which they both contribute thereto. *Weatherford, M. W. & N. W. Ry. Co. v. Duncan*, 31 S. W. 562, 565, 10 Tex. Civ. App. 479; *Houston & T. C. R. Co. v. Kelley*, 13 Tex. Civ. App. 1, 7, 34 S. W. 809, 811.

Contributory negligence implies some negligence by both parties. *Felton v. Aubrey* (U. S.) 74 Fed. 350, 354, 20 C. C. A. 436.

"Contributory negligence" means that both the plaintiff's and the defendant's negligence were to blame directly for the injury; and, when both are to blame, one cannot be held, in law, to blame the other. *Bodie v. Charleston & W. C. Ry. Co.*, 39 S. E. 715, 719, 61 S. C. 468. The principle is that, in order that there may be any contributory negligence on plaintiff's part, there must be negligence also on the part of the defendant having a direct and proximate causal relation to the injury. *Wastl v. Montana Union Ry. Co.*, 61 Pac. 9, 15, 24 Mont. 159.

Contributory negligence exists only when both parties have combined and concurred in producing the injury. There must always be negligence on the part of the defendant, or

else it cannot be said that a plaintiff has been guilty of contributory negligence. And as to a carrier of goods there is no such thing as contributory negligence by the owner of the goods. *McCarthy v. Louisville & N. R. Co.*, 14 South. 870, 871, 102 Ala. 198, 48 Am. St. Rep. 29.

#### **Knowledge of danger involved.**

Contributory negligence involves, as a necessary element, a knowledge of the probable danger, or a sufficient reason to apprehend it. *Hadley v. Lake Erie & W. Ry. Co.*, 51 N. E. 337, 341, 21 Ind. App. 675.

#### **Negligence distinguished.**

See "Negligence."

#### **Negligence of co-employees.**

Negligence of co-employees has never been regarded as contributory negligence. *Cooper v. New York, O. & W. R. Co.*, 82 N. Y. Supp. 98, 100, 84 App. Div. 42.

#### **Prior negligence of plaintiff.**

In speaking of the rule that contributory negligence on the part of the plaintiff will not disentitle the plaintiff to recover if it appears that the defendant might by the exercise of reasonable care and prudence have avoided the consequences of the plaintiff's negligence, it is said that the rule is but the statement, in another form, of a proposition that antecedent misconduct on the part of the plaintiff, such as could not have had any influence upon the conduct of the defendant, will not defeat a recovery for injuries inflicted by the immediate negligence of the defendant, and that it is a misuse of terms to speak of such negligence as contributory negligence. *Pennsylvania R. Co. v. Reed* (U. S.), 60 Fed. 694, 696, 9 C. C. A. 219.

The negligence of a person does not place him beyond the protection of the law, and does not excuse another for a failure to exercise care to avoid injuring him. Consequently, where the negligence of a defendant in a personal injury case intervenes between the plaintiff's negligence and the injury, and becomes the proximate cause of the injury, the defendant will not be exempted from liability on the ground of contributory negligence. But this does not mean that contributory negligence will not exempt the defendant where his negligence was gross. The cases cited to support this rule, as thus laid down by some writers, almost invariably show that the negligence of defendant intervened between the negligence of plaintiff and the injury complained of. *McDonald v. International & G. N. Ry. Co.*, 22 S. W. 939, 943, 86 Tex. 1, 40 Am. St. Rep. 803.

By "contributory negligence" is meant such negligence on the part of the plaintiff as contributes to the injury; that is, directly in part causes it. It is, therefore, not contributory negligence for the plaintiff to be guilty

of a negligent act which might have produced the injury, if, before it actually results, the defendant is guilty of some negligent act which was the immediate cause of the injury, even though no damage could have resulted to the plaintiff had he not been originally negligent. *Washington v. Baltimore & O. R. Co.*, 17 W. Va. 190, 196.

"While it is generally a defense to an action of tort that the plaintiff's negligence contributed to produce the injury, still, where the negligent acts of the parties are distinct and independent of each other, the act of the plaintiff preceding that of the defendant, it is considered that the plaintiff's conduct does not contribute to produce the injury if, notwithstanding his negligence, the injury could be avoided by the use of ordinary care at the time by the defendant." *O'Brien v. McGlinchy*, 68 Ma. 552, 557.

#### **In law of agency.**

In regard to the duty of a person dealing with an agent to inquire as to his authority, it is said that if a person is careless in exhibiting confidence in an agent, yet this does not make him liable to a third party, who in dealing with such agent fails to apply the diligence usual with good business men under the circumstances. The case becomes, in such a view, one of what is called "contributory negligence"; in other words, the causal connection between the negligence in giving color to the employment of A., and B.'s loss by dealing with A., is broken by B.'s own negligence in trusting A. without due inquiry. *Hurley v. Watson*, 36 N. W. 726, 729, 68 Mich. 531.

## **CONTRIVANCE.**

Other contrivance, see "Other."

## **CONTRIVING.**

The words "contriving, propagating, and spreading," in an indictment charging the defendants with conspiring to occasion a fall and decline in the market price of certain stock by contriving, propagating, and spreading divers false and injurious rumors, statements, imputations, etc., regarding and impugning the management and financial condition of the corporation, is equivalent to the word "circulating," as used in Pen. Code, § 435, making it criminal for any one, with intent to affect the market price of stocks, to knowingly circulate any false statement, rumor, or intelligence; and they further charge motive, intent, and guilty knowledge. *People v. Goslin*, 73 N. Y. Supp. 520, 523, 67 App. Div. 16.

## **CONTRARY TO EVIDENCE.**

A verdict may be said to be "contrary to the evidence" when it is so clearly

against its weight as to make it apparent that the jury were misled or were influenced by partiality, passion, or undue bias. So, too, a verdict is contrary to the evidence when it is founded solely upon the testimony of an interested plaintiff, who is discredited to such an extent as to make it apparent either that the jury misapprehended the scope and effect of the discrediting circumstances, or that, apprehending, they disregarded them capriciously or from bias. *Streicher v. Third Ave. R. Co.*, 57 N. Y. Supp. 716, 720, 39 App. Div. 658.

## CONTRARY TO LAW.

The expression "contrary to law," in a complaint averring that defendant sold liquor contrary to the law, is a conclusion at law, and states no fact. *Village of Cortland v. Howard*, 37 N. Y. Supp. 843, 844, 1 App. Div. 131.

"Contrary to law" means contrary to the general principles of the law as applicable to the facts. *Candy v. Hanmore*, 76 Ind. 125, 128.

2 Rev. St. 1853, p. 117, providing that where a verdict is contrary to law a new trial shall be granted, does not mean a verdict "that is defective or insufficient in law merely. A verdict may be defective and insufficient in law, and yet not be contrary thereto. We think that a verdict which is contrary to law is one which is contrary to the principles of law as applied to the facts which the jury were called upon to try, and the principle of law which should govern the cause." *Bosseker v. Cramer*, 18 Ind. 44, 45. See, also, *Candy v. Hanmore*, 76 Ind. 125, 127, 128.

In Rev. St. § 3082, making it an offense to fraudulently or knowingly import or bring into the United States, or assist in doing so, any merchandise, contrary to law, the words "contrary to law" clearly relate to legal provisions not found in the section itself, and hence, in an indictment under such section, the acts violated should be alleged. *Keck v. United States*, 19 Sup. Ct. 254, 255, 172 U. S. 434, 43 L. Ed. 505.

### As contrary to statute.

The phrase "contrary to law," as used in an indictment in which the conclusion recites that the act complained of is contrary to law, is equivalent to the phrase "contrary to statute." *Hudson v. State (Ind.)* 1 Blackf. 317, 318.

### As referring to instructions.

Gen. St. 1878, c. 66, § 253, subd. 5, authorizing a new trial when the verdict is "contrary to law," should be construed to mean "contrary to the instructions"; and in order to obtain a new trial on that ground

it must be made to appear that there was an instruction which was disregarded, it not being sufficient that a principle of law not embodied in an instruction was disregarded by the jury. *Valerius v. Richard*, 59 N. W. 534, 57 Minn. 443.

A statement in a motion for a new trial that the verdict is contrary to law presents a question whether the finding of the jury is in accord with the law embodied in the instructions, and does not present for review any errors in the instruction. *Drexel v. Daniels*, 68 N. W. 399, 49 Neb. 99.

Code Civ. Proc. § 999, authorizing a new trial where the verdict is "contrary to law," does not refer to an erroneous decision by the court as to the law of the case. The phrase, as used in reference to a verdict, means that the verdict is one which the law does not authorize the jury to render upon the evidence presented to them, and does not refer to any act of the court in giving to the jury directions upon which their verdict is to be based; for though such verdict may be contrary to the law in the sense that it is not authorized by the law, yet it is not an error for which the jury is responsible. Where in any case the evidence is examined, and found to be such as warrants the verdict in the case, the verdict cannot be said to be contrary to law. *Swartout v. Willingham*, 26 N. Y. Supp. 769, 771, 6 Misc. Rep. 179.

## CONTRARY TO STATUTE.

An allegation in a criminal complaint that the acts are against the peace and contrary to the statute is equivalent to an allegation that the act was unlawfully or maliciously done. *State v. Tibbetta*, 29 Atl. 979, 86 Me. 189.

The object, in the averment, of the phrase "contrary to the form of the statutes," is to show that the action is brought upon the statutes, and that it is not an action at common law. If that otherwise appears upon the face of the declaration, the averment is at most a mere formal averment. And where the declaration in the first instance referred to certain statutes, and it appeared throughout that the action was brought on them, the fact that each count concluded "contrary to said statutes," rather than "contrary to the statutes of 18—," was not objectionable. *Blydenburgh v. Miles*, 39 Conn. 484, 496.

Where there were two statutes relative to assaults and batteries, one merely abridging or limiting the discretion of the court with respect to the amount of fine and the duration of the imprisonment, but in no wise attaching any penalty or punishment to the offense, an indictment for assault and battery, concluding "contrary to the form of

the statute," instead of "to the statutes," is proper. *State v. Berry*, 9 N. J. Law (4 Halst.) 874, 876.

## CONTROL

See "Exclusive Control"; "Immediate Control"; "Superintending Control"; "Supervisory Control"; "Under Control."

The words "control" and "manage" are synonymous. *Youngworth v. Jewell*, 15 Nev. 45, 48.

A person who, as guardian, has the management of the estate of an insane person, has the "control" thereof, within the meaning of St. 1890, c. 410, which provides for the punishment of one trespassing upon land against the order of one having the lawful control of the premises, since "management" means "control," as the latter word is used in the statute. *Gray v. Parke*, 39 N. E. 191, 162 Mass. 582.

Code Civ. Proc. § 1417, providing that no bill shall be dismissed for failure to file a transcript when such failure is owing to the fault or omission of the clerk, or other circumstances over which appellant has no control, "does not require the circumstances to be absolutely beyond appellant's control, but allows relief for appellant's own delay or neglect where the same is fairly excusable." *Smith v. Arthur*, 81 Pac. 757, 5 Wash. 356.

### As in charge of.

As used in various clauses of appropriation acts passed by Congress since 1872, in which divers sums of money have been appropriated for the care and repair of buildings and furniture, etc., in the customhouses, courthouses, post offices, marine hospitals, and other public buildings, under the control of the Treasury Department, the words "under the control of" mean "in charge of," and nothing more. The control referred to in all the acts is simply a control as respects repairs, care, maintenance, etc., and confer no authority to control the use and occupation of the buildings. In *re Lyman* (U. S.) 55 Fed. 29, 40.

### As giving power of disposition.

A will providing that the testator's trustees should retain certain property in their hands and under their control, and should "manage and control" the same to produce an income, etc., does not, unaided by other considerations, confer a power to sell, and the power to sell cannot be derived from such words. *Blanton v. Mayes*, 58 Tex. 422, 429.

In a will where testator bequeathed to his wife all his property, both real and per-

sonal, to be at her control during her natural life, the word "control" cannot mean that she shall have an absolute fee simple or power of sale, so as to pass a fee during her natural life; it cannot have been used in a different sense from its usual signification and import. The testator, it is manifest, did not use it in any other sense. He intended that she should have authority over it—the management and superintendence and use of it—during her natural life. *Porter v. Thomas*, 23 Ga. 467, 472.

Within the meaning of a will giving the executors absolute control of testator's estate, the word "control" means to manage, which is to have authority over the particular matter, to check, to restrain, to govern with reference thereto. The language used is in legal effect the same as if it had been "the entire control of my estate," so far as it is accorded and permitted by the law, and the extent of the power as thus conferred would be to do whatever was necessary in and about the administration of the estate. But it is not believed that the executor would have power to sell and convey the lands of the estate at his discretion, or for any other purpose than the payment of debts or carrying into execution executory contracts made with reference to the lands by the testator. *Anderson v. Stockdale*, 62 Tex. 54, 61.

When used in a will giving a wife exclusive control over testator's property, "control" is not to be construed as giving the power to make absolute disposition thereof, and use and enjoy it as her own, but only to give her the management and control thereof. *Wolfe v. Loeb*, 13 South. 744, 746, 98 Ala. 426.

The words "control and management," as used in a will devising property to the testator's son, and declaring that he shall have the control and management of the same during life, means that the son should have the use, possession, superintendence, and direction of the property, and the power of exercising a general restraint over the same during the continuance of his estate, or until the happening of the event that will determine the taker of the fee in the same, and manifestly does not include a power of disposal. *Randall v. Josselyn*, 10 Atl. 577, 579, 59 Vt. 557.

In a provision in a will giving a widow "control" of certain lands, with a remainder to children, a tenancy without impeachment or waste is not imported by the use of the word "control." *Hogan v. Hogan*, 61 N. W. 73, 74, 102 Mich. 641.

### As imposing duty.

In Acts 1853, c. 389, § 1, constituting and declaring the county commissioners a corporation and body politic, and enacting



that they shall have charge and control over public roads and bridges and the property owned by the county, the phrase "charge and control" should be construed as equivalent to "duty and obligation," since the statute conferred a power upon the corporation to be exercised for the public good, the exercise of which is not discretionary, but imperative, and the commissioners are not at liberty to exercise a discretion as their sense of duty to their constituents dictate, without coercion or liability for its nonuser. The power vested in the county commissioners was a ministerial one, which they were obliged to exercise, and they are liable to an action for damages at the suit of one injured by a defect in a road or bridge. *Anne Arundel County Com'rs v. Duckett*, 20 Md. 468, 475, 88 Am. Dec. 557.

#### As govern or regulate.

Const. art. 9, § 7, provides that county superintendents and boards of education shall have control of the examination of teachers and the granting of teachers' certificates. By the use of the word "control" it was not meant that the Legislature could not prescribe the rules by which the qualification of teachers should be determined. The word was not used as synonymous with "govern," "rule," or "regulate," so as to give the board of education unlimited and exclusive authority, and does not imply that the power of legislation on the subject in question was prohibited to the Legislature. *Mitchell v. Winnek*, 49 Pac. 579, 580, 117 Cal. 520.

#### Guardianship implied.

A devise which provided that the executors shall have "control and direction" over defendant's son means that they shall have the power of guardianship over such son. *Rock River Paper Co. v. Fisk*, 10 N. W. 344, 346, 47 Mich. 212.

#### As power to license, prohibit, or restrain.

The word "control" means power or authority to check or restrain; and, being a synonym of "management," a statute giving a city management of certain industries gives it power to restrain them. *City of St. Louis v. Howard*, 24 S. W. 770, 771, 119 Mo. 41.

In the charter of the city of Portland, giving authority to the council to control and regulate washhouses and public laundries, the words "control and regulate" *ex vi termini* imply to restrain, to check, to rule and direct; and the power to do either of these implies the right to license as a convenient and proper means to that end. *In re Wan Yin* (U. S.) 22 Fed. 701, 702.

The title of an ordinance as "An ordinance to regulate and control the driving of cattle through the streets of Jersey City" meant "to establish rules and limits," but did not import that the driving of cattle should

be prohibited. *McConvill v. Jersey City*, 39 N. J. Law (10 Vroom) 83, 44.

#### As applicable to mandamus.

The word "control" seems in itself to imply that the party to be controlled has power to exercise his functions or discharge his duty in several different ways. It is not the word, therefore, which expresses correctly the kind of power or authority asserted by a court when it issues its mandamus. To control properly means to keep under check, to govern, to restrain. A mandamus is simply a demand to a person to do an act which he is bound by law to do, and which he has no lawful right to refuse to do. *United States v. Kendall* (U. S.) 26 Fed. Cas. 702, 750.

#### Possession implied.

The control of papers as securities implies such a possession thereof under a delivery to the holder and such acceptance as will perfect the security. *Bank of Monroe v. Gifford*, 44 N. W. 558, 560, 79 Iowa, 300.

A conveyance in trust, with power to hold and control the property, involves the custody and possession of the trust property, both real and personal. *Ure v. Ure*, 56 N. E. 1087, 185 Ill. 216.

#### As repeal.

"Control" means to exercise a directing, restraining, or governing influence over, counteract, regulate, but does not embrace the idea of repealing, extinguishing, or doing away with. Thus, provisions of a city charter framed under Const. art. 11, § 6, providing that charters of cities framed under this Constitution shall be subject to and controlled by general law, are not repealed by general law contrary to such provisions, but merely suspended during the existence of such law. *Byrne v. Drain*, 60 Pac. 433, 127 Cal. 663.

#### Of billiard table.

The "control, care, or management of any billiard table," within the meaning of a statute prohibiting any person having the control, care, or management of any billiard table from allowing minors to congregate in his place, is not shown in an indictment describing defendant as having the control and management of a saloon in which were kept billiard tables. *Hanrahan v. State*, 57 Ind. 527, 528.

#### Of building.

If a building is let to a tenant, who enters into possession under a lease, the building is not under the control of the landlord within the meaning of Pub. St. c. 101, § 2, making it criminal for any one to knowingly permit a building under his control to be used for the illegal sale of intoxicating liquors, but is under the control of the tenant.

while he continues in possession under the lease, unless there are special provisions in the lease which give the control to the landlord. *Commonwealth v. Wentworth*, 15 N. E. 138, 141, 146 Mass. 36.

Rev. St. c. 17, § 4, prohibits any person who has control of a tenement to permit the same to be used as a house of ill-fame and for the illegal keeping and selling of intoxicating liquors with his knowledge, permission, or consent. Held, that the word "control," as there used, includes one who had authority to let a tenement and receive the rents from it; but the mere fact of control was not sufficient to charge a person with aiding in the illegal use thereof, it being required that he, having control, consented with knowledge of the purpose for which the house should be used. *State v. Frazier*, 8 Atl. 347, 79 Me. 95.

#### Of expenditure.

In a statute providing that, where money is contributed by a county to assist a town in building a bridge, the fund shall be expended by and under the control of the commissioners, and to persons to be appointed by the county board, such appointees have the right to participate, not merely in the disbursement or paying out of the fund, but also to the free exercise of judgment and choice between all the different specific objects presented as necessary and proper to effectuate the general purpose of the expenditure. To control the expenditure is to hinder, restrain, or check it in the exercise of the free will. *Board of Sup'rs of Mercer County v. Town of New Boston*, 13 Ill. App. (13 Bradw.) 274, 279.

#### Of railroad.

A contract made by a railroad company concerning all roads which it then did or might thereafter control by ownership, lease, or otherwise, meant an immediate or executive control exercised by the officers chosen by and acting under the direction of the contracting road. *Pullman Palace Car Co. v. Missouri R. Co.* (U. S.) 11 Fed. 634, 636.

#### Of religious observances.

To compel men to refrain from labor solely from regard to the imputed holiness of a particular day is not, within the meaning of the Constitution, to "control" the religious observance, and to interfere with and constrain the consciences of those who honestly disbelieve the asserted sanctity of the selected day. So long as no attempt is made to force upon others the adoption of the belief of the governing power, or to compel a practice in accordance with it, so long is conscience left in the enjoyment of its natural right of individual decision and independent religious action. Act April 22, 1794, prohibiting the performance of any ordinary employment or business on the Lord's day, commonly called "Sunday," works of necessity or charity only excepted, is not in con-

flict with Const. art. 9, § 3: " \* \* No human authority can, in any case whatever, control or interfere with the rights of conscience; and no preference shall be given by law to any religious establishment or mode of worship." *Specht v. Commonwealth*, 8 Pa. (8 Barr) 312, 324, 49 Am. Dec. 518.

#### Of schools.

"Control," as used in Rev. St. 1879, art. 3783, and Gen. Laws 1883, p. 112, providing that in certain cities the council may appoint trustees, who shall have power to control the schools in such cities, includes the fixing of the salary of the superintendent. *Board of Trustees of Public Schools v. City of Sherman*, 42 S. W. 546, 548, 91 Tex. 188.

The word "control" means to check or restrain, and as used in a statute investing school district trustees with the care and custody of schoolhouses and other school property belonging to their districts, with full power to control the same as they may think best, the word "control" is confined to the care and custody of the schoolhouses or other property. There is nothing that hints at authorizing the school trustees to impose any incidental fees on the pupils; for while the word "regulate" has been defined, in relation to the power to regulate commerce, as the power to prescribe the rules by which it shall be governed—that is, the condition upon which it shall be conducted, to determine when it shall be free, and when subject to duties or other exactions—and the word "regulate" is one of the meanings of "control," still, in its primary sense, the word "control" imports a check by a counter check or register or duplicate account, and gradually came to have an enlarged meaning, so that it means to exercise a restraining influence over, to check, to counteract, to restrain, to regulate; and it is essential that the idea of check or restrain in some shade of meaning shall appear. *Young v. Trustees of Fountain Inn Graded School*, 41 S. E. 824, 827, 64 S. C. 131.

#### Of separate property of married woman.

The married women's act, giving a married woman the sole and exclusive "control" of her separate property, does not enable her to make all and every sort of contract, so that it be as to her "separate property," but merely enables her to make simple contracts in connection therewith, such as sales, etc., and could not be construed to extend to contracts of suretyship. *Stiles v. Lord*, 11 Pac. 314, 316, 2 Ariz. 154.

A piano in the house occupied by the husband, who had such control over it as he had of his wife's clothing or personal jewelry, and which he could by physical force have taken back, in view of the domestic relations, is in no legal sense of the

word in his "control." *Norbeck v. Davis*, 27 Atl. 712, 714, 157 Pa. 399.

"Control," as used in a will providing that portions of property given thereby to the testatrix's granddaughters should be so secured for their use and benefit as not to be subject to the control and disposition of their husbands, means the legal control on the part of the husband by virtue of his marital rights, and not the just and natural influence arising from the marital relation. *Deering v. Tucker*, 55 Me. 284, 288.

#### Of train.

St. 1887, c. 270, providing that an employé of a railway company may recover for injuries due to the negligence of the person in charge or control of a train, etc., means a person who, for the time being, at least, has immediate authority to direct the movements and management of the train as a whole, and of the men engaged upon it; and hence a brakeman on cars which are moving from the impetus imparted by a locomotive shortly detached therefrom has not "charge or control" of the cars, within the meaning of the statute. *Caron v. Boston & A. R. Co.*, 42 N. E. 112, 113, 164 Mass. 523. It includes the engineer of the train, but does not include the station agent and the tower man in charge of the track, since they have charge of the switches. *Fairman v. Boston & A. R. Co.*, 47 N. E. 613, 617, 169 Mass. 170.

Generally, when the engineer is on and running the engine, or has the actual custody, he has control of it. It may be, however, when he is not in active manipulation of it, that other persons control it. It will not do to say, as a matter of law, who has control of an engine for any particular time, when it is fairly inferable from the evidence that either one or the other of two persons may have such control. *Louisville & N. R. Co. v. Richardson*, 14 South. 209, 211, 100 Ala. 232.

The words "person in charge or control of the train," within the meaning of section 1, cl. 3, of the employers' liability act, no doubt for many purposes applies to the conductor, but, if the statute is to be of any use in the cases of running down or collision, the engineer must be regarded as the person in charge, so far as giving signals or slackening speed at the approach of danger is concerned. *Davis v. New York, N. H. & H. R. Co.*, 34 N. E. 1070, 1071, 159 Mass. 532.

The term "person in charge or control of any locomotive or train," in the master's liability act, in reference to injuries caused by the negligence of persons having charge or control of any railroad locomotive, engine, or train, does not include the conductor of a switch engine having charge of making up freight trains in the yard, in so far as his negligent acts in making up the train relate

to and are the cause of an accident occurring after it is started on the road and outside of his control. *Thyng v. Fitchburg R. Co.*, 30 N. E. 169, 170, 156 Mass. 13, 32 Am. St. Rep. 425.

In construing the statute relative to the liability of a railroad company for personal injuries by reason of the negligence of any person who has charge or control of any train upon a railroad, it was held that it was a question for the jury whether the brakeman who, in signaling a train to back when he and the engineer were the only persons on the train, was not acting under the orders of any immediate superior, was to be considered a person in charge or control of a train, the court saying that the language of the statute implies that some one is to be regarded as in charge. *Steffe v. Old Colony R. Co.*, 30 N. E. 1137, 1138, 156 Mass. 262.

#### CONTROLLER.

A will providing that testator's wife shall be the sole controller of all his property, "just the same as if I was alive," does not imply that the wife had control of the property of testator during his life, but that after his death she should have the management of it as he had in his lifetime, and the word "controller" does not imply the power in her to make absolute disposition of the property and use and enjoy it as her own, but to have the management and authority over it. *Wolfe v. Loeb*, 13 South. 744, 746, 98 Ala. 426.

#### In machinery.

A "controller" is the easily recognized cylinder-shaped electric mechanism of an electric car at the left hand of the motor-man, which is operated by a handle which is constantly being swung to and fro, and is the visible means by which the speed of the car is retarded or is promoted. The controller, as a whole, is a device for regulating or controlling the current delivered to an electric motor, and thereby regulating the speed of the car. *Electric Car Co. of America v. Nassau Electric R. Co. (U. S.)* 91 Fed. 142, 33 C. C. A. 420.

#### CONTROLLING CAUSE.

A controlling cause of an accident is that without which the accident would not have occurred. *Nashville R. Co. v. Norman*, 67 S. W. 479, 481, 108 Tenn. 324.

#### CONTROVERSY.

See "Amount in Controversy"; "Matters in Controversy"; "Sum in Controversy."

See "Separable Controversy"; "Separate Controversy."

A controversy is a dispute arising between two or more persons. *Barber v. Kennedy*, 18 Minn. 216 (Gil. 196, 206) (citing 1 Bouv. Law Dict. 309).

Controversy is a disputed question; a suit at law. *State ex rel. Hamilton v. Guinotte*, 156 Mo. 513, 519, 57 S. W. 281 (citing Standard Dict.).

In *Smith v. Adams*, 130 U. S. 173, 9 Sup. Ct. 566, 32 L. Ed. 895, Mr. Justice Field, speaking for the court, said that the terms "cases" and "controversies" in the Constitution, giving jurisdiction to the United States courts, embrace the claims or contentions of litigants before the courts for adjudication by regular proceedings established for the protection or enforcement of rights, or the prevention, redress, or punishment of wrongs. *Interstate Commerce Commission v. Brimson*, 14 Sup. Ct. 1125, 1132, 154 U. S. 447, 38 L. Ed. 1047.

The term "controversy" in Rev. St. U. S. § 639, subd. 3, as amended by 24 Stat. 553, giving the right to remove to the federal courts a suit in the state courts involving a controversy between a citizen of the state in which the suit is brought and a citizen of another state, means a dispute concerning rights or wrongs cognizable by law, and which may therefore be the subject of an action or involved therein. *Fisk v. Henarie* (U. S.) 32 Fed. 417, 423.

"Controversy," in Act Cong. March 5, 1875, providing for the removal of causes from a state court to the federal court in any suit where there shall be a controversy which is wholly between citizens of different states and which can be fully determined as between them, means an actual controversy in which both parties have an interest. *Sheldon v. Keokuk Northern Line Packet Co.* (U. S.) 1 Fed. 789, 794.

To constitute a "controversy" in an action at law, there must be an allegation on one side and a denial on the other, making an issue of fact or an issue of law. *Gudger v. Western N. C. R. Co.* (U. S.) 21 Fed. 81, 83 (citing *Boyd v. Gill* [U. S.] 19 Fed. 145).

Where there are parties and a contest in reference to property, and informal pleadings under which the disputed matters are to be settled by the court, it is a "controversy" that may be removed to the federal courts under Act Cong. March 3, 1875. *Craigie v. McArthur* (U. S.) 6 Fed. Cas. 736, 737.

Where, in a proceeding in a court of bankruptcy to marshal assets in the hands of a trustee as between partnership and individual creditors, a distinct and separable issue is raised between parties intervening, involving substantial rights, and which might arise at common law or in equity, there is a "controversy" within the meaning of Act July 1, 1898, c. 541, § 24a, 30 Stat. 545, which

gives the several Circuit Courts of Appeals appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases. *Burleigh v. Foreman* (U. S.) 125 Fed. 217, 219, 60 C. C. A. 109.

#### Case or suit distinguished.

Within the provision of the Constitution giving United States courts jurisdiction of cases in law and equity, cases in admiralty and maritime jurisdiction, and controversies to which the United States shall be a party, and controversies between two or more states, or between citizens of one state and another state, etc., the Supreme Court, in *Cobens v. Virginia*, 6 Wheat. 264, determine that the word "suit" is not so broad as the word "controversy," because it determined that a writ of error could be maintained though it was not a suit, and yet it could not be denied that it was a controversy. Mr. Justice Iredell, in *Chisholm v. Georgia*, 2 U. S. (2 Dall.) 419, 431, 432, 1 L. Ed. 440, distinguished between the word "controversies" and the word "cases" in this connection, by confining the former to such as are of a civil nature; but this change in language from the word "cases" to the word "controversies" will be found to have been a mere matter of style, and to have no relation to any limitation or extension of the class of questions to be adjudicated. So long as this section of the Constitution speaks especially with reference to the nature of the questions involved, it uses the word "cases"; but when it considers more particularly proceedings having relation to the existence of parties, it uses the word "controversies," probably because, when parties are speaking of a raid against each other, the literary style suggested the change. *King v. McLean Asylum of the Massachusetts General Hospital* (U. S.) 64 Fed. 331, 336, 12 C. C. A. 145.

The Constitution of the United States gives jurisdiction to the courts of the United States over cases in law and equity, cases of admiralty and maritime jurisdiction, controversies between two or more states, and controversies between citizens of different states. This language makes a distinction between "cases" or "suits" on the one hand, and "controversies" on the other, and the Supreme Court has repeatedly and explicitly recognized the distinction thus made. The doctrine has been settled in various decisions of that court that if a suit embraces but one controversy, and the parties to it on either side are not wholly residents, respectively, of different states, the suit cannot be removed; yet if in the suit there is a separable controversy, the parties to which actually interested in the decision of it are on each side wholly citizens of different states, then the suit may, on the petition of one or more such parties to the separable controversy, be re-

moved into the federal court. *Snow v. Smith* (U. S.) 88 Fed. 857, 658 (citing *Blake v. McKim*, 103 U. S. 336, to the former point, and *Barney v. Latham*, 103 U. S. 205, to the latter).

The term "controversies," as used in the provision of the federal Constitution that the judicial power shall extend to certain cases, and to controversies to which the United States shall be a party, and to controversies between two or more states, is broader in its meaning than the word "case," which it supersedes. *Home Ins. Co. v. North Western Packet Co.*, 82 Iowa, 223, 238, 7 Am. Rep. 183.

A "controversy," in the sense of a statute giving Circuit Courts jurisdiction of any controversy in which the United States are petitioners or plaintiffs, is a case at law or in equity brought before some competent court of justice for forensic discussion and judicial decision. *United States v. Henderlong* (U. S.) 102 Fed. 2, 4.

A "controversy," as used in Act March 3, 1875, cl. 2, providing for the removal of a cause commenced in a state court to a United States court when there is a controversy in the suit wholly between citizens of different states, should be construed to exist whenever any property, or the claim of the parties capable of pecuniary estimation, is the subject of litigation and is presented by the pleading for judicial determination. *Bybee v. Hawsett* (U. S.) 5 Fed. 1, 2 (citing *Gaines v. Fuentes*, 92 U. S. 20, 23 L. Ed. 524).

"Controversies and disagreements," as used in Act 1862 (Laws 1862, p. 743, c. 412), authorizing justices of the Supreme Court to refer controversies and disagreements arising between receivers and members of mutual insurance companies, include actions regularly commenced by summons and complaint, and in which an answer has been put in. *Sands v. Harvey* (N. Y.) 4 Abb. Dec. 147, 148.

"Controversy" has been defined as follows: 'A dispute arising between two or more persons.' It differs from 'case,' which includes all suits, criminal as well as civil, whereas 'controversy' is a civil and not a criminal proceeding." 1 Bouv. Law Dict. 309. One of the definitions of "controversy" is "a lawsuit," as given in the American Encyclopedic Dictionary. The United States Constitution (article 3, § 2) declares its judicial power shall extend to "controversies" between two or more states, between a state and citizens of another state, between citizens of different states, and between a state, or citizen thereof, and a foreign state, citizen, or subject. The United States Judiciary act of 1789 (section 13) provides "that the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a

state is a party," except in certain specified cases. See *Delafield v. Illinois*, 2 Hill, 159, 163. "The term in Code Civ. Proc. § 46, providing that a judge shall not sit as such in, or take any part in the decision of, a cause or matter if he is related by consanguinity or affinity to any party to the 'controversy' within the sixth degree, is synonymous with 'civil action' or 'proceedings at law.'" *Matthews v. Noble*, 55 N. Y. Supp. 190, 191, 192, 25 Misc. Rep. 674.

#### As cause of action.

As employed in Act Cong. March 3, 1875, c. 137, relating to federal jurisdiction and removal of causes to the federal courts from state courts, the word "controversy" and the words "separate controversy" are not identical in meaning with "a separable cause of action." There may be separate remedies against several parties for the same cause of action, but there is only one subject-matter of controversy involved. Where there are separate and distinct causes of action in the same suit, either of which might have been sued on alone, then there are "separate controversies" within the meaning of the statute. *Gudger v. Western N. C. R. Co.* (U. S.) 21 Fed. 81, 83 (citing *Boyd v. Gill* [U. S.] 19 Fed. 145).

Act 1875, § 2, cl. 2, declaring that when, in any suit between citizens of different states, "there shall be a controversy which is wholly between citizens of different states and which can be fully determined as between them," then either one or more of the plaintiffs or defendants may remove the cause to the United States courts, cannot be construed as restricting the right of removal to suits which contained two or more controversies. The language is doubtless designed to embrace suits which do contain two or more controversies, and to authorize removal at the instance of any one plaintiff or necessary defendant, provided the necessary conditions exist as respects any one distinct controversy in the suit; but it does not follow that such is its only purpose. The phrase "and which can be determined as between them" only shows that the clause was designed to embrace suits which do contain two controversies, as well as suits which contain but one controversy, and that, when applied to a suit containing several controversies, the same conditions must exist as to that controversy which necessarily exist when there is but one controversy in the case. As the language of the clause, instead of indicating any exclusion of the cases having but a single controversy, appears rather to have been chosen so as to cover all suits having several plaintiffs or several defendants which have either one controversy or several, the clause should not be narrowed by construction, but should be applied to both cases alike. *Mut. Life Ins. Co. v. Champlin* (U. S.) 21 Fed. 85, 86.

**Compelling production of evidence.**

The issue made before the Circuit Court on the application of the civil service commission for an order to compel the giving of testimony or the production of books and papers is a "case" or "controversy" within the meaning of the federal Constitution. *People v. Kipley*, 49 N. E. 229, 237, 171 Ill. 44, 41 L. R. A. 775 (citing *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, 14 Sup. Ct. 1125, 38 L. Ed. 1047).

**Construction of will.**

A question involving the construction of a will and the administration of its trusts, of the most profound moment to the estate and its legatees and distributees, which is a real, unfeigned, actual contention between the parties, is a "controversy" within the jurisdiction of a federal court of chancery, if there are jurisdictional facts sufficient to give it jurisdiction. *Woodfin v. Phoebe* (U. S.) 80 Fed. 289, 292.

**Criminal cases.**

Const. art. 3, § 2, providing that the judicial power should extend to "controversies" between two or more states, between a state and citizens of another state, and between a state and foreign states and citizens or subjects, cannot be construed to include any proceedings that relate to criminal cases. *Chisholm v. Georgia*, 2 U. S. (2 Dall.) 419, 430, 1 L. Ed. 440.

Act 1790, speaking of perjury as being an offense which may be committed in any "suit, controversy, matter or cause depending" in any of the courts of the United States, should be construed to include an indictment, with issue joined on a plea of "not guilty," found for an act which does not constitute an offense under the laws of the United States. *United States v. Reese* (U. S.) 27 Fed. Cas. 746, 748.

**Habeas corpus.**

A petition for a writ of habeas corpus by a citizen of one state seeking release from illegal restraint by a citizen of another state is a suit or "controversy" between said parties, within the meaning of the federal Constitution giving the federal court jurisdiction in controversies between citizens of different states. *King v. McLean Asylum of the Massachusetts General Hospital* (U. S.) 64 Fed. 331, 336, 12 C. C. A. 145.

**CONTOVERTSY BETWEEN CITIZENS OF DIFFERENT STATES.**

A controversy between citizens of different states is none the less such a controversy because they are not the only parties to it. To confine the operation of the words "controversies between the citizens of different states" to cases wherein the controversy is exclusively between citizens of different

states is to interpolate a word into the grant of judicial power which materially limits and restrains its operation. *Flak v. Henarie* (U. S.) 82 Fed. 417, 423.

**CONTOVERTSY CONCERNING PROPERTY.**

A controversy concerning the amount of compensation to be paid for land tax for a public use is a "controversy concerning property" within the meaning of article 20, Bill of Rights. *Copp v. Henniker*, 55 N. H. 179, 187, 20 Am. Rep. 194.

**CONTOVERTSY OF CIVIL NATURE.**

The expression "controversies of a civil nature," as used in the judiciary act of 1789, § 13, providing that the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature where a state is a party, except between a state and its citizens, is broad and comprehensive, and by no obvious meaning or necessary implication can be construed to exclude a suit between two states in relation to the boundary between such states. *Rhode Island v. Massachusetts*, 37 U. S. (12 Pet.) 657, 723, 9 L. Ed. 1233.

**CONTOVERTSY TOUCHING AN ACCOUNT.**

The legal term "controversy touching an account," within the meaning of Revision, D. 875, § 177, providing that all actions in which matters of account are in controversy may by rule of court be referred, etc., is a legal term which has a definite signification. It denotes the necessity of adjustment and settlement of items, some of which are controverted. The subject is illustrated and explained by a perception of such matters of account as are cognizable by a court of equity, or that can be embraced in the ancient common-law action of account. The term does not apply to a case where the sole question is with respect to certain forgeries. *American Saw Co. v. First Nat. Bank*, 84 Atl. 1, 2, 58 N. J. Law (29 Vroom) 438.

**CONTOVERT.**

To "controvert" means more than to "deny," and, by provision of the Code, new matter or counterclaims set up in the answer must be controverted or they will be deemed true. A plaintiff cannot deny the truth of the facts averred in the counterclaim and then introduce evidence in avoidance. *Swenson v. Kleinschmidt*, 26 Pac. 198, 199, 10 Mont. 473.

"Controvert" means to "deny." It is not necessary, however, that the word "controvert" or "deny" should be necessarily used in a pleading purporting to deny the allegation to a bill, it being sufficient if the allegations thereof are such that if true those of the

bill could not be true. *Henny Buggy Co. v. Patt*, 35 N. W. 587, 589, 73 Iowa, 485.

Rev. St. c. 110, § 89, declares that no assignment of error shall be allowed in the Supreme Court which calls in question the determination of "controverted" questions of fact by the lower court. Held, that the word "controverted" meant such facts as tended, either as evidentiary or subordinate facts or as the ultimate fact, to sustain the issue made by the pleading in the cause, irrespective of whether the evidence in itself is or is not conflicting. *La Salle County v. Milligan*, 32 N. E. 196, 197, 143 Ill. 321 (citing *American Exch. Nat. Bank v. Chicago Nat. Bank*, 131 Ill. 547, 22 N. E. 523; *Cothran v. Ellis*, 125 Ill. 496, 16 N. E. 649).

## CONVENE.

See "Duly Convened."

## CONVENIENCE—CONVENIENT.

See "As Nearly as can be Conveniently Done"; "As Soon as Convenient"; "Public Convenience."

The words "conveniently found," in *Mills' Ann. St. 1891*, § 2794, authorizing a justice of the peace to appoint a special constable whenever no qualified constable can conveniently be found in the township, must be construed to have a restricting significance, and the justice may not of his own motion appoint a special officer, nor may he do it on request of a litigant unless there exist a legal necessity for the appointment. In other words, it must be made to appear to the justice, before he is authorized to appoint a special constable, that some legal right is liable to be jeopardized, or some substantial detriment or harm come to the litigant. *Cunningham v. Bostwick*, 43 Pac. 151, 153, 7 Colo. App. 169.

A contract for the insertion of an advertisement in a publication, the price to be "payable as convenient," cannot be construed as intended to excuse the parties contracting in any event from making any payment at all, but can only mean that some indulgence as to the length of credit was to be allowed to them. *Black v. Bachelder*, 120 Mass. 171.

The use of the phrase "as soon as they can conveniently locate and construct," in the charter of a railroad company authorizing them, as soon as they conveniently can, to construct a road with one or more tracks, and to make or erect warehouses, etc., is not a limitation upon the power to compel the company to exercise its whole authority in the very beginning. It would be an unreasonable construction of its charter to require provision to be made for all the unknown wants of the future. The increase in trade

and business, and the changes taking place, often require new and increased facilities. *Philadelphia, W. & B. R. Co. v. Williams*, 54 Pa. (4 P. F. Smith) 103, 107.

What is covered by the word "convenience," as used in relation to the subject of the duty of carriers in furnishing conveniences to the public, it might be difficult to define for all cases; but an opportunity to purchase a 1,000-mile ticket for less than the standard rate, we think, is improperly described as a "convenience." *Lake Shore & M. S. Ry. Co. v. Smith*, 19 Sup. Ct. 565, 568, 173 U. S. 684, 43 L. Ed. 858.

In an action against the indorser of a note payable at a bank, the judge instructed the jury that a demand of payment in some reasonable and convenient time before the doors were closed would be sufficient. Held, that the word "convenient" was too indefinite, inasmuch as it must mean the convenience of the notary. *Harrison v. Crowder*, 14 Miss. (6 Smedes & M.) 464, 474, 45 Am. Dec. 290.

The word "convenient" is defined by lexicographers to be "fit, suitable, proper, adapted," as its primary and ordinary meaning. This required the assignee in a voluntary assignment, directing him to sell, etc., "as soon as conveniently may be," to make sale in a fit, suitable, or proper manner. In doing so it is required to be done at a suitable time, for a proper price, after giving a fit opportunity for competition, all adapted to the interest of the parties, the nature of the property, and to effectuate the objects of the trust. By applying the secondary meaning of the word, it might be held to apply to the mere convenience of the assignee; but the rules of construction require that the intention of the parties must be ascertained from the instrument itself, and to ascertain that intention the primary and popular meaning of the words will be adopted, unless it is obvious from the context that they are not employed in that sense. When the popular meaning is applied to this term, it is as apt and proper as any word that could have been employed by the draftsman. *Finlay v. Dickerson*, 29 Ill. (19 Peck) 9, 20.

### As fit or suitable.

"Convenient," as used in a charter empowering the trustees of an almshouse to appoint and remove 24 inmates "as often as it shall seem to be convenient to them," means as often as it seems fit to the commission. *Davis v. Waddington*, 7 Man. & G. 37, 45.

The word "convenient" in Rev. St. § 5033, authorizing a change of venue to the adjoining county most convenient for both parties, is to be taken in the sense of most suitable, becoming, or appropriate, and not in the sense of physical ease. *Wilson v. Cincinnati St. Ry. Co.*, 9 Ohio Dec. 640, 641.

"Convenient," as defined by Webster, is fit or adapted to an end; suitable; becoming; appropriate. "Fit" or "suitable" is probably the proper meaning as applied to a sidewalk. This does not necessarily apply to any particular material out of which it is to be constructed, but it must be placed in such condition that people in the exercise of ordinary care will not in the night season fall into an excavation or place left in a dangerous condition. *City of Grand Island v. Oberschulte*, 55 N. W. 301, 302, 36 Neb. 696.

An exception in a partition deed of "all places which may be found convenient for erecting mills" on a certain creek, etc., should be construed to mean only natural mill sites or falls in the creek, and not places where mills might be erected and supplied with water by means of sluices or other works of art. *Jackson v. Lawrence* (N. Y.) 11 Johns. 191, 192.

No place can be "convenient" for the carrying on of a business which is a nuisance and which causes substantial injury to the property, nor can any use of one's own land be reasonable which deprives an adjoining owner of the lawful enjoyment of his property. *Susquehanna Fertilizer Co. v. Malone*, 20 Atl. 900, 902, 73 Md. 268, 9 L. R. A. 737, 25 Am. St. Rep. 595.

#### As nearest or most handy.

"Convenient," as used in a statute requiring notice of incorporation to be published in some newspaper as convenient as practicable to the principal place of business of the corporation, means that it must be published in the nearest or most handy paper suitable therefor. *Berkson v. Anderson*, 87 N. W. 402, 403, 115 Iowa, 674.

#### As necessary.

Code Civ. Proc. § 1185, provides that the "land upon which any building is constructed, together with a convenient space about the same or so much as may be required for the convenient use and occupation thereof," is subject to mechanics' liens. It was held that the expression should be construed to mean such space or area of land as is necessary to the enjoyment of the building for the purpose in view in its construction, it being said in explanation that the uses to which a building is to be put must manifestly, many times, determine the quantity of land necessary for the convenient use and occupation thereof. If erected as a sawmill for sawing lumber, the space required for a log and lumber yard would be regarded as necessary to its use, while like space around a similar building for a watch factory might not be at all necessary. Pursuant to this principle, it is decided that a decree establishing mechanics' liens on the entire premises constituting the fair grounds of an agricultural society, consisting of about 60 acres of land, with race

track, grand stand, corrals, stables, and other improvements thereon, in favor of persons who constructed a building on the grounds to be used as an hotel, clubhouse, and saloon, is erroneous. *Tunis v. Lakeport Agricultural Park Ass'n*, 33 Pac. 63, 98 Cal. 285.

The words "convenience, use and improvement of a city," in a city charter authorizing the city to purchase property required for the use, convenience, and improvement of the city, operating to limit the power of the city, it cannot purchase property by reason of collateral advantages incidentally resulting in the city's commercial or business prosperity. It is not contemplated or permitted that such property shall be acquired in aid of any public enterprise not of a public character, however laudable may be its purpose, or however useful may be its encouragement. A city cannot purchase for an agricultural society. *City of Eufaula v. McNab*, 67 Ala. 588, 591, 42 Am. Rep. 118.

#### As reasonable time.

Where it was agreed between the holder and maker of a note that the time for payment should be extended until it should be convenient for the maker to pay it, the word "convenient" meant that it should be extended for such a period as, under the circumstances of the case, would be reasonable. *Newsam v. Finch* (N. Y.) 25 Barb. 175, 177.

A note was in the following form: "June 20, 1835. For value received I promise to pay to the order of T. ninety five dollars, when I can make it convenient." Held, that the phrase "when I can make it convenient" imported that it should be payable within a reasonable time after its date. *Lewis v. Tipton*, 10 Ohio St. 88, 91, 75 Am. Dec. 498.

The statute of 1862 (page 398, § 2) provides that in case of assessments for street improvements the contractor for such improvement shall call upon the persons assessed and make demand for sums assessed against them if he can conveniently do so. Held, that "conveniently" means if he may do so by the exercise of reasonable diligence. *Guerin v. Reese*, 33 Cal. 292, 297.

In the pre-emption laws requiring a pre-emptor who temporarily leaves the land to return thereto as early as "convenient," the law means as early as he reasonably can. He has no right to keep possession, without a residence, for the mere purpose of preventing others from making a settlement on the land. *Jacobs v. Figard*, 25 Pa. (1 Casey) 45, 47.

A promise to pay the balance due, "when-ever it is convenient to make a final settlement," is in legal effect a stipulation that the act shall be done within a reasonable time. It cannot mean that the thing shall be done on the demand of the party, for then he might demand immediately, and before a proper time had elapsed. "Convenient," as



here used, must mean such a time for doing the act as, under all the circumstances of the case, should be reasonable. *Howes' Ex'r v. Woodruff* (N. Y.) 21 Wend. 640, 642.

Where a father promised a daughter and her proposed husband, in contemplation of their marriage, that he would do equal justice to all his daughters as fast as it was in his power "with convenience," the true meaning was that he would do it in a reasonable time, taking into consideration the circumstances of his estate, and the length of time that elapsed between the marriages of his other daughters and his advances to them respectively. *Chicester's Ex'r v. Vass' Adm'r* (Va.) 1 Munf. 98, 117, 4 Am. Dec. 531.

The words "when convenient," in a note so payable to order at Cincinnati, cannot be construed to nullify the words "On demand I promise to pay." If any force be given to them, it will be that the maker binds himself to pay within a reasonable time after date. *Works v. Hershey*, 35 Iowa, 340, 343.

An assignment for the benefit of creditors, in trust, to the purpose that the assignee shall "as soon as convenient" sell, etc., means as soon as he reasonably can do so. The word "convenient" ordinarily signifies fit, suitable, proper, without difficulty, and is used in this sense in the assignment, as directing the assignee to sell and dispose of the property in such time as it is fit, suitable, and proper for him to do under all the circumstances, or as soon as it can be done without difficulty. *McClung v. Bergfeld*, 4 Minn. 148 (Gil. 99, 103).

#### As reasonably convenient.

Where the charter of a railroad company provided that the corporation should have power to acquire and hold such lands as necessary and convenient, the words "necessary or convenient" should be liberally construed, and include all lands found to be reasonably necessary or convenient for the purpose of operating the road. *Boston & N. Y. Air-Line R. Co. v. Coffin*, 50 Conn. 150, 155.

The meaning of the term "convenient privilege of passing" in a deed of a gristmill located upon land at a distance from a highway, and providing that the grantee shall have a convenient privilege of passing to the mill, which privilege is not defined in the deed, is for the jury. To determine that question they would be authorized to ascertain from evidence aside from the deed, not only what description of way would be convenient for the purposes of the grant, but also to ascertain the character of the way which actually existed, if any, at the time of the grant, as indicating what the parties then understood to be a convenient way. *Simpson v. Norton*, 45 Me. 281, 290.

In a private act of Parliament for inclosing the waste lands of a manor, reserving

to the lord all mines, together with "convenient and necessary" ways then made or thereafter to be made, in liberty of laying wagonways, and to do such other works as might be necessary or convenient for the complete enjoyment thereof, held, that on the construction of the words "convenient and necessary" the question was not whether a road which had been laid out by the lord over one of the allotments had been made in the direction or in the manner least injurious to the owner of the allotment, or in that direction or by that mode which a strict and rigid necessity would point out, much less whether it had been made in that direction or by that mode which, on a view of the work when accomplished, and when a better judgment might be formed than could have been formed before, might be thought by persons possessing the highest degree of skill to be the best that could have been devised, but the question was whether the direction chosen had been such as a person of reasonable and ordinary skill and experience would have selected beforehand, and whether the mode adopted had been such as a prudent and rational person would have adopted if he had been making the road over his own land, and not on the land of another. *Abson v. Fenton*, 1 Barn. & C. 195, 203.

#### CONVENIENT CERTAINTY.

"Convenient certainty," within a statute requiring the declaration in ejectment to describe the property with convenient certainty, means not with the strict rules of common-law special pleading, but such certainty as in the usual sense of the word is convenient. *Kemble v. Herndon*, 28 W. Va. 524, 530.

#### CONVENIENT COURTHOUSE.

A good and convenient courthouse may necessarily mean a courthouse with shade trees surrounding it, and therefore a statute requiring the board of supervisors of each county to keep in repair a "good and convenient courthouse" may be construed to be an authorization for the making of an appropriation for shade trees on the courthouse grounds. *Allgood v. Hill*, 54 Miss. 666, 667.

#### CONVENIENT DISPATCH.

An order directing the settlement of a bill of exceptions "promptly and with all convenient dispatch" meant such reasonable dispatch as is consistent with the nature of the act required. *State v. Cunningham*, 11 S. E. 76, 82, 83 W. Va. 607.

#### CONVENIENT PLACE.

The term "convenient place" in which a factory, which would otherwise be a nuisance, may be maintained, does not mean the one best for the profit and convenience of the

owner of the offensive factory, but the one where it shall cause no actionable injury to others. One nuisance does not justify another; still it may be taken as one of the surrounding circumstances to be considered in determining whether or not the other be a nuisance. *Powell v. Bentley & Gerwig Furniture Co.*, 34 W. Va. 804, 807, 12 S. E. 1085, 1087, 12 L. R. A. 53.

### CONVENIENT SECTIONS.

How. Ann. St. § 1740d, providing that, after a public grade shall be located, the commissioner shall divide the route into convenient sections for the allowing of the work, does not compel the allowing to be done in sections, but gives the commissioners the right to allow any one section at his discretion. *Smith v. Carlow*, 72 N. W. 22, 24, 114 Mich. 67.

### CONVENIENT SPEED.

A stipulation in a charter party that the vessel should proceed "with all convenient speed" from a certain place to enter on the charter was equivalent to a stipulation that she should proceed without unnecessary delay. *Olsen v. Hunter-Benn & Co.* (U. S.) 54 Fed. 530, 531.

A charter party describing a ship as "now trading," and providing that she should sail to a specified port with "all convenient speed," meant that she should proceed with all reasonable diligence with reference to the voyage which she had already undertaken. *Gill & Fisher v. Browne* (U. S.) 53 Fed. 394, 396, 3 C. C. A. 573.

### CONVENIENT TIME.

A covenant in a lease, for the landlord to be allowed to come into a house to see the state of its repairs at "convenient times," requires a notice of the coming, and if he does not give notice it is not to be considered a "convenient time." *Wetherell v. Bird*, 6 Car. & P. 195, 200.

### CONVENIENT USE.

"Convenient use" of land for a right of way of a railroad company means fit, appropriate, and advantageous use. The adjective "convenient" does not limit the word "use" so as to make it apply to the actual running of trains upon the track, that being done by virtue of the meaning of the word "use" itself. The use of a thing is not the use of an appurtenant thereto, and hence the convenient use of a railroad does not include the use of an appurtenance thereto. *Vermilya v. Chicago, M. & St. P. R. Co.*, 24 N. W. 234, 235, 66 Iowa, 606, 25 Am. Rep. 279.

## CONVENTION.

See "Mass Convention"; "Political Convention."

A convention is an organized assemblage of delegates representing a political party or organization. *Pol. Code Cal.* 1903, § 1186.

An assembly or "convention of delegates," within the meaning of the act relating to elections, is an organized assemblage of delegates representing a political party which at the last general election before the holding of such convention or assembly, polled at least 1 per cent. of the entire vote cast in the state or county, or other division or district for which the nomination is made. *Gen. St. Minn.* 1894, § 39.

A "convention of delegates" is a convention of delegates of any political party which, at the last general election before such convention, polled as a party at least 3 per cent. of the entire vote cast in the state, county, or subdivision for which the nomination is made. *Rev. St. Mo.* 1899, § 7081.

A convention is an organized assemblage of delegates representing a political party which, at the last election before the holding of such convention, polled at least 3 per cent. of the entire vote cast in the state, county, town, or other political division for which the nomination is made. *Comp. Laws Nev.* 1900, § 1694.

The word "convention," as employed in the act relating to elections, shall mean an assembly of delegates chosen at a caucus in accordance with the usage of any political party. *Pub. St. N. H.* 1901, p. 140, c. 78, § 1.

A convention is an organized assemblage of delegates representing a political party or principle which cast 5 per cent. of the total number of votes cast for member of Congress at the last general election. *Rev. Codes N. D.* 1899, § 498.

A convention is an organized assemblage of voters or delegates representing a political party which, at the last election before the holding of such convention, polled at least 2 per cent. of the entire vote cast in the state, county, or other political division or district for which the nomination may be made. *Rev. St. Utah* 1898, § 822.

A convention is an organized assemblage of voters or delegates of any political party, for the purpose of nominating a candidate or candidates for public office, which, at the last general election before such convention, polled at least 3 per cent. of the entire vote of the state, or any division or subdivision thereof for which the nominations are made. *Code W. Va.* 1899, p. 69, c. 3, § 18.

A "convention" or "primary meeting," within the meaning of the election laws, is an organized assemblage of electors or delegates representing a political party. Rev. St. Wyo. 1890, § 219.

A "convention" or "primary meeting," within the meaning of Pol. Code, § 1810, providing that any convention or primary meeting held for the purpose of making nominations to public office, or the number of electors required in this chapter, may nominate candidates for public office, to be filled by election in the state, is defined in the statute as an "organized assembly of electors or delegates representing a political party or principle." *State v. Tooker*, 46 Pac. 530, 531, 18 Mont. 540, 34 L. R. A. 315; *Same v. Hogan*, 62 Pac. 583, 586, 24 Mont. 383; *Price v. Lush*, 24 Pac. 749, 10 Mont. 61, 9 L. R. A. 467.

"Convention" is defined by Sess. Laws 1891, p. 143 (3 Mills' Ann. St. § 1625c), as any organized assembly of voters or delegates representing a political party which, at the last election before the holding of such convention, polled at least 10 per cent. of the entire vote cast in the state, county, or other political division or district for which the nomination may be made. *Schafer v. Whipple*, 55 Pac. 180, 181, 25 Colo. 400.

A convention must be a representative body. The very underlying principle of convention organization is in representation. This principle pervades every political system in our form of popular government. It was recognized in May, 1787, when the federal system was revised by the Philadelphia convention of delegates from the states, at the outset of the government. As political parties have grown and become the medium of declarations of principles of electors, so the convention system has become a common part of political machinery as the means of putting candidates before the people, and the statutes of many states, including those of Montana, have briefly put in definite form the rule that a convention is an organized assemblage of electors or delegates representing a political party or principle. *State v. Johnson*, 46 Pac. 533, 534, 18 Mont. 548, 34 L. R. A. 313.

As used in Rev. St. § 2116, providing that no purchase, grant, lease, or other conveyance of lands from an Indian nation shall be valid unless made by treaty or convention pursuant to the Constitution, the words "treaty or convention" are employed in the sense of compacts between states and organized communities or their representatives. This is the ordinary signification of those words—the first meaning which is suggested by their use. This is not doubted as to the word "treaty," and scarcely admissible of doubt as to the word "convention" when used in connection with the word "treaty."

*United States v. Hunter* (U. S.) 21 Fed. 615, 616.

The term "convention," as used in an act for the protection of submarine cables, shall be taken to mean the International Convention for the Protection of Submarine Cables, made at Paris on the 14th day of May, 1884, and proclaimed by the President on the 22d day of May, 1885. U. S. Comp. St. 1901, p. 3589.

#### CONVENTIONAL INTEREST.

"Conventional interest" is that interest which is agreed upon and fixed by the parties to a written contract, not to exceed 10 per cent. per annum. Rev. St. Tex. 1895, art. 3009.

"Conventional interest" is the rate general and usual by custom at a given time and at a given place, without regard to the legal rate of interest, meaning that rate fixed by law. *Fowler v. Smith*, 2 Cal. 568, 570.

#### CONVENTIONAL MORTGAGE.

A "conventional mortgage" is that which depends on covenants. Civ. Code La. 1900 art. 3287.

A "conventional mortgage" is a contract by which a person binds the whole of his property, or a portion of it only, in favor of another, to secure the execution of some engagement, but without divesting himself of the possession. Civ. Code La. 1900, art. 3290.

To create a "conventional mortgage" two things are essential, namely, the intention to create it on the part of the parties to the contract, and, in order to have it take effect in regard to third parties, the expression of that intention with sufficient clearness to serve as notice to them when the instrument is recorded. *Succession of Benjamin*, 2 South. 187, 189, 39 La. 612.

#### CONVENTIONAL SUBROGATION.

The term "conventional subrogation" is applied to a subrogation arising when one pays the debt of another under an agreement, existing at the time of payment, with either the debtor or the creditor, that the person paying shall be subrogated to the liens existing as security for the debt. It differs from "legal subrogation," which exists only in favor of the surety for the payment of the debt, or one who is compelled to pay the debt to protect his own rights. It is entirely settled that one who advances money to pay a claim, for the security of which there exists a lien, in default of an agreement cannot be subrogated to the rights of the lienor. *Seeley v. Bacon* (N. J.) 34 Atl. 139, 140.

"Conventional subrogation" is a term used to designate a subrogation arising by reason of an express or implied agreement between a third person paying a debt and either the debtor or creditor. The mere payment of a debt by one not bound to see that it is paid, or by one who is affected in his property by its nonpayment, will not entitle the payor to subrogation; nor will an understanding existing in the mind of the payor that he will be entitled to subrogation so entitle him, unless this mental condition is produced by some conventional arrangement between the payor and either the creditor or debtor that this will be the consequence of the payment. *Gore v. Brian* (N. J.) 35 Atl. 897, 898.

"Conventional subrogation," as its name imports, results from agreement of the parties, and can take effect only by agreement. The agreement is of course with the party to be subrogated, and, it seems, may be either by debtor or creditor. Under this doctrine a stranger paying off the vendor's lien at the instance of a debtor, and upon agreement that he shall have a lien for his reimbursement, stands in the shoes of the vendor in respect to the lien. It is purely a conventional subrogation. It results directly from the agreement. *Allen v. Caylor*, 24 South. 512, 513, 120 Ala. 251, 74 Am. St. Rep. 31.

"Conventional subrogation" results from an equitable right springing from an express agreement of the debtor by which one advances money to pay a claim for the security of which there exists a lien, and by which agreement he is to have an equal lien to that paid off. Then he is entitled to the benefit of the security which he has satisfied, with the expectation of receiving an equal lien. *Coe v. New Jersey M. Ry. Co.*, 31 N. J. Eq. (4 Stew.) 106; *Tradesmen's Building Ass'n v. Thompson*, 32 N. J. Eq. (5 Stew.) 133; *Tyrrell v. Ward*, 102 Ill. 29. Thus one who makes a loan to discharge a first mortgage, pursuant to an agreement with the mortgagor that he shall have a first mortgage on the same land to secure it, but there is at the time another mortgage on the land, of which the lender is ignorant, will be subrogated to the rights of the first mortgagee. *Home Sav. Bank v. Bierstadt*, 48 N. E. 161, 162, 168 Ill. 618, 61 Am. St. Rep. 146.

A "conventional subrogation" is where an agreement is made with the person paying the debt that he shall be subrogated to the rights and remedies of the original creditor. A conventional subrogation can result only from a direct agreement, express or implied, made with either the creditor or the debtor. And it is not sufficient that a person paying the debt of another should have merely the understanding, on his part, that he is to be subrogated to the rights of a creditor. *Wilkins v. Gibson*, 38 S. E.

374, 379, 380, 113 Ga. 44, 84 Am. St. Rep. 204.

A "conventional subrogation" occurs when the creditor formally transfers his claim to a third person. *Connecticut Mutual Ins. Co. v. Cornwall*, 25 N. Y. Supp. 348, 350.

#### CONVENTIONAL TRUSTEE.

A "conventional trustee" is a trustee appointed under a decree. Generally speaking, where there are no restrictions imposed by the testator, a trustee named by him is vested with a discretion which a conventional trustee does not ordinarily possess; and, where a discretion is expressly conferred by will, its exercise in good faith and with proper diligence, though resulting in a pecuniary loss, presents quite a different situation from that which would arise were the loss to follow from an unauthorized act, or from the exercise of an assumed discretion not intrusted to a conventional trustee. And this is so because the power of the one is broader than the power of the other, and the accountability of each is measured by a totally different standard. Loss resulting from an act of a conventional trustee, though the act were done in the utmost good faith, if it were not an act permitted by the instrument creating or defining the trust, or were done without proper judicial sanction, would fall on the trustee. *Gilbert v. Kolb*, 37 Atl. 423, 85 Md. 627 (citing *Zimmerman v. Fraley*, 70 Md. 561, 17 Atl. 500).

#### CONVERSATION.

See "Private Conversations."

The conversation between a husband and wife concerning which one cannot testify in an action for divorce does not include all language between husband and wife, but it must be construed to include a private conversation between them in which the husband requested the wife to return home, though the conversation explained the wife's act in going away and her mental attitude in the act. *Fuller v. Fuller*, 58 N. E. 588, 589, 177 Mass. 184, 83 Am. St. Rep. 273.

The word "conversation," when employed to denote an interchange of sentiments, or a talking together, implies mutuality. The notion ordinarily conveyed by its use is an oral discourse, or talk, in which two or more participated, as distinguished from the word "admission," which is applicable to a statement or declaration made by one person alone. *Jackson v. Ely*, 49 N. E. 792, 794, 57 Ohio St. 450.

"Conversation" means more than answering questions; it means familiar intercourse and exchange of thoughts or sentiments; and is so used by a witness as to

the mental condition of testatrix when she said that she would not engage in any conversation, but appeared to be in a study. *In re Fenton's Will*, 97 Iowa, 192, 200, 66 N. W. 99.

"Communicate" means substantially the same as "converse," so that an oath administered to an officer not to allow a jury to converse, etc., is substantially the same as not to allow them to communicate. *Scott v. State*, 75 Tenn. (7 Lea) 232, 233.

#### Acts.

Gen. Laws 1877, c. 40, provides that it shall not be competent for any party to an action, or interested in the event thereof, to give evidence of or concerning any conversation with a deceased person relating to any matter in issue between the parties. Held, that the term "conversation," as so used, meant oral admissions, only spoken words, between the witness and a deceased person, and did not include acts of the deceased which might be evidence of an admission. *Chadwick v. Cornish*, 1 N. W. 55, 57, 26 Minn. 28.

#### As manner of living.

"Conversation," as used in a statute providing that in an action for abduction the prosecuting witness would be presumed to have led a chaste life and "conversation," means manner of living, habits of life, conduct. *Bradshaw v. People*, 38 N. E. 652, 653, 153 Ill. 156.

## CONVERSE.

The word "converse," as used in speaking of a shop "wherein any person doth converse," means "to be employed or engaged with." *Quinn v. People*, 71 N. Y. 561, 568, 27 Am. Rep. 87.

## CONVERSION.

See "Constructive Conversion"; "Equitable Conversion"; "Fraudulent Conversion."

See, also, "Trover."

"The term 'conversion' was defined by Lord Holt in *Baldwin v. Cole*, 6 Mod. 212, as the assuming to one's self the property and right of disposing of another man's goods. Such definition was adopted and sanctioned by Lord Ellenborough in the case of *McCombie v. Davies*, 6 East, 540." *Murray v. Burling* (N. Y.) 10 Johns. 172, 175; *Covell v. Hill*, 6 N. Y. (2 Seld.) 374, 383.

"Conversion" at law is defined to be an unauthorized assumption and exercise of the right of ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights. *Industrial & General*

*Trust Co. v. Tod*, 63 N. E. 285, 288, 170 N. Y. 233; *Thorp v. Robbins*, 33 Atl. 896, 897, 68 Vt. 53 (citing 15 Am. Law Rev. 363); *Boyce v. Brockway*, 81 N. Y. 490, 493; *Smith v. Smalley*, 46 N. Y. Supp. 277, 279, 19 App. Div. 519; *Tenny v. State*, 7 South. 50, 88 Ala. 105 (citing *Conner v. Allen*, 33 Ala. 515, 516; *Thwett v. Stamps*, 67 Ala. 96); *Zion v. De Jonge*, 81 N. Y. Supp. 491, 39 Misc. Rep. 839 (citing *Laverty v. Snethen*, 68 N. Y. 522, 524, 23 Am. Rep. 184).

"Every unauthorized taking of personal property, and all intermeddling with it, beyond the extent of the authority conferred, in case a limited authority has been given with intent so to apply and dispose of it as to alter the condition or interfere with the owner's dominion, is a conversion." *Laverty v. Snethen*, 68 N. Y. 522, 524, 53 Am. Rep. 184 (quoted and approved in *Industrial General Trust Co. v. Tod*, 170 N. Y. 233, 63 N. E. 285; *Field v. Sibley*, 77 N. Y. Supp. 252, 255, 74 App. Div. 81).

Conversion is an unauthorized act which deprives a man of his property, permanently or for an indefinite time. *Newlin v. Prevot*, 90 Ill. App. 515, 526 (citing *Union Stockyards & Transit Co. v. Mallory, Son & Zimmerman Co.*, 157 Ill. 554, 563, 41 N. E. 888, 48 Am. St. Rep. 341); *Pease v. Smith*, 61 N. Y. 477. In order to establish conversion, it must appear that the plaintiff was deprived of his property by an unauthorized act of the defendant. *Kreher v. Mason*, 33 Mo. App. 297, 315 (citing *Add. Torta*, 525).

A "conversion," in the sense of the law of trover, is defined by Mr. Greenleaf to consist in either the appropriation of a thing to the party's own use and beneficial enjoyment, or its destruction, or in exercising dominion over it in exclusion or defiance of the plaintiff's right, or in withholding the possession of the plaintiff under a claim of title inconsistent with his own. *University of North Carolina v. State Nat. Bank*, 3 S. E. 359, 361, 96 N. C. 280; *Tinker v. Morrill*, 39 Vt. 477, 480, 94 Am. Dec. 845; *Allen v. Bicknell*, 38 Me. 436, 439; *Rhea v. Deaver*, 85 N. C. 337, 340; *Ferguson v. Clifford*, 37 N. H. 86, 101; *King v. Franklin*, 31 South. 467, 468, 132 Ala. 559; *Hunter v. Cronkhite*, 36 N. E. 924, 925, 9 Ind. App. 470; *Davis v. Hurt*, 21 South. 468, 469, 114 Ala. 146; *Roach v. Turk*, 56 Tenn. (9 Heisk.) 708, 715, 24 Am. Rep. 360; *Baker v. Beers*, 6 Atl. 35, 37, 64 N. H. 102; *Thorp v. Robbins*, 33 Atl. 896, 897, 68 Vt. 53; *Mahaney v. Walsh*, 44 N. Y. Supp. 969, 971, 16 App. Div. 601; *Union & Planters' Bank v. Farrington*, 31 Tenn. (13 Lea) 333, 336. It may therefore be either direct or constructive. Every unlawful taking with intent to apply the goods to the use of some other person than the owner, or destroying or altering their nature, is a conversion. *Tracy v. Cloyd*, 10 W. Va. 19, 23, 24; *Sparks v. Purdy*, 11 Mo. 219, 226.

A "conversion" consists of some act of dominion exerted over one's property in denial of his right or inconsistent with it. *Crosby v. Stratton* (Colo.) 68 Pac. 180, 131 (citing *Cooley, Torts*, 448); *Velsian v. Lewis*, 16 Pac. 631, 632, 15 Or. 539, 8 Am. St. Rep. 184; *Budd v. Multnomah Ry. Co.*, 7 Pac. 99, 101, 12 Or. 271, 53 Am. Rep. 355; *Ramsby v. Beezley*, 8 Pac. 288, 11 Or. 49; *Johnson v. Dun*, 78 N. W. 98, 99, 75 Minn. 533 (citing *Cooley, Torts*, 448); *Liptrot v. Holmes*, 1 Ga. (1 Kelly) 381; *Horton v. Jack* (Cal.) 37 Pac. 652, 653; *Nichols v. Newsom*, 6 N. C. 302, 303; *Badger v. Hatch*, 71 Me. 562, 567; *McIntire v. Blakeley* (Pa.) 12 Atl. 325, 327; *Kinhead v. Holmes & Bull Furniture Co.*, 64 Pac. 157, 158, 24 Wash. 218; *Tuttle v. Hardenberg*, 88 Pac. 1070, 1071, 15 Mont. 219; *Cernahan v. Chrysler*, 88 N. W. 778, 779, 107 Wis. 645; *Wentworth v. McDuffie*, 48 N. H. 402, 406 (citing *Woodman v. Hubbard*, 25 N. H. [5 Post.] 67, 71, 57 Am. Dec. 310).

"Conversion" is any dealing with the thing which impliedly or by its terms excludes the owner's dominion. *State v. Rigall*, 70 S. W. 150, 151, 169 Mo. 659; *Spalding v. People*, 172 Ill. 40, 56, 49 N. E. 993, 998.

Mr. Bigelow says that the assertion of a title to or an act of dominion over personal property inconsistent with the rights of the owner is a conversion. *Bigelow, Torts*, 428. Every assuming by one to dispose of the goods of another is a conversion. *Ramsby v. Beezley*, 8 Pac. 288, 11 Or. 49 (citing *Bacon's Abr.*); *Budd v. Multnomah Ry. Co.*, 7 Pac. 99, 101, 12 Or. 271, 53 Am. Rep. 355. "A 'conversion' of personal property takes place whenever one person assumes the ownership or control of another's property in contravention of and against the rights of such other person and against his consent." *Hill v. Finigan*, 19 Pac. 494, 497, 77 Cal. 267, 11 Am. St. Rep. 279.

"A conversion is defined to be any act of the defendant inconsistent with the plaintiff's right of possession or subversive of his right of property." *Omaha & Grant Smelting & Refining Co. v. Tabor*, 21 Pac. 925, 930, 13 Colo. 41, 5 L. R. A. 236, 16 Am. St. Rep. 185 (citing *Harris v. Saunders* [S. C.] 2 Strob. Eq. 370, note; *Webber v. Davis*, 44 Me. 147, 69 Am. Dec. 87; *Gilman v. Hill*, 36 N. H. 311); *Donahue v. Shippee*, 8 Atl. 541, 542, 15 R. I. 453; *Williams v. Wall*, 60 Mo. 318, 321.

The legal signification of the word "conversion" is an appropriation of and dealing with the property of another as if it were one's own, without right. *Land v. Klein*, 50 S. W. 638, 639, 21 Tex. Civ. App. 3; *Ramsby v. Beezley*, 8 Pac. 288, 11 Or. 49. "Conversion" means the wrongful taking of or an appropriation by one person of the property of another. *Stough v. Stefani*, 27 N. W. 445, 446, 19 Neb. 468. Conversion is a wrongful or unauthorized deprivation of property.

*Mohr v. Langan*, 63 S. W. 409, 416, 162 Mo. 474, 85 Am. St. Rep. 508.

Conversion is the unauthorized assumption or exercise of acts of ownership over the personal property of another. "Whoever undertakes to deal with the property of another as his own or detains it from the owner is, in contemplation of law, guilty of a conversion of it." *Watt v. Potter* (U. S.) 29 Fed. Cas. 438; *Louisville & N. Ry. Co. v. Lawson*, 11 S. W. 511, 513, 88 Ky. 496.

A conversion of property is an act of malfeasance, not of mere nonfeasance; a positive wrong, and not the mere omission of what was right. A wrongful taking or assumption of a right to control or dispose of property constitutes a conversion. Indeed, any wrongful act which negatives or is inconsistent with the owner's right is per se a conversion. It is not necessary that the party guilty of the conversion should have made use of the property in any way. "Does he exercise a dominion over it in exclusion or in defiance of plaintiff's right? If he does, that is in law a conversion, be it for his own or another person's use." *Schroepel v. Corning* (N. Y.) 5 Denio 236, 240 (citing *Bristol v. Burt* [N. Y.] 7 Johns. 254, 5 Am. Dec. 264).

The action of trover is founded on the right of property and possession, and any act of a party other than the owner, which militates against this conjoint right, in law is a "conversion." *Bristol v. Burt* (N. Y.) 7 Johns. 254, 257, 5 Am. Dec. 264; *Brown v. Campbell Co.*, 24 Pac. 492, 495, 44 Kan. 237, 21 Am. St. Rep. 274. It is conversion if one takes the property of another and sells or otherwise disposes of it without the owner's authority; or if he takes it for a temporary purpose only, in disregard of the owner's right, it is conversion. *Brown v. Campbell Co.*, 24 Pac. 492, 495, 44 Kan. 237, 21 Am. St. Rep. 274.

Conversion has acquired a technical meaning; that is, detaining goods so as to deprive the owner or person entitled to the possession of them of his dominion over the same. *Cannon v. State*, 42 S. W. 981, 982, 38 Tex. Cr. R. 322; *Brown v. Campbell Co.*, 24 Pac. 492, 495, 44 Kan. 237, 21 Am. St. Rep. 274.

"A conversion may be either, first, by wrongfully taking a personal chattel; second, by some other illegal assumption of ownership, or by illegally using or mistaking goods; or, third, by a wrongful detention." *Aschermann v. Philip Best Brewing Co.*, 45 Wis. 262, 266; *Davis v. Hurt*, 21 South. 468, 469, 114 Ala. 146.

An assertion of right inconsistent with that of the owner to exercise dominion over his property is a conversion. *Abrahams v. Southwestern R. Bank*, 1 S. C. (1 Rich.) 441, 445, 7 Am. Rep. 33 (citing 6 Bac. Abr. 677).

To make out a "conversion," there must be proof of a wrongful possession, or the ex-

ercise of a dominion over it in exclusion or defiance of the owner's right or authority, or injury, use, or unlawful detention after demand. *Fernald v. Chase*, 37 Me. 289, 291.

If one person disposes of the goods of another for the benefit of a third person, this is a "conversion." "Every unlawful intermeddling with the rights of another is a conversion, it being a disposition pro tanto of the goods of another as if they were the goods of the intermeddler." *United Society of Shakers v. Underwood*, 72 Ky. (9 Bush) 609, 619, 15 Am. Rep. 731 (citing *Bac. Abr.* tit. "Trover," subd. "B").

#### **Appropriation to converter's use.**

Any distinct act of dominion wrongfully exercised over one's property in denial of his right or inconsistent with it is a "conversion," and this is true whether such wrongful act be exercised for the wrongdoer's own or for another's use. *Murphy v. Hobbs*, 5 Pac. 637, 638, 8 Colo. 17; *Bristol v. Burt* (N. Y.) 7 Johns. 254, 257, 5 Am. Dec. 264; *Mahaney v. Walsh*, 44 N. Y. Supp. 969, 971, 18 App. Div. 601; *Donahue v. Shippee*, 8 Atl. 541, 542, 15 R. I. 453; *Budd v. Multnomah St. Ry. Co.*, 7 Pac. 99, 101, 12 Or. 271, 58 Am. Rep. 355; *McIntire v. Blakeley* (Pa.) 12 Atl. 325, 327; *Brown v. Campbell Co.*, 24 Pac. 492, 495, 44 Kan. 237, 21 Am. St. Rep. 274; *Tuttle v. Hardenberg*, 38 Pac. 1070, 1071, 15 Mont. 219; *Mohr v. Langan*, 63 S. W. 409, 416, 162 Mo. 474, 85 Am. St. Rep. 508; *Cernahan v. Chrisler*, 83 N. W. 778, 779, 107 Wis. 645.

"Conversion is an appropriation of another's property; change of ownership is implied by it. The change may be temporary or perpetual, but so strongly has our court insisted on this change as resulting from conversion, that when a verdict in trover is rendered whilst the chattel remains out of the possession of the plaintiff, the judgment for the plaintiff is itself without satisfaction (which satisfaction is insisted on elsewhere, 8 Cow. 43), considered here to be an acknowledgment by plaintiff that the title has by conversion been transferred from him." "Any act in exclusion or defiance of the plaintiff's right, any assumption of property and of the right of disposition, any intermeddling indicating a claim of ownership, any assertion of the control which belongs to the owner, whether for the benefit of the defendant or of a third person, may furnish proof of the conversion. But the idea of property is of the essence of a conversion." *Nelson v. Whetmore* (S. C.) 1 Rich. Law, 318, 322.

#### **Asportation.**

Any carrying away of a chattel for the use of one without the owner's consent, or for a third party, amounts to a conversion, because it is inconsistent with the general right of dominion which the owner has in it, who is entitled to the use of it at all times and in

all places. Such an asportation is conversion. *Brown v. Campbell Co.*, 24 Pac. 492, 495, 44 Kan. 237, 21 Am. St. Rep. 274.

Asportation is not an essential element of conversion, and therefore the act of a party in changing the lock on a store door to bar out the owner of property contained therein, and the leaving of orders that the latter shall be ejected if he gains entrance, constitutes a conversion. *Simon v. Simon*, 55 N. Y. Supp. 915, 38 App. Div. 85.

Lord Mansfield says: A mere wrongful asportation of the chattel does not amount to a conversion, unless the taking or detention of the chattel is with intent to convert it to the taker's own use, or that of some third person, or unless the act done has the effect of destroying or changing the quality of the chattel. *Rogers v. Hule*, 2 Cal. 571, 572, 56 Am. Dec. 368.

#### **Assertion of title.**

"Conversion is based upon the idea of an assumption by the defendant of a right of property, or of a right of dominion over the thing converted which casts upon him all the risks of an owner, and it is therefore not every wrongful intermeddling with, or wrongful asportation, or wrongful detention of personal property, that amounts to a conversion. Acts which themselves imply an assertion of title, or of a right of dominion over personal property, such as a sale, letting, or destruction of it, amounts to a conversion, even though the defendant may have honestly mistaken his rights. The acts which do not in themselves imply an assertion of title, or of a right of dominion over such property, will not sustain an action of trover, unless done with the intention to deprive the owner of it permanently or temporarily, or unless there has been a demand for the property and a neglect or refusal to deliver it." *Spooner v. Manchester*, 133 Mass. 270, 273, 43 Am. Rep. 514.

To constitute conversion there must be a claim of ownership asserted against the true owner, or, in case the property has come into the possession of another, there must be a demand for its return by the owner or his authorized agent. A demand by a third person who has no relation to, or does not stand in privity with, the owner, is insufficient. *Castle v. Corn Exch. Bank*, 26 N. Y. Supp. 1035, 1039, 75 Hun. 89.

The mere assertion of ownership of property without in any way interfering with it or the owner's right to control it is no evidence of a conversion. *Thorp v. Robbins*, 33 Atl. 896, 897, 68 Vt. 53 (citing *Irish v. Cloyes*, 8 Vt. 30, 30 Am. Dec. 446).

#### **Authority of third person.**

Lord Ellensborough, in *Stephens v. Ellwall*, 4 Maule & S. 259, lays it down as clear

law "that a person is guilty of conversion who intermeddies with the property of another and disposes of it; and it is no answer that he acted under authority from some other person, who had himself no authority to dispose of it." *Bonaparte v. Claggett*, 27 Atl. 619, 624, 78 Md. 87.

One acting under an authority from a person having no right to give such authority in relation to certain goods may be guilty of conversion if he disposes of them. *Mohr v. Langan*, 63 S. W. 409, 416, 162 Mo. 474, 85 Am. St. Rep. 503. Neither is it any defense to say that he acted as agent. Thus, plaintiff purchased a horse and buggy from a widow, who delivered the property at a certain livery stable. The widow having run away leaving the children, their uncle took charge of them, and came to town to get any property she might have left. Defendant, who was under-sheriff, having discovered the horse and buggy at the stable, directed those in charge not to allow any one to remove them, and returned with the uncle and directed that the property be delivered to him, which was done. Held that, though defendant was ignorant of plaintiff's ownership, and later had the property redelivered to plaintiff, he was guilty of conversion. *Cernahan v. Chrisler*, 83 N. W. 778, 779, 107 Wis. 645.

Conversion, in the sense of the law of trover, consists either in the appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it in exclusion or defiance of the plaintiff's right, or in withholding possession from the plaintiff under a claim of title inconsistent with his own. 2 Greenl. Ev. § 642. A commission merchant or warehouseman, to whom goods are consigned or delivered for sale, and who, in ignorance of any claim by other parties thereto, or want of title in his principal, sells the goods and pays over the proceeds to his principal, who, it is afterwards discovered, was not the owner or authorized to sell them, is not liable to the real owner for the value of the goods. *Abernathy, Long & Co. v. Wheeler, Mills & Co.*, 13 Ky. Law Rep. 730, 732.

#### Change in condition.

Conversion is the unlawful appropriation or exercise of acts of ownership over the personal property of another. Conversion is complete when the party in possession has appropriated the property as his own. The term does not imply any change in the condition of the goods. *Wells*, Repl. 351. Thus, if one originally in the rightful possession of goods refuses to deliver them to the owner on demand, the refusal is evidence of a conversion, although the goods have neither been sold nor changed in form, but remain in the possession of the wrongdoer just as they were before. *Wood v. McDonald*, 6 Pac. 452, 453, 66 Cal. 546.

#### Conversion through agent.

Any actual wrongful exercise or assumption by a person himself, or by another by his procurement, over the goods of the real owner, by which he is deprived of them, is a conversion for which the action of trover will lie. Therefore, where defendant caused plaintiff's property to be sold under a distress warrant as the property of another person, to collect a debt due from such person, such act was a conversion. *Hale v. Ames*, 18 Ky. (2 T. B. Mon.) 143, 144, 15 Am. Dec. 150.

The term "conversion" does not necessarily import a manual taking of the property of another, but includes a direction of defendant to his servant to feed his cattle from the plaintiff's hay, as such conduct is an act of dominion wrongfully exerted over plaintiff's property, inconsistent with his right. *Brown v. Ela*, 30 Atl. 412, 413, 67 N. H. 110.

#### Demand necessary.

"It is believed that all conversions may be divided into four distinct classes: (1) By a wrongful taking; (2) by an illegal assumption of ownership; (3) by an illegal user or misuser; and (4) by a wrongful detention. In the three first named classes there is no necessity for a demand and refusal, as the evidence arising from the acts of the defendant is sufficient to prove the conversion. In the latter class alone is such evidence (of demand and refusal) to be required, as the mere detention of a chattel furnishes no evidence of a disposition to convert it to the holder's own use, or to divest the true owner of his property." *Strauss v. Schwab*, 16 South. 692, 104 Ala. 669.

To constitute a conversion of chattels there must be some exercise of dominion over the property in repudiation of, and inconsistent with, the owner's right. *Evans v. Mason*, 64 N. H. 98, 5 Atl. 766. A demand and refusal are sufficient evidence of a conversion, and a demand is only necessary when the circumstances do not themselves amount to a conversion. *Porell v. Cavanaugh*, 41 Atl. 860, 861, 69 N. H. 364.

A conversion is an authorized act which deprives a man of his property permanently or for an indefinite time. A wrongful assumption of the ownership of property may be a conversion in itself, and a demand for the return of the property and a refusal is unnecessary as a condition precedent to an action for the conversion of the same. *Union Stockyard & Transit Co. v. Mallory, Son & Zimmerman Co.*, 41 N. E. 888, 890, 157 Ill. 554, 48 Am. St. Rep. 341.

At common law a conversion is that tort which is committed by a person who deals with chattels not belonging to him in a manner which is inconsistent with the rights of



the lawful owner. *Velsian v. Lewis*, 15 Or. 539, 16 Pac. 631, 3 Am. St. Rep. 184. Hence a demand is not necessary to constitute conversion. *Kinhead v. Holmes & Bull Furniture Co.*, 64 Pac. 157, 158, 24 Wash. 216.

A demand and refusal are not a conversion, but simply evidence of it, and are necessary where the property has come lawfully into the defendant's possession. *Smith v. Smalley*, 46 N. Y. Supp. 277, 279, 19 App. Div. 519.

In a suit for the recovery of the possession of personal property alleged to be unlawfully detained, if a wrongful "conversion" of the property by the defendant is shown by the evidence, a demand for the property before suit brought, and proof of such demand, are not necessary. *Cox v. Albert*, 78 Ind. 241, 244.

Where money of the principal, with his knowledge and consent, or by his direction, is paid to another person as his agent, the former cannot, as a general rule, maintain an action against the latter for the recovery of such money, until demand therefor has been made; but if the evidence shows a wrongful conversion of the money by the agent, or by him and another, proof of such prior demand is unnecessary. *Terrell v. Butterfield*, 92 Ind. 1, 10.

Purchasing property from one who has no right to sell, and holding it to one's own use, is a direct act of conversion, without any demand and refusal, it being necessary to show demand and refusal only where a party obtains possession lawfully. *Amherst v. Hollis*, 9 N. H. 107, 110.

#### Disposal of whole by owner of interest.

Where defendant and another, who was the owner of an undivided one-third of an auger, used such auger in partnership in boring a well, and while in their possession the auger was seized and sold by a creditor of such partnership to pay a partnership debt without the consent or the procurement of defendant, neither such use of the auger nor such seizure and sale constituted a conversion by defendant. *Bell v. Layman*, 17 Ky. (1 T. B. Mon.) 89, 41, 15 Am. Dec. 83.

Conversion is a completed act by which property is disposed of without authority by another than the owner, contrary to the rights of the owner or one having a lease or mortgage thereon. Thus, where the lessor of land was entitled to a certain amount of wheat raised thereon, and notified the proprietor of an elevator, on its delivery, of his rights, and such elevator man agreed to hold the wheat for him, a delivery of the warehouse receipt to the lessee thereafter constituted a conversion. *Willard v. Monarch Elevator Co.*, 87 N. W. 996, 998, 10 N. D. 400.

The term "conversion" includes the act of a co-tenant of a chattel in selling the

whole of the chattel as his own. *Leader v. Planta*, 50 Atl. 53, 95 Me. 343, 85 Am. St. Rep. 418.

#### Failure to pay over money.

"Conversion" has reference to specific articles of property which are owned by the plaintiff, or to which he has a right of immediate possession, but it does not apply to money when the receipt of it creates only a debt to the plaintiff. An action for conversion cannot be maintained against a person who receives money in a fiduciary capacity unless he is bound to turn over the identical money. *Rothchild v. Schwarz*, 59 N. Y. Supp. 527, 528, 28 Misc. Rep. 521.

Where a party breached his contract by dismissing an appeal without the other party's consent, and failed to account to him for the money left by such party with the other for the purpose of prosecuting the appeal, there was in law a conversion of the amount so held, and the holder became immediately liable for the same, no demand therefor being necessary. *Gregory v. Montgomery*, 56 S. W. 231, 233, 23 Tex. Civ. App. 68.

The refusal of defendant, to which negotiable paper was sent by a bank for collection, to pay the proceeds thereof over on demand, was conversion. *Hawkins v. State Loan & Trust Co. (U. S.)* 79 Fed. 50, 51.

#### Intent.

Conversion is the unlawful taking of the goods of another out of his possession with the intent to convert them to the use of the taker. *Clark v. Whitaker*, 19 Conn. 319, 326, 48 Am. Dec. 160.

Conversion is the act of assuming the general right of dominion and control of a thing belonging to another, which is usually exercised by the owner thereof. It "is defined to be an unauthorized act which deprives another of his property permanently or for an indefinite time. A wrongful intent is not an essential element of a conversion. It is enough that the rightful owner has been deprived of his property by some unauthorized act by another assuming dominion or control over it." *Pease v. Smith*, 61 N. Y. 477, 481; *Industrial & General Trust v. Tod*, 63 N. E. 285, 288, 170 N. Y. 233 (citing *Boyce v. Brockway*, 31 N. Y. 490); *Mohr v. Langan*, 63 S. W. 409, 416, 162 Mo. 474, 85 Am. St. Rep. 503.

A conversion is any interference "subversive of the right of the owner of personal property to enjoy and control it. The gist of the conversion is the usurpation of the owner's right of property, and not the actual damages inflicted. Honesty of purpose is not a defense." *Ferrera v. Parke*, 23 Pac. 883, 885, 19 Or. 141.

The taking possession of personal property under a contract of purchase is an act

based on the presumption of ownership or a right of dominion over the thing converted where the vendor is without title, and, although without evil intent, is a conversion, for which trover lies without previous demand. The intent with which the wrongful act is done on the part of the defendant is not an essential element of the conversion. It is enough that the true owner has been deprived of his property by the unauthorized act of some person who assumes dominion or control over it. It is the effect of the act which constitutes the conversion. The conversion may consist simply of a purchase even by an innocent party of the goods or other personal chattels from one who has himself been guilty of conversion in disposing of them, where the buyer takes the goods or chattels into his possession or custody. *Velsian v. Lewis*, 16 Pac. 681, 682, 15 Or. 539, 3 Am. St. Rep. 184.

Where a banker took the bonds of a depositor from their place of deposit, and sent them out of the state to be used as collateral security for such banker's own debt, such act was a fraudulent conversion of the bonds. Intention to restore the bonds, and the agreement of the party who received them not to sell or dispose of them, do not do away with the criminal nature of the transaction. *Commonwealth v. Tenney*, 97 Mass. 50, 59.

#### Manual taking.

A conversion of property is the act of exercising dominion over it in exclusion or in defiance of the owner's right. It is not necessary that there be a taking of manual possession of the property. *Reynolds v. Shuler* (N. Y.) 5 Cow. 323, 325; *Bristol v. Burt* (N. Y.) 7 Johns. 254, 257, 5 Am. Dec. 264; *Mahaney v. Walsh*, 44 N. Y. Supp. 969, 971, 16 App. Div. 601; *McIntire v. Blakeley* (Pa.) 12 Atl. 325, 327; *Budd v. Multnomah St. Ry. Co.*, 7 Pac. 99, 101, 12 Or. 271, 53 Am. Rep. 355; *Donahue v. Shippee*, 8 Atl. 541, 542, 15 R. I. 453; *Brown v. Campbell Co.*, 24 Pac. 492, 495, 44 Kan. 237, 21 Am. St. Rep. 274; *Tuttle v. Hardenberg*, 38 Pac. 1070, 1071, 15 Mont. 219; *Oernahan v. Chrysler*, 83 N. W. 778, 779, 107 Wis. 645.

Conversion is an unauthorized assertion or exercise of acts of ownership over personal property belonging to another. "A manual taking is not necessary, but, where words are relied upon to show the conversion, they must be uttered under such circumstances, in proximity to the property, as to show a defiance of the owner's right—a determination to exercise dominion and control over the property and to exclude the owner from the exercise of his rights." *Moore v. Prentiss Tool & Supply Co.*, 15 N. Y. Supp. 150, 154, 59 N. Y. Super. Ct. 516; *Gillet v. Roberts*, 57 N. Y. 28, 33. The language alone, not coupled with circumstances sufficient to show an intention or possibility of claiming or exer-

cising control over the property, will not constitute a conversion. In this connection the court says: "Suppose one should meet me at a distance of 30 miles from my office, and declare that he owned my law library and that he would not give it up, he not having it in any way under his control or in his possession; could it be said that he had converted the same?" No cases have yet gone so far as to hold that mere words, under such circumstances, would constitute a conversion. *Gillet v. Roberts*, 57 N. Y. 28, 33.

In order to constitute a conversion it is not necessary to show a manual taking of the thing in question, nor that the defendant has applied it to his own use. A refusal to issue certificates of stock in a corporation to the owner of the stock is such conversion of the stock as will authorize an action thereon. *Withers v. Lafayette County Bank*, 67 Mo. App. 115, 119 (citing *Abb. Law Dict.*; *Cooley, Torts*; *Bigelow, Lead. Cas.*).

It is not essential to a conversion which will support the action of trover that the defendant should have the complete manupation of the property. An intermeddling with or dominion over the property of another, whether by the defendant alone or in connection with others, which is subversive of the dominion of the true owner and in denial of his rights, is a conversion. *Freeman v. Scurlock*, 27 Ala. 407. Where a note is given in payment for a machine, to which title is to remain in the seller until the note is paid, and thereafter, the purchaser having left the state, the seller demands the machine from the purchaser's wife, and her father refuses to allow the seller to take it, he is guilty of a conversion thereof. *Bolling v. Kirby*, 90 Ala. 215, 222, 7 South. 914, 917, 24 Am. St. Rep. 789.

#### Misdelivery.

"Conversion," when applied to the action of trover, imports an unlawful act, not the mere nonfeasance; and hence the misdelivery of the goods by one intrusted with them constituted a conversion of them was sufficient to render him liable in trover, since it amounted to an unlawful act. *Bowlin v. Nye*, 64 Mass. (10 Cush.) 416, 417.

If a person who is intrusted with the goods of another puts them into the hands of a third person contrary to orders it is a conversion. *Murray v. Burling* (N. Y.) 10 Johns. 172, 175.

To constitute a conversion of a boat leased, and returned to a place other than that called for by the contract, there must be such an intention of deviation from the contract as would be tantamount to an assertion of right or dominion over the property inconsistent with the bailor's rights of ownership. *Direct Nav. Co. v. Davidson* (Tex.) 74 S. W. 790, 791.

**Mistake.**

Assuming to one's self the property and right of disposition of another's goods is a conversion thereof. It is clear that in a case where a person gives a mortgage on property which does not belong to him, without the consent or knowledge of the owner, such mortgage is a nullity. Where a party mortgaging property is the owner of an undivided half interest thereof, and the mortgage includes the entire property through a mistake of the scrivener, it cannot be said that there is a conversion. *Patterson v. Atkinson*, 37 Atl. 532, 533, 20 R. I. 102.

**Pledge or appropriation of trust property.**

Where goods sent to an agent to sell for his principal for what they would command were pledged by the agent to secure his own debt, such act constituted a conversion, and the measure of damages therefor is the value of the property at the time of the conversion. *Kennedy v. Strong* (N. Y.) 14 Johns. 128, 132.

Where a banker took the bonds of a depositor from their place of deposit, and sent them out of the state to be used as collateral security for the banker's own debt, such act was a conversion of the bonds. *Commonwealth v. Tenney*, 97 Mass. 50, 59.

The term "conversion" may be used to designate the act of a guardian in failing to invest the funds of his ward in securities approved by order of court, and in mingling such funds with his own funds. In *re Noble's Estate*, 35 Atl. 859, 860, 178 Pa. 460.

**Positive act required.**

Conversion "is wrongfully withholding property from the owner by a party who has possession thereof, actual or constructive, and who ought and has the power to put it in the owner's possession or within his control. Conversion sufficient to support an action of trover must be a positive, tortious act." *Polley v. Lenot Ironworks*, 84 Mass. (2 Allen) 182, 184.

In *Carraway v. Burbank*, 12 N. C. 306, Henderson, J., says that conversion is any act of ownership exercised over the personal chattel of another inconsistent with an owner's rights. It must be an act—bare words will not do. *University of North Carolina v. State Nat. Bank*, 3 S. E. 359, 361, 96 N. C. 280.

A conversion is a positive, tortious act. Mere nonfeasance, or neglect of some legal duty, will not suffice to support trover, although it may constitute a sufficient ground to maintain an action on the case. *Sturges v. Keith*, 57 Ill. 451, 11 Am. Rep. 28. That which becomes, on contract, a nonperformance of what the party so undertakes to do, or a bare nondelivery of what he undertakes to deliver, is not to be considered as of it-

self amounting to a tortious conversion. *Race v. Chandler*, 15 Ill. App. 532, 538.

**Refusal to deliver.**

To constitute a conversion there must be some exercise of dominion over the property in repudiation of, or inconsistent with, the owner's rights. A refusal to deliver property to the owner upon his demand is not of itself a conversion. It is evidence tending to show a conversion, but, like other inconclusive acts, is open to explanation. It is a sufficient answer that it is not in the power of the defendant to comply with the demand, as that the property has been taken from him and is in the custody of the law. *Hett v. Boston & M. R. R.*, 44 Atl. 910, 911, 69 N. H. 139.

A conversion seems to consist in any tortious act by which defendant deprives the plaintiff of his goods. A demand and refusal to deliver are, in general, evidence of a conversion; but it is said that, to make a refusal to deliver evidence of a conversion, it must be in the power of the defendant to make the delivery demanded. There must be an actual tort. In every action for trover and conversion the possession is supposed to have been lawfully in the defendant. It is the breach of the trust or the abuse of such lawful possession which constitutes the conversion. *Spencer v. Blackman* (N. Y.) 9 Wend. 167, 168.

In *Magnin v. Dinsmore*, 70 N. Y. 410, 417, 28 Am. Rep. 608, the court defines conversion, as applied to common carriers, as follows: "A conversion implies a wrongful act, a misdelivery, a wrongful disposition or withholding of property. A mere nondelivery will not constitute a conversion; nor will a refusal to deliver on demand, if the goods have been lost through negligence or stolen." Again, in *Briggs v. New York Cent. R. Co.* (N. Y.) 28 Barb. 515, it was held that "a mere delay in the delivery of goods by a common carrier is not a conversion thereof." A mere expression of inability to deliver goods which have been mislaid by mistake or through negligence is not a conversion. *Wamsley v. Atlas S. S. Co.*, 61 N. E. 896, 897, 168 N. Y. 533, 85 Am. St. Rep. 699; *Rogers v. Hine*, 2 Cal. 571, 572, 56 Am. Dec. 363.

The very denial of goods to him that has a right to demand them is an actual conversion, and not only evidence of it, as has been held, for what is a conversion but an assuming upon one's self the property and right of disposing of another's goods? And he that takes upon himself to detain another man's goods from him without cause takes upon himself the right of disposing of them. *Baker v. Beers*, 6 Atl. 35, 37, 64 N. H. 102 (citing *Baldwin v. Cole*, 6 Mod. 212). "But the very denial to deliver is not always a conversion; as where a piece of timber was left on land by a lessee at the expiration of his term, and the defendants, when requested

to deliver it, refused, but suffered the timber to lie without intermeddling. *Bristol v. Burt* (N. Y.) 7 Johns. 254, 257, 5 Am. Dec. 284.

Refusal to deliver, in order to constitute a conversion, must amount to a denial of the defendant's right. *Phillips v. Shackford*, 44 Atl. 306, 307, 21 R. L. 422.

There is a conversion by refusal to deliver pledged property on demand after a tender of performance of the obligation for which the property was pledged, for such refusal is the exercise of dominion over the property of another in defiance of another's right. *Loughborough v. McNevin*, 14 Pac. 369, 371, 74 Cal. 250, 5 Am. St. Rep. 435.

The exercise by one of dominion over the goods of another to the exclusion of the latter, in defiance of his rights, constitutes a conversion. *Gordon v. Stockdale*, 89 Ind. 240. Thus, an agent's refusal to deliver wheat purchased for his principal as his agent constitutes a conversion thereof. *Nadling v. Howe*, 55 N. E. 1032, 1033, 23 Ind. App. 690.

Mere delay in the delivery of goods, unless there has been a demand, does not amount to a conversion. *Louisville & N. Ry. Co. v. Lawson*, 11 S. W. 511, 513, 88 Ky. 496.

The mere failure of a warehouseman to deliver, on demand, goods which have been entrusted to him, does not support an action of conversion where the failure is solely because of the goods having unaccountably disappeared. *Davis v. Hurt*, 21 South. 468, 469, 114 Ala. 146.

Conversion means detaining goods so as to deprive the person entitled to the possession of them of his dominion over them, and the act of taking possession must be intended, and not merely accidental or negligent; and where defendant has come into the possession lawfully, but without fault, it is generally necessary to make a demand of possession before a suit for conversion will lie, unless it appeared that the defendant had appropriated the articles to his own use, or had disposed of the property contrary to the terms and stipulations under which he obtained possession. The refusal to surrender possession on demand is not of itself a conversion, but is only evidence of conversion, and, like other inclusive acts, is open to explanation. *McIntire v. Blakeley* (Pa.) 12 Atl. 325, 327.

#### **Sale of another's property.**

Conversion is a deprivation of property through a wrongful—that is, unauthorized—act. A sale of another's property evidences conversion, and any voluntary act which changes the character of the property and places it beyond the reach of the owner amounts to a conversion. *Mohr v. Langan*, 63 S. W. 409, 416, 162 Mo. 474, 85 Am. St. Rep. 503.

Where defendant sold to plaintiff's testator 75 shares of stock, being part of 216 shares, for which defendant had a certificate, but he retained possession of the certificate, and the shares were not transferred to the testator, but defendant afterwards transferred the 216 shares to a third person, to whom a new certificate was issued, there was a conversion by the defendant of the 75 shares sold to testator. *Mahaney v. Walsh*, 44 N. Y. Supp. 969, 971, 16 App. Div. 601.

The act of selling property belonging to another constitutes a conversion of the same, and even obviates the necessity of a demand, which, after sale and disposition of the property, would be futile. *Ochs v. Pohly*, 84 N. Y. Supp. 1, 3, 87 App. Div. 92.

#### **Trespass and misfeasance distinguished.**

The distinction between acts of trespass, acts of misfeasance, and acts of conversion is often a substantial one. In actions in the nature of trespass or case, for misfeasance, the plaintiff recovers only the damages which he has suffered by reason of the wrongful acts of the defendant; but in actions in the nature of trover the general rule for damages is the value of the property at the time of the conversion, diminished, when the property has been returned and received by the owner, by the value of the property at the time it was returned, so that after the conversion, and until the delivery to the owner, the property is absolutely at the risk of the person who has converted it; and he is liable to pay for any depreciation in value, whether that depreciation has been occasioned by his negligence or fault, or by the negligence or fault of any other person, or by inevitable accident or by act of God. Another distinction is that a judgment for a breach of contract or injury to property, though followed by payment, does not transfer title to the subject-matter involved, while a judgment in trover for conversion will, after payment, effect a complete change of ownership by operation of law. *May v. Georger*, 47 N. Y. Supp. 1057, 1060, 21 Misc. Rep. 622.

#### **CONVERSION (Action of).**

An action for conversion is within the provisions of the code prescribing the limitation of an action for taking, detaining, or injuring goods or chattels. *Horton v. Jack* (Cal.) 37 Pac. 652, 653.

#### **Title in plaintiff.**

It is a fundamental principle governing the action of conversion that the plaintiff must show a legal title. He must have the property, general or special, or the actual possession or right to immediate possession, at the time of conversion. In law "conversion" is defined to be the unauthorized assumption and the exercise of the rights of

ownership over goods or personal chattels belonging to another, to the alteration of their condition or the exclusion of the owner's rights. Hence, as the right to possession of personal property vests exclusively in the administrator, an heir has no interest in it, which will support an action for conversion, until final distribution of the estate. *Scruggs v. Scruggs* (U. S.) 105 Fed. 28, 29.

Where plaintiff in an action for conversion neither owned nor was entitled to the property alleged to have been converted, a judgment in his favor will be set aside. *Hunter v. Cronkhite*, 36 N. E. 924, 925, 9 Ind. App. 470.

### CONVERT.

By the use of the word "convert" in the statute providing that an assignee under a general assignment for the benefit of the creditors shall, before he shall have any power or authority to sell, dispose of, or convert to the purpose of the trust any of the assigned property, enter into a bond, was evidently intended to restrain the assignee from paying out any of the money or disposing of any of the property assigned to him for the purpose of the trust, until he should have filed his bond, and not that he could not take possession of the property to preserve it, or bring an action to enforce a chose in action. *Easton v. Durland's Riding Academy Co.*, 40 N. Y. Supp. 283, 285, 7 App. Div. 288.

"Convert," as used in Rev. St. 1889, § 3555, inflicting a penalty on any officer who shall convert to his own use or make way with or secrete any portion of the public moneys, "is generic, and includes within it the expressions 'make way with' and 'secrete' as modifiers." *State v. Manley*, 17 S. W. 800, 801, 107 Mo. 364.

Code, § 179, authorizing the arrest of defendant on execution in an action for wrongful taking, detaining, or converting property, is to be construed as wrongfully taking, detaining, or converting personal property. *Merritt v. Carpenter* (N. Y.) 33 How. Prac. 428, 432, \*41 N. Y. (2 Keyes) 462, 466, \*42 N. Y. (3 Keyes) 142, 146.

### As embezzle.

"Converted," as used in an indictment charging that the defendant fraudulently embezzled and converted a certain sum of money, is synonymous with the word "embezzled" as there used. *State v. Jamison*, 38 N. W. 508, 509, 74 Iowa, 602.

### Fraud implied.

In an action for an accounting between partners, a finding by referee was made that defendant converted a certain sum of money belonging to the partnership, and it was contended that this, *ex vi termini*, indicated fraud so as to relieve the defendant under

a discharge in bankruptcy. It was held that the use of the term was shown by the remaining findings to have been in no such sense, but it described conduct not inconsistent with honesty and good faith. *Gee v. Gee*, 87 N. W. 1116, 1117, 84 Minn. 384.

### Of bonds.

"Convert," as used in Greater New York Charter, § 172, Laws 1897, c. 379, providing that bonds of the annexed municipalities may be converted into registered bonds, will not be held to mean that they may be exchanged for registered bonds or surrendered and new bonds given, or that it is the duty of the comptroller to cancel them, but that an indorsement by the comptroller on the bonds that they are registered converts them from coupons to registered bonds. *People v. Coler*, 56 N. Y. Supp. 1072, 1075, 26 Misc. Rep. 327; *In re Whann*, 58 N. Y. Supp. 5, 7, 38 App. Div. 339.

### CONVERTIBLE COUPON BONDS.

The term "convertible coupon bonds" is used to designate coupon bonds which may, at the option of the holder, be converted into registered bonds. This option is expressed in a clause contained in the bond itself, and, when inserted, produces a convertible coupon bond. The usual process of converting a coupon to a registered bond is to present the bond, cut off and surrender the coupons to the debtor, have the name of the creditor entered on a proper book kept by the debtor, and a proper indorsement made upon the bond itself showing its registration, thus reducing it as nearly as possible to the form and shape of an original registered bond. *Benwell v. City of Newark*, 38 Atl. 668, 669, 55 N. J. Eq. 260.

### CONVEY.

See "Agreement to Sell or Convey"; "Lawfully Convey"; "Quitclaim and Convey."

The meaning of the word "convey," as used in an instrument, can only be determined by reference to the context. It may mean "to conduct water from place to place, or to transfer title from one person to another. Assuming that in the latter sense it is a term of art, which it is not, we are still bound to receive it in its other meaning if water was the subject-matter spoken of, since it would be absurd to speak of 'conveying' water in a technical sense from a spring to a paper mill." *Edelman v. Yeakel*, 27 Pa. (3 Casey) 26, 29.

A statute making it criminal to convey a slave away will be construed to mean "a carrying from the possession of the owner." *State v. Hardin*, 19 N. C. 407, 416.

The term "convey" can be properly used only when the transfer of some estate in land is spoken of. To speak of "conveying" a right from one person is to use inappropriate language. *Nickell v. Tomlinson*, 27 W. Va. 697, 720.

The term "convey" is a technical term, long known and used in deeds conveying real estate, and never known or used in a will or devise, any more than the terms "bequeath" or "devise" are used in a deed. *Jenckes v. Court of Probate of Smithfield*, 2 R. I. 255, 256.

**As any transfer of title, legal or equitable.**

To "convey," ordinarily speaking, is to transfer property from one person to another by means of a written instrument and other formalities. The word in its broadest significance might embrace any transmission of property. *Kelly v. Fleming*, 18 S. E. 81, 113 N. C. 133 (citing *Rap. & L. Law Dict.*).

In a strict legal sense, the word "conveyance" imports a transfer of the legal title to land, but it is also habitually used by lawyers to denote any transfer of title, legal or equitable, and the last is also the popular sense of the term, and such will be held to be its use in a deed "excepting and reserving from this conveyance all lands which have been heretofore 'conveyed' by said parties from the above described premises." *Adams v. Hopkins* (Cal.) 69 Pac. 228, 232.

The word "convey," when applied to the disposition of personal property, has the signification of "transfer," and means the passing of title and dominion from one person to another. *Lippman v. State*, 16 South. 130, 104 Ala. 61.

In a stipulation relating to the right to lands involved under deeds of a widow, which stated that if said quitclaim deed from the widow to the defendants conveyed to them all her dower interest, then the defendants should have judgment herein, but if said deed did not so convey her dower interest, etc., the word "conveyed" will not be used in its technical meaning, which would defeat the clear rights of the parties, but in the general popular sense of assignment or transfer. *Dobberstein v. Murphy*, 66 N. W. 204, 205, 64 Minn. 127.

**As applicable to personalty.**

"Convey" is properly applied to a transfer of real property, and should not be used in reference to personalty. *Dickerman v. Abrahams* (N. Y.) 21 Barb. 551, 561.

"Convey," as used in a will directing the conveyance of property, properly refers to real estate, and not personalty. *Story v. Palmer*, 18 Atl. 363, 365, 46 N. J. Eq. (1 Dick.) 1.

Manifestly the word "convey" is appropriate to the transfer of real property, and entirely inappropriate to the transfer of personal property; but when used in a will it may be construed to apply to personal property, when such construction is in accord with the language directing the distribution, and the whole scheme of the will. *Thompson v. Hart*, 69 N. Y. Supp. 223, 229, 58 App. Div. 439.

The term "convey," though usually applied to real estate, is very comprehensive in its meaning, and implies a transfer and assignment of personal property also. *Leaycraft v. Hedden*, 4 N. J. Eq. (3 H. W. Green) 512, 552.

**As appoint.**

A power contained in a trust deed granting premises in trust for a certain person for her life, and upon her death to the use of such person or persons as she shall by her deed, duly executed, "convey" the same, authorizing the use of the premises until the rents and profits thereof should pay a certain debt, comes within the meaning of the term "convey" as used in such deed of trust. The word "convey" means, in such place, "appoint." *Manning v. Screven*, 34 S. E. 22, 24, 56 S. C. 78.

**Consideration imported.**

In a contract stating that the obligor had "this day conveyed a note" for the payment of which he held himself accountable, the word "conveyed" did not import a consideration. Webster defines it as signifying "to carry, to bear, to pass, to transfer; to pass a title to anything from one person to another, as by deed, assignment, or otherwise." One may "convey" a farm without any consideration. The word as used in a contract is synonymous with "transfer," and a promissory note may be conveyed or transferred without consideration. *Spicer v. Norton* (N. Y.) 13 Barb. 542, 546.

**Consignment for sale.**

"An allegation that goods were 'sold and conveyed' is sustained by proof of the conveyance of the goods, which was a sale in form, although in fact it was a consignment of them, to be sold for or on account of the consignor, with authority for the consignee to apply the proceeds toward payment of a pre-existing debt which the consignor owed to the consignee." *Burpee v. Sparhawk*, 97 Mass. 342, 344.

The word "convey," as employed in Cr. Code, § 3836, prohibiting the conveyance of property by a mortgagor, when applied to a disposition of personal property has the signification of "transfer," and means the passing of title and dominion from one person to another. It is intended to prohibit the mortgagor from disposing of the property

so that the security would be endangered or embarrassed. The danger or embarrassment would result, not only from a sale, but from an exchange, a gift, or any other transfer by which a title not in subordination to the mortgage was created, or by which the possession was changed; and hence where defendant consigned to a third person property mortgaged by him, taking a receipt therefor from the carrier, which he retained, and he testified that he sent the property to such person "for him to do what he pleased with it," he was guilty of "conveying" the property within the statute. *Lippman v. State*, 16 South, 130, 104 Atl. 61.

#### As convey by deed.

"Conveyance," when used in reference to real estate, means transmission of the legal title thereto by an appropriate conveyance from the person owning the real estate to the person to whom it is to be conveyed, which conveyance must be duly executed by the grantor and accepted by the grantee. *Abendroth v. Town of Greenwich*, 29 Conn. 356, 365. Thus allegations that land was conveyed by the owner to third persons, who thereby acquired the title, fairly imports that the conveyance was by deed legally executed. *Langmede v. Weaver*, 60 N. E. 992, 997, 65 Ohio St. 17.

An allegation in a complaint that defendant "conveyed" certain real estate will be construed to mean that defendant conveyed the land by his deed thereto. *Jones v. Davis*, 22 Wis. 421, 424.

#### As convey by instrument in writing.

To "convey" means to carry, to transport, to take to or from; and hence, where it was stated in a deposition that a person sold and conveyed certain chattels, the word "convey" did not necessarily imply that the transfer was made by an instrument in writing. *Brown v. Fitz*, 13 N. H. 283, 285.

"Conveyed," as used relative to a transfer of land, means that there has been a conveyance by writing. *McDonald v. Campbell* (Pa.) 2 Serg. & R. 473, 474.

#### Conveyance of life estate.

A granting clause in a deed which "conveys and warrants" described land, without pretending to define the nature and character of the estate granted, is not repugnant to the habendum clause, which vests the grantee with a life estate; and hence the rule that the habendum cannot divest an estate in fee conveyed by the granting clause has no application. *Welch v. Welch*, 55 N. E. 694, 183 Ill. 237.

#### Conveyance of right of redemption.

"The words 'give, grant, sell, and convey' in a deed do not of themselves imply a warranty. Nor do they expressly and spe-

cifically convey the whole title, but are rather words of general description, susceptible of explanation or modification by other appropriate language. They are just as applicable to a conveyance of a right of redemption as to the grant of a fee." Thus their use in a deed, followed by a statement that the grantee intends to convey the same premises and title as conveyed to him by another only, operates to pass such title, though it is only a right of redemption. *Bates v. Foster*, 59 Me. 157, 160, 8 Am. Rep. 406.

#### Conveyance of title.

The agreement "to convey by deed of conveyance a certain tract of land" means not merely that the party is to execute a deed, but what is implied in conveying land is that the title shall be conveyed. *Lawrence v. Dole*, 11 Vt. 549, 553; *Lambert v. Smith*, 9 Or. 185, 187.

The words "give, grant, and convey" are as comprehensive as any that can be used to convey legal title, and are as efficient in law to transfer the title. *Young v. Ringo*, 17 Ky. (1 T. B. Mon.) 30, 31.

The word "convey," in an instrument which purports, in consideration of a fixed annual rental, to lease and convey for a term of years all the coal on or under certain described land, does not operate to make the instrument a conveyance, but it is only a mining lease, entitling the grantee to take out all the coal he can mine during the term. *Austin v. Huntsville Coal & Min. Co.*, 72 Mo. 535, 541, 37 Am. Rep. 446.

The use of the word "convey," in a contract whereby one of the parties agrees to convey premises to the other, implies that the conveyance shall give the vendee a sufficient title. *Parker v. McAllister*, 14 Ind. 12, 16.

To "convey" real estate is to transfer the legal title to it from the owner to another by an appropriate instrument. Citing *Abendroth v. Town of Greenwich*, 29 Conn. 356. Land is "conveyed" only when the title to it passes. Citing *Fairfax's Adm'r v. Lewis* (Va.) 11 Leigh, 233, 248. The Century Dictionary defines the word "convey" to mean in law "to pass title by deed." *Langmede v. Weaver*, 60 N. E. 992, 996, 997, 65 Ohio St. 17.

#### As conveyance to husband.

As used in Act 1849, giving to a married woman the right to convey and devise real and personal property as if she were unmarried, meant, by simulating the case of a wife to that of an unmarried woman, that she should have the same power as though she were not under the disability of coverture; that, taking away that disability, she should have power to make all such conveyances as were not forbidden by special provisions of

law; but it did not mean to overreach particular prohibitions founded on special reasons of policy or convenience, and hence did not authorize the making of a deed to her husband. *White v. Wager*, 25 N. Y. 328, 338.

#### **Delivery of deed imported.**

Where suit was brought to set aside a deed, and an allegation in the complaint was to the effect that the deed was executed, and that it "conveyed" to the defendant all the right of the grantor in the land, the word "conveyed" in such allegation should be construed to import that the deed referred to was delivered, since without a delivery there could be no conveyance. *Keenan v. Keenan*, 12 N. Y. Supp. 747, 749, 58 Hun, 605.

A testator, in his will, spoke of land as "conveyed" to his son, but as a matter of fact the deed to the son had not been delivered, and in the will it was further directed that the deed be delivered at testator's death. Held, that the use of the word "conveyed" was not conclusive that the deed had become effective by the delivery, and the deed would therefore be of a testamentary character, and subject to construction in that line. *Mortgage Trust Co. v. Moore*, 50 N. E. 72, 73, 150 Ind. 465.

#### **Devise.**

The terms "convey and warrant," when given their legal purport or acceptance, fully indicate an intention to convey a present estate to the grantee and defend the title thereto, and in no way is it apparent or to be inferred from these words that the grantors intended to devise the real estate in question. *Wilson v. Carrico*, 40 N. E. 50, 51, 140 Ind. 533, 49 Am. St. Rep. 213.

#### **As executed.**

In Gen. St. 1878, c. 39, § 14, providing that if any person, having conveyed by mortgage any article of personal property, shall dispose of said property with intent to defraud, he may be punished, the word "conveyed" meant "having executed," so that a person who executed a mortgage might be guilty of the offense though he had conveyed no title thereby. *State v. Williams*, 21 N. W. 746, 748, 32 Minn. 537.

#### **Execution of note.**

A statute giving to a married woman the right to "convey" and devise her property did not empower her to make a valid promissory note or other personal engagement. *Stiles v. Lord*, 11 Pac. 314, 317, 2 Ariz. 154.

#### **Furnish distinguished.**

"Furnish" and 'convey' are words of widely different meaning. To 'furnish' a thing and to 'convey' it signify very different acts. To 'furnish' is to provide or supply anything wanted by another; to 'convey' is to

bear, carry, or transport the thing to another person or place. A person at a distance may 'furnish' the article desired upon request by letter or otherwise, and another may 'convey' it to the person for whom it is intended. One may 'furnish,' 'provide,' or 'supply' a person confined in jail with food, which another may 'convey' into the jail to the person therein confined. Therefore to furnish a person who is confined in jail with anything may, and ordinarily does, mean quite a different act from what we understand by the words, 'shall convey in jail.' Thus an indictment charging the defendant with furnishing articles to a person confined in jail is not sufficient to describe the crime created by Pen. Code, art. 321, which makes it criminal to convey into jail any disguised instrument, etc." *Francis v. State*, 21 Tex. 280, 285.

#### **As grant.**

In a conveyance the word "convey" means to transfer the title or property. The word "convey" means to transfer the title from one person to another. It has the same legal effect as the word "grant," which has become a generic term applicable to the transfer of all classes of real property. In New York the operative word of conveyance is "grant," but Chancellor Kent says: "As other modes of conveyance operate equally as grants, any words showing the intention of the parties would be sufficient." The word, then, "convey," or "transfer," in a deed, is of equivalent signification and effect as "grant." And to construe a deed containing the words "have bargained, sold and conveyed, and by these presents do bargain, sell and convey," as a bargain and sale, is to ignore the word "convey," and give it no effect in the conveyance which is executed with the formalities required by the statute. *Lambert v. Smith*, 9 Or. 185, 193.

The word "convey" means to transfer title from one person to another, and has the same legal effect as "grant," which has become a generic term applicable to the transfer of all classes of property. *Edelman v. Yeakel*, 27 Pa. (3 Casey) 27. The use of the word "convey" in a deed is equivalent to a grant at common law, and passes the title, and is in meaning and effect sufficient to answer the requisites of a grant at common law. *Chapman v. Charter*, 34 S. E. 768, 772, 46 W. Va. 769 (citing *Lambert v. Smith*, 9 Or. 185).

"Convey," as used in an instrument granting real estate, is the equivalent of "grant." In this connection the court says: "We conceive that the word 'convey' is in meaning and effect sufficient to answer all the requisites of a grant at common law and under our statute concerning conveyances, and to carry with it the legal estate and vest it in the grantee." *Patterson v. Carneal's Heirs*, 10 Ky. (3 A. K. Marsh.) 618, 621, 18 Am. Dec. 208.



The word "convey" is now held equivalent to the word "grant," even at common law. *Uhl v. Over River R. Co.*, 41 S. E. 340, 344, 51 W. Va. 106.

#### **Lease.**

In Laws 1869, c. 56, § 4, enacting that no power of attorney from wife to her husband to "convey real estate or any interest therein" shall be of any force, the word "convey" is evidently used as comprehending the word "lease." *Sanford v. Johnson*, 24 Minn. 172, 173.

Rev. St. c. 61, § 1, declares that real estate conveyed to a married woman by her husband, or paid for by him, or given to her by his relations, "cannot be conveyed" by her without the joinder of the husband, means a sale of real estate. The word "convey" or "conveyances" must refer to an alienation of the estate, a transference of the title, and could not include a lease. We generally mean by the term "convey" that the title is deeded. *Perkins v. Morse*, 2 Atl. 130, 131, 78 Me. 17, 57 Am. Rep. 780.

"Neither the word 'convey' nor 'incumber,' according to its ordinary significance, is expressive of the act of creating a tenancy for years in lands. The former of the terms is appropriate to the transfer of a title to a freehold, the latter to putting the property in pledge for the payment of money. That the word 'conveyance' does not, when standing without assistance in a statute, signify its applicability to the passing of a chattel interest in realty, is clearly indicated in the cases of *Kinney v. Watts* (N. Y.) 14 Wend. 38, and *Tone v. Brace*, 8 Paige, 598." *Sullivan v. Barry*, 46 N. J. Law (17 Vroom) 1, 5.

#### **Mortgage of leasehold.**

The word "conveys," in Act 1898, p. 670, entitled "An act respecting conveyances, and relating to the recording of instruments," includes any instrument which transfers an interest in land, and it matters not how small in quantity and how short in time of duration that interest may be. A man who is in possession of land as a tenant from year to year has an interest therein which he may "convey." The term includes a mortgage of a 10-year leasehold. *Lembeck & Bets Eagle Brewing Co. v. Kelly*, 51 Atl. 794, 796, 63 N. J. Eq. 401.

The use of the word "convey" is equivalent to a grant at common law, and passes title. It means a transfer of title from one person to another. Thus where a lessee, who had erected on the leased lands elevator buildings which could not be removed without injury to them and to the freehold, and whose lease gave him no right to remove fixtures, gave a mortgage thereof which, though in form a chattel mortgage, purported to grant and convey the elevator, the mortgage

was valid as a mortgage on the leasehold estate, although it was realty. *Croas v. Wear Commission Co.*, 38 N. E. 1038, 1041, 153 Ill. 499, 46 Am. St. Rep. 902.

#### **Payment and demand for conveyance implied.**

Where one agrees to convey land on the payment of money, the word "convey" is to be construed as meaning the making and delivery of a deed after the vendee has not only tendered or paid the money, but demanded a conveyance. *Fuller v. Hubbard* (N. Y.) 6 Cow. 13, 17, 16 Am. Dec. 423.

#### **Power to sell imported.**

Where a testator gave his executors full power and authority to convey in fee simple absolute or otherwise, in their discretion, all or any portion of his real estate, and to execute and deliver all proper deeds and instruments in writing therefor, the phrase "full power and authority to convey in fee simple absolute or otherwise, in their discretion," meant that the executors might convey any of the testator's real estate as they might deem advantageous, the power to make all proper deeds implying the power to sell. *Hamilton v. Hamilton*, 98 Ill. 254, 258.

#### **Present transfer imported.**

The words "convey and warrant" in a deed operate to pass all the grantor's estate by virtue of legal implication only when there is nothing in the deed showing a contrary intent on the part of the grantor; and therefore the words in a deed reciting that, in consideration of a small cash payment and an agreement to furnish the grantor with support for life, she did convey and warrant to the grantee certain premises, "it being understood that possession of said property is to be given at my death," does not have such effect, but the deed must be construed as reserving a life estate to the grantor. *Hart v. Gardner*, 20 South. 877, 879, 74 Miss. 153.

#### **Retention of legal title.**

Land is "conveyed and sold," within the meaning of a statutory grant of land to a railroad company free from taxation till sold and conveyed, when the railroad company has parted with the entire equitable interest in the land and received full compensation therefor, although it still holds the bare legal title. *State v. Winona & St. P. R. Co.*, 21 Minn. 472, 477. Where a railroad company to whom lands are granted by the state to aid in the construction of its road, such lands to be exempt from taxation until sold and conveyed, has sold the lands and received the consideration, so that it retains no lien upon nor actual interest in them, though it retains the naked legal title only as trustee for the purchaser, it has "sold and conveyed" them within the meaning of the exempting clause. *State v. Webber*, 37 N. W. 949, 951, 38 Minn.

597 (following *State v. Winona & St. P. R. Co.*, 21 Minn. 472).

"Sold and conveyed," within the meaning of Illinois Central Railroad Charter, § 22, providing that certain lands owned by the company shall be exempt from all taxation under state laws until sold and conveyed by said corporation or trustees, includes lands sold and paid for, though it is not actually conveyed, as any other construction would enable the land to be held exempt from taxation for all time. *Champaign County v. Reed*, 100 Ill. 304, 307.

#### **Sell distinguished.**

In a "power to sell and convey" real estate, the power to sell and the power to convey are not one and indivisible. A person may give another authority to sell land without giving him authority to execute conveyances, or he may give him power to execute conveyances without the power to make sales, or he may give him the power to do both. Authority to convey can only be given by deed, while authority to sell may be given by parol. *Dayton v. Nell*, 45 N. W. 231, 43 Minn. 246.

#### **Send distinguished.**

See "Send."

#### **As take.**

The word "take" may be regarded as an equivalent of "convey." *May's Heirs v. Slaughter*, 10 Ky. (3 A. K. Marsh.) 505, 509.

#### **A warranty implied.**

The words "give, grant, sell, and convey" in a deed do not of themselves imply a warranty. *Allen v. Sayward*, 5 Me. (5 Greenl.) 227, 230, 17 Am. Dec. 221; *Bates v. Foster*, 59 Me. 157, 160, 8 Am. Rep. 406.

### **CONVEY AND WARRANT.**

The words "convey and warrant" comprehend and express all the covenants of warranty as fully as if they were written out at full length. *Jackson v. Green*, 112 Ind. 341, 342, 14 N. E. 89.

Under the express provision of Rev. St. c. 30, § 13, the words "convey and warrant" in a deed amount to the conveyance in fee simple. *Palmer v. Cook*, 42 N. E. 796, 159 Ill. 300, 50 Am. St. Rep. 165.

As used in a deed providing that the grantor conveyed and warranted unto the grantee the property conveyed, the expression "convey and warrant" is to be construed as containing a covenant not only of title and seisin, and against incumbrances, but also for quiet enjoyment; and where the original grantor either had the title or was in possession under claim of title, such covenant is in futuro and runs with the land,

and binds the grantor himself, and his heirs and personal representatives, to the grantee, his heirs and assigns, that the grantor is lawfully seised of the premises, has good right to convey the same, and guarantees possession thereof, that the same are free from incumbrances, and that he will warrant and defend the title to the same against all lawful claims. *Worley v. Hineman*, 33 N. E. 260, 261, 6 Ind. App. 240.

Under the statute of Indiana, a deed containing the words "conveys and warrants" shall be deemed and held to be a conveyance in fee simple to the grantee, his heirs and assigns, with covenant from the grantor, for himself and his heirs and personal representatives, that he is lawfully seised of the premises, has good right to convey the same, and guarantees the quiet possession thereof, that the same are free from all incumbrances, and that he will warrant and defend the title to the same against all lawful claims. Rev. St. 1881, § 2927. Each one of these covenants is contained in the general warranty, the same as if they had been separately written in the deed. *Kent v. Cantrall*, 44 Ind. 452. In construing such a deed the court said: "It is thus seen that the deed in question contained, amongst other things, a covenant of general warranty, and this covenant, beyond all doubt, runs with the land." *Dehority v. Wright*, 101 Ind. 382, 383.

### **CONVEYANCE.**

See "Fraudulent Conveyance"; "Private Conveyance"; "Public Conveyance"; "Voluntary Conveyance."

A "conveyance" is defined to be that by which anything is conveyed or transported, or which serves as means or way of carriage, as any vehicle. *Von Bokkelen v. Travelers' Ins. Co.*, 54 N. Y. Supp. 307, 309, 84 App. Div. 399.

The word "conveyance," in an insurance policy insuring against accident "while traveling by public or private conveyance," imports traveling by some vehicle or instrument or conveyance, other than the legs of a man walking and carrying his own body, as a car, vessel, stage, or by one's own or another's team. *Ripley v. Railway Passengers' Assur. Co. (U. S.)* 20 Fed. Cas. 823, 824.

A locomotive or engine is not a "conveyance provided for the transportation of passengers," within the meaning of an insurance policy insuring against death caused by accident while traveling by public or private conveyance provided for the transportation of passengers. *Brown v. Railway Passenger Assur. Co.*, 45 Mo. 221, 225.

A provision in an accident policy that the insurer shall not be liable for injuries in or on any conveyance, using steam, not provided for transportation of passengers, does not de-

feat recovery for death from an injury received while riding by invitation in a locomotive drawing a passenger train, the locomotive and train together constituting a "conveyance" for transportation of passengers. *Berliner v. Travelers' Ins. Co.*, 121 Cal. 458, 462, 53 Pac. 918, 41 L. R. A. 467, 66 Am. St. Rep. 49.

**Agreement to convey.**

A contract reciting that S. "hath agreed to sell and has sold to P." and that P. "hath agreed to purchase and has purchased," the lease of certain property, and providing that the consideration for such lease was certain property for which P. was to give good and sufficient deeds "on or before the first day of May next," at which time or before conveyance was "to be made by both parties of the property hereby agreed to be conveyed," was an agreement to convey, and not a conveyance. *Jackson v. Moncrief* (N. Y.) 5 Wend. 26, 29.

There being a controversy concerning certain land, the plaintiff and P. entered into a written contract reciting that plaintiff had given P. a power of attorney to prosecute the action to judgment, and had agreed to grant, bargain, and sell, and did thereby grant, bargain, and sell, the land in controversy to P. and his heirs, but which provided that P. should prosecute the suit "by virtue of the power of attorney" from the plaintiff, and that if he should be successful he should pay the plaintiff a certain sum, and the plaintiff should convey the land to him in fee, otherwise P. was not to pay such sum, or any part thereof. Held, that the instrument constituted an agreement to convey rather than a conveyance. *Maus' Lessee v. Montgomery* (Pa.) 11 Serg. & R. 829, 831.

**As any instrument of transfer.**

As used in Civ. Code, § 1214, providing that every conveyance of real estate, other than a lease for a term not exceeding one year, shall be void as against subsequent purchasers in good faith and for a valuable consideration whose conveyances are first duly recorded, embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or incumbered, or by which the title to any property may be affected, except wills. *Odd Fellows' Sav. Bank v. Banton*, 46 Cal. 603, 604.

Code, § 1215, defines the meaning of the term "conveyance," as used in the two preceding sections, as embracing "every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged or incumbered, or by which the title to real property may be affected, except wills." *Hoag v. Howard*, 55 Cal. 564, 566.

The term "conveyance," as defined by the act concerning conveyances (1850, § 36), embraces "every instrument in writing by which

any real estate or any interest in real estate is created, aliened, mortgaged, or assigned, except wills, leases for a term not exceeding one year, executory contracts for the sale or purchase of lands, and powers of attorney." *Brannan v. Mesick*, 10 Cal. 95, 108.

The term "conveyance," as used in the chapter relating to frauds and perjuries, shall be construed to embrace every instrument in writing except a last will and testament, whatever may be its form and by whatever name it may be known in law, by which any estate or interest in land is created, aliened, assigned, or surrendered. *Mills' Ann. St. Colo.* 1891, § 2036; *Rev. St. Wis.* 1898, § 2326; *Comp. Laws Nev.* 1900, § 2714; *Cobbey's Ann. St. Neb.* 1903, § 5972; *Gen. St. Minn.* 1894, § 4226.

As the word is ordinarily used in statutes in relation to real estate, "conveyance" means the deed, the act or instrument, by which property in real estate is transferred. *Dudley v. Sumner*, 5 Mass. 438, 470.

The term "conveyance," as used in the chapter relating to deeds and mortgages, shall be construed to embrace every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged, or assigned, or by which the title to any real estate may be affected in law or equity, except wills, leases for a term not exceeding three years, and executory contracts for the sale or purchase of lands. *Comp. Laws Mich.* 1897, § 8994.

The term "conveyance," as used in the chapter relating to deeds, mortgages, and other conveyances, shall be construed to embrace every instrument in writing by which an estate or interest in real estate is created, alienated, mortgaged, or assigned, or by which the title to any real estate may be affected in law or equity, except leases for a term not exceeding three years, and executory contracts for the sale or purchase of lands. *Gen. St. Minn.* 1894, § 4185; *Chandler v. Kent*, 8 Minn. 524, 528 (Gil. 467, 468); *State v. Grant*, 10 Minn. 39, 50 (Gil. 22); *Ortman v. Chute*, 59 N. W. 533, 534, 57 Minn. 452; *White v. McGarry* (U. S.) 47 Fed. 420, 421.

The term "conveyance," as used in the provisions relating to the recording of conveyances, embraces every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or incumbered, or by which the title to real property may be affected, except wills. *Civ. Code Mont.* 1895, § 1642.

The term "conveyance" is defined by § 3 Rev. St. p. 2561, as embracing every instrument in writing by which any estate in real estate is created, aliened, mortgaged, or assigned. *State Trust Co. v. Casino Co.*, 41 N. Y. Supp. 1, 3, 18 Misc. Rep. 827.

The term "conveyance," as used in the title relating to real estate, shall be con-

strued to embrace every instrument in writing by which any real estate or interest in real estate, is created, aliened, mortgaged, incumbered, or assigned, except wills, and leases for a term not exceeding one year. Rev. St. Utah 1898, § 1969.

The term "conveyance," as used in the chapter relating to the alienation by deed, etc., of real property, etc., shall be construed to embrace every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged, or assigned, or by which the title to any real estate may be affected in law or equity, except wills, and leases for a term not exceeding three years. Rev. St. Wis. 1898, § 2242.

The term "conveyance" shall be construed to embrace every instrument in writing by which any estate or interest in real estate is created, alienated, mortgaged, or assigned, or by which the title to any real estate may be affected in law or in equity, except wills, leases for a term not exceeding three years, executory contracts for the sale or purchase of lands, and certificates which show that the purchaser has paid the consideration and is entitled to a deed for the lands, and contain a promise or agreement to furnish said deed at some future time. Rev. St. Wyo. 1890, § 2728.

The term "conveyance," as used in Act April 30, 1848, prescribing the mode of conveyances by married women, includes any writing necessary to convey land, and which operates to convey any estate or interest in land of a married woman. *Dority v. Dority*, 71 S. W. 950, 952, 96 Tex. 215, 60 L. R. A. 941.

The term "conveyance," as used in Rev. St. art. 635, providing that a husband and wife shall join in the conveyance of the wife's separate property, signifies the deed which transfers the title from the wife to the purchaser. *Nolan v. Moore*, 72 S. W. 583, 96 Tex. 341.

An instrument executed by the grantee in a deed, reciting that the deed was executed as security for a debt, and agreeing to quitclaim to the grantor on payment of the debt, is a "conveyance" within Rev. St. 1851, c. 46, § 80, requiring any conveyance to be acknowledged or proved before recorded. *Cogan v. Cook*, 22 Minn. 137, 143.

In construing Act 1891, c. 91, § 1, providing that whenever household or kitchen furniture is conveyed by chattel mortgage or otherwise, as allowed by law in North Carolina, the privy examination of married women shall be as prescribed in conveyances of land, the court said: "The word 'convey,' in its broadest significance, might embrace any transmission of possession; but we are restrained to its legal meaning, which, ordinarily speaking, is the transfer of property from one person to another by means of a

written instrument and other formalities. According to Webster, a 'conveyance' is an instrument in writing by which property, or the title to property, is conveyed or transmitted from one person to another. The meaning of this word being well understood at common law, it must be understood in the same sense when used in the statute." *Kelly v. Fleming*, 18 S. E. 81, 118 N. C. 133.

#### As any transfer of title legal or equitable.

"Conveyance" is defined to be the transfer of the title of land of one person or class of persons to another. *Klein v. McNamara*, 54 Miss. 90, 105 (citing 1 Bouv. Law Dict. [12th Ed.] 361).

In a strict legal sense, the word "conveyance" imports a transfer of the legal title to land, but it is also habitually used by lawyers to denote any transfer of title, legal or equitable; and the last is also the popular sense of the term, and such will be held to be its use in a deed excepting and reserving from this conveyance all lands which have been heretofore conveyed by said parties from the above-described premises. *Adams v. Hopkins* (Cal.) 69 Pac. 228, 232.

#### Antenuptial contract.

An antenuptial contract whereby the intended husband agrees that there shall be conveyed on his death to his intended wife, by a proper deed, certain land therein described, but that if she does not survive him the agreement shall be void, is a "conveyance" within the meaning of How. St. § 5727, relating to recording of instruments. *Aultman, Miller & Co. v. Pettys*, 59 Mich. 482, 487, 26 N. W. 680, 682.

#### Assignment for benefit of creditors.

"A 'conveyance' is defined to be an instrument in writing by which property, or the title to property, is conveyed or transmitted from one person to another." An assignment for the benefit of creditors is required to be in writing, duly acknowledged in the same manner as conveyances of real estate, and recorded. The assignee has as full power to dispose of all the estate as the debtor had. An assignment for the benefit of creditors is therefore a conveyance. *Prouty v. Clark*, 84 N. W. 614, 615, 73 Iowa, 55.

A "conveyance," as used in the insolvent laws (Laws 1881, c. 184, § 2), prohibiting conveyances by insolvent debtors with preferences, includes an assignment by an insolvent debtor in which creditors are preferred or given rights not equally available to other creditors. *Weston v. Loyhed*, 14 N. W. 892, 894, 30 Minn. 221.

#### Assignment of chose in action.

The word "conveyance," as used in Act 1852, c. 365, § 10, authorizing a creditor to file

a bill for attachment after a judgment at law in all cases where a conveyance is made by a debtor of property of any description, for the purpose of hindering, delaying, or defrauding his creditors, embraces a fraudulent assignment by a debtor of a chose in action. *Willson v. Beadle*, 39 Tenn. (2 Head) 510, 513.

#### Assignment of mortgage.

The assignment of a mortgage is a "conveyance" within the recording acts. *Larned v. Donovan*, 32 N. Y. Supp. 731, 733, 84 Hun, 533; *Merrill v. Luce*, 61 N. W. 43, 45, 6 S. D. 354, 55 Am. St. Rep. 573; *Burns v. Berry*, 42 Mich. 176, 179, 3 N. W. 924. An assignment of a mortgage is a "conveyance," within Pub. St. c. 120, § 4, declaring a conveyance, unless recorded, invalid against persons other than the grantor, his heirs and devisees, and persons having actual notice. *Swasey v. Emerson*, 46 N. E. 426, 168 Mass. 118, 60 Am. St. Rep. 368. The term "conveyance," in Rev. St. Code, § 3594, which provides that every conveyance of real estate, except, etc., shall be void against any subsequent purchaser or incumbrancer, etc., in good faith, and for a valuable consideration, includes an assignment of a real estate mortgage. *Henniges v. Johnson*, 84 N. W. 350, 353, 9 N. D. 489, 81 Am. St. Rep. 588; *Hull v. Diehl*, 52 Pac. 782, 783, 21 Mont. 71.

Under section 2242, Rev. St. 1878, providing that the term "conveyance" as used in such statute shall be construed to embrace every written instrument by which any estate or interest in real estate is created, aliened, mortgaged, or assigned, an assignment of a mortgage is included within the term "conveyance." *Butler v. Bank of Mazeppa*, 68 N. W. 998, 999, 94 Wis. 351.

The term "conveyance," as used in the recording acts, is defined by it to include an instrument in writing by which real estate, or an interest therein, is mortgaged. A mortgage, therefore, is a "conveyance" within such acts, but such a mortgage does not create an estate in real property. An assignment of the mortgage is not a conveyance. *Hull v. Diehl*, 52 Pac. 782, 783, 21 Mont. 71.

#### Certificate of execution sale.

A properly recorded certificate of an execution sale of lands is within the meaning of the term "conveyance" in the recording laws. *Drake v. McLean*, 47 Mich. 102, 103, 10 N. W. 126, 127.

#### Certificate of sale of state lands.

A certificate of sale executed by the commissioner of the state land office on the sale of school land, pursuant to Gen. St. 1894, § 3967, is a "conveyance" within the meaning of the statute prohibiting resulting uses and trusts. *Haaven v. Hoaa*, 62 N. W. 110, 111, 60 Minn. 313.

#### Charter party.

A charter party is not a "conveyance" within the meaning of an act of Congress entitled "An act to provide for recording the conveyances of vessels, and for other purposes." *Hill v. The Golden Gate* (U. S.) 12 Fed. Cas. 163, 170 (citing 9 Stat. 440).

#### Consignment of goods.

The terms "assignment, transfer or conveyance, directly, indirectly, absolutely or conditionally," in Gen. St. c. 118, § 89, forbidding any assignment, transfer, or conveyance, directly, indirectly, absolutely, or conditionally, by an insolvent debtor with a view to prefer a creditor, includes a consignment of goods to be sold for or on account of the consignor, and therefore such a consignment is prohibited by the statute if the consignee is authorized by it to apply the avails of the sales to the payment of a pre-existing debt which the consignor owes him. *Burpee v. Sparhawk*, 97 Mass. 342, 344.

#### Contract distinguished.

A conveyance is a contract under seal. There is often a difference between a power to contract and the power of making conveyances. But the power to contract given under the section providing that contracts may be made by the wife in the same manner and to the same extent as if she were unmarried will not be held to be limited to such contracts as are included in a section providing that a conveyance, transfer, or lien executed by either husband or wife to or in favor of the other shall be valid to the same extent as between other persons, and a section providing that a husband or wife may constitute the other his or her attorney in fact to control or dispose of his or her property for their mutual benefit, and under such first section the wife is authorized to enter into parol contracts with her husband. *Grubbe v. Grubbe*, 88 Pac. 182, 185, 26 Or. 363.

#### Contract for mortgage.

Real Property Law, § 240, states that the term "conveyance" includes every written instrument by which any estate or interest in real property is created, transferred, mortgaged, or assigned, or by which the title to any real property may be affected, including an instrument in execution of a power, and although the power be one of revocation only, except a will, a lease for a term not exceeding three years, an executory contract for the sale or purchase of lands, and an instrument containing a power to convey real property as the agent or attorney for the owner of such property. A contract for an alteration of a building, by which, in lieu of final payment, the contractor is to take a second mortgage on the premises, is not within the statute. *David-*

son v. Fox, 78 N. Y. Supp. 533, 534, 65 App. Div. 262.

#### Contract for sale of land.

By Rev. St. § 2242, the term "conveyance," as used in the previous section declaring every conveyance of real estate not recorded to be void as against a subsequent purchaser in good faith, etc., is to be construed to embrace every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged, or assigned, by which the title to any real estate may be affected in law or equity, except wills, leases, and executory contracts for the sale or purchase of land, so that a mere executory contract for the sale or purchase of land is not a "conveyance" within section 2241. First Nat. Bank v. Chafee, 73 N. W. 318, 319, 98 Wis. 42.

The word "conveyance," in Gen. St. 1878, c. 69, § 2, providing that no conveyance or contract for the sale of real estate, or of any interest therein, by a married woman, other than mortgages on lands to secure the purchase money of such lands, and leases for terms not exceeding three years, shall be valid unless her husband join with her in such conveyance, refers back to what precedes, and includes contracts for the sale of real estate, or of any interest therein, the word "conveyance" being used in its more general sense. Gregg v. Owens, 33 N. W. 216, 217, 37 Minn. 61.

A bond for title by a married woman is not a "conveyance," required by Pub. St. Minn. c. 35, § 12, to be separately acknowledged by her; the word "conveyance" being expressly defined by section 30 as not embracing "executory contracts for the sale or purchase of land." Kingsley v. Gilman, 15 Minn. 59, 62 (Gil. 40, 42).

#### Conveyance of personalty.

"A conveyance is the act or instrument by which property in real estate is transferred. This word cannot be applied to an instrument in writing relating to personal property." Alexander v. State, 12 S. W. 595, 28 Tex. App. 186, 187.

A "conveyance," as used in a statute prohibiting fraudulent conveyances, or conveyances intended to defeat or defraud creditors, does not apply to chattels, but means a transfer of real estate by deed. Livermore v. Bagley, 3 Mass. 487, 505.

Within Const. 1885, art. 11, § 1, providing that the consent of a married woman, to be effective to render her separate statutory property liable for her husband's debts, must be in writing, and must be executed according to the laws respecting the conveyances by married women, the word "conveyance" is used in a broad sense, including

conveyances of both real and personal property. Springfield Co. v. Ely (Fla.) 32 South. 892, 894.

#### Declaration of trust.

A "conveyance," within 2 Rev. St. 134, § 6, providing that no trust should be created or declared unless by a deed or conveyance in writing, is an instrument by which the title to such estate may be affected in law or equity, and comprehends a declaration of trust, although not under seal. Corse v. Leggett (N. Y.) 25 Barb. 389, 394.

A mere declaration in writing that the person making it holds land conveyed to him in trust for another is not such a conveyance or instrument as requires either a United States or state revenue stamp. Sime v. Howard, 4 Nev. 473, 481.

#### As deed.

15 Geo. II, c. 8, provided that a register should be appointed to record all conveyances, and that after a certain date no conveyance should be good to hold the same against any other persons but the grantors or their heirs until the deed thereof was recorded as provided in the statute. Held, that the "conveyances" meant by the statute were conveyances by deed. Foster v. Briggs, 3 Mass. 313, 316.

A conveyance is a deed which passes or conveys land from one person to another. Oting Brown v. Fitz, 13 N. H. 283, 285; Jacob, Law Dict. Thus allegations that land was "conveyed" by the owner to third persons, who thereby acquired the title fairly, imports that the conveyance was by deed legally executed. Langmede v. Weaver, 60 N. E. 992, 997, 65 Ohio St. 17.

#### Deed of trust.

"Conveyance" is the transfer of a title of land from one person or class of persons to another. So that, under Code 1891, c. 74, § 2, providing that every gift, sale, conveyance, etc., made by an insolvent debtor to a trustee giving or attempting to give a priority or preference shall be void as to such priority, a deed of trust is a conveyance prohibited by such act. Argand Refining Co. v. Quinn, 20 S. E. 576, 579, 39 W. Va. 535.

#### Homestead declaration.

A homestead is not a conveyance. It possesses none of the essential requisites of a conveyance. There is neither grantor nor grantee nor consideration in a declaration of homestead. There is no transfer of or change in the title. It is the act of the owner of the property whereby such owner secures a right or privilege given him by the statute. Burbank v. Kirby, 55 Pac. 295, 299, 6 Idaho, 210, 96 Am. St. Rep. 260.

**As incumbrance.**

Code 1857, p. 336, art. 23, providing that no "conveyance or incumbrance" for the separate debts of the husband shall be binding on the wife beyond the amount of her income, means that the wife shall not make her property security for her husband's debts by any form of instrument by which, under the law, a lien or hypothecation can be created. The words "conveyance or incumbrance," as so used, are not used to convey the same idea. "Conveyance" is a general word, comprehending the several modes of passing title to real estate. Strictly speaking, the words include mortgages and deeds of trust, and also the ordinary deed of bargain and sale. *Klein v. McNamara*, 54 Miss. 90, 105.

**Judgment.**

The term "conveyance," as used in a statute requiring all conveyances to be recorded, does not include judgments. *Wilcoxson v. Miller*, 49 Cal. 193, 195.

**Lease.**

A lease is a conveyance of real estate. *Shimer v. Inhabitants of Town of Phillipsburg*, 38 Atl. 852, 58 N. J. Law (29 Vroom) 506; *Carlton v. Williams*, 19 Pac. 185, 186, 77 Cal. 89, 11 Am. St. Rep. 243; *Jamaica Pond Aqueduct Corp. v. Chandler*, 91 Mass. (9 Allen) 159, 168; *Craig v. Summers*, 49 N. W. 742, 743, 47 Minn. 189, 15 L. R. A. 236; *Stinson v. Hardy*, 41 Pac. 116, 118, 27 Or. 584. Contra, see *Perkins v. Morse*, 2 Atl. 130, 131, 78 Me. 17, 57 Am. Rep. 780.

A lease of land for 99 years to an alien who has not declared his intention to become a citizen contravenes Const. art. 2, § 33, which declares that a conveyance of land to any alien, directly or in trust, shall be void. And the word "conveyance" will not be limited to an instrument which transfers the title to another. *State v. Morrison*, 52 Pac. 228, 18 Wash. 664.

The term "conveyance," within the meaning of Code, § 1810, providing that conveyances of unconditional estates of real property shall be void as to purchasers, etc., unless registered, etc., includes a written lease of all the timber on a tract of land for three years. *Milliken v. Faulk*, 20 South. 594, 595, 111 Ala. 658.

The term "conveyance," as used in Code Civ. Proc. § 1722, subd. 3, authorizing appeals from judgments or orders in probate proceedings against or in favor of directing the partition sale or conveyance of real property, is used in a restricted sense, and falls within the definition of that term as applied to the actual transfer of title to lands and interest therein, and does not include the hiring of real estate at a fixed rental for a term of years. In *re Tuohy's Estate*, 58 Pac. 722, 724, 23 Mont. 305.

Under Burns' Rev. St. 1894, § 6961, providing that a married woman cannot incumber or convey her lands except by deed in which her husband shall join, a lease of lands by a married woman for the purpose of giving the lessee the right to prospect and operate for gas and oil was not an "incumbrance or conveyance." *Heal v. Niagara Oil Co.*, 50 N. E. 482, 150 Ind. 483.

Under Comp. Laws, c. 241, § 8994, providing that the term "conveyance" as used in that chapter shall be construed to embrace every instrument in writing by which any estate or interest is created, aliened, mortgaged, or assigned, or by which the title to any real estate may be affected in law or equity, except wills, leases for a term not exceeding three years, and executory contracts for the sale or purchase of lands, a lease of real estate which has 8 or 10 years yet to run is within the meaning of such chapter, so that the real estate recording laws are applicable to it. *Crouse v. Michell*, 90 N. W. 32, 35, 130 Mich. 347.

Under 1 Rev. St. 738, § 140, providing that "no covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not," an instrument under seal, whereby the lessor demises and leases the right to collect wharfage for the term of one year, is not a conveyance of real estate. *City of New York v. Mable*, 13 N. Y. (3 Kern.) 151, 158, 64 Am. Dec. 538.

A lease of real estate for a time exceeding one year is a conveyance within the recording act, which declares that the word "conveyance" as used therein shall be construed to embrace every instrument in writing by which any real estate is created, alienated, mortgaged, or assigned, except wills, and leases for a time not exceeding one year. *Jones v. Marks*, 47 Cal. 242.

**Mortgage.**

"Conveyance" is a technical or quasi-technical word of precise and definite import, and defined by Bouvier as a transfer of the title to land by one person to another. The instrument itself is called a "conveyance." Bouv. Law Dict. 346. It is a general term indicating the several modes of passing title. A mortgage in fee is a conveyance. *Pickett v. Buckner*, 45 Miss. 226, 245.

The term "conveyance," as used in the recording acts, requiring every conveyance of real property to be recorded, includes a real estate mortgage. *Merrill v. Luce*, 61 N. W. 43, 45, 6 S. D. 354, 55 Am. St. Rep. 844; *Burns v. Berry*, 3 N. W. 924, 925, 42 Mich. 176; *Larned v. Donovan*, 32 N. Y. Supp. 731, 733, 84 Hun, 533; *Odd Fellows' Sav. Bank v. Banton*, 46 Cal. 603, 607; *Allison v. Mancke*, 94 N. W. 659, 661, 118 Wis. 11.

The term "conveyance," as used in the bankruptcy act, which provides that all property conveyed by the bankrupt in fraud of his creditors shall vest in his assignee, and which enacts that the creditor receiving a conveyance contrary to the act shall not be allowed to prove his debt in bankruptcy, includes a mortgage. *Bingham v. Frost*, 6 N. B. R. 130, 131. But as used in a statute providing that conveyances made by debtor with a view to insolvency shall be void, it will not be construed to include mortgages. *Bates v. Coe*, 10 Conn. 280, 294.

The word "conveyance" in the bankrupt act is a generic term, including all proceedings to dispose of or incumber property in derogation of the equality of creditors, with intent by such disposition either to defeat or delay the operation of the act. Hence it includes mortgages on real estate which, if given prior to the provisions of the thirty-ninth section, are void, and deprives the mortgagee of all right to prove his claim in bankruptcy, even though he should be willing to surrender his rights under the mortgage. *Bingham v. Frost* (U. S.) 3 Fed. Cas. 401.

"Conveyance," as used in Civ. Code, § 1187, relating to the conveyance of property by a married woman, should be construed to include a mortgage, which must be executed in the manner required for a conveyance. *Tolman v. Smith*, 16 Pac. 189, 191, 74 Cal. 345.

Within Rev. Code, § 2279, declaring that a conveyance by the owner is of no validity unless the husband and wife, if the owner be married, concur in and sign the conveyance, the term "conveyance" means not only a deed, but embraces a mortgage. *Babcock v. Hoey*, 11 Iowa, 373, 378.

Under Rev. St. U. S. § 2262, which provides that any grant or "conveyance" by the pre-emptor of government lands, except in the hands of bona fide purchasers for a valuable consideration, shall be null and void, except, etc., a mortgage is not included. *Norris v. Heald*, 29 Pac. 1121, 12 Mont. 282, 33 Am. St. Rep. 581.

The term "conveyance," as used in a statute providing that a conveyance made by a grantor who is ousted shall be invalid unless made to the person in possession, does not include a mortgage. *Harral v. Leverty*, 50 Conn. 46, 55, 47 Am. Rep. 608.

"Conveyance," as used in a fire insurance policy providing that it should be void if any change take place in the title, interest, or possession, whether by sale, transfer, or conveyance, in whole or in part, should be construed to include a mortgage. *East Texas Fire Ins. Co. v. Clarke*, 15 S. W. 166, 79 Tex. 23, 11 L. R. A. 293.

"Conveyances," as used in Sess. Laws 1871-72, p. 700, declaring that the board of

education in cities having a population exceeding 100,000 inhabitants shall have power to lease school property and loan moneys belonging to the school fund, but all conveyances of real estate shall be made to the city, should be construed to include a mortgage, for a mortgage is a conveyance of an estate or property to secure a debt or the performance of some particular act, subject to a defeasance usually written in the body of the same instrument. *People v. Roche*, 14 N. E. 701, 702, 124 Ill. 9.

How. Ann. St. § 5689, provides that the term "conveyance" shall embrace every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or assigned, or by which the title to any real estate may be affected in law or equity, except wills, leases for a term not exceeding three years, and executory contracts for the purchase of land. Held, that the term "conveyance" as so defined included a mortgage, which instrument creates an equitable interest in real estate within such section. *Edwards v. McKernan*, 22 N. W. 20, 23, 55 Mich. 520; *Reynolds v. McMullen*, 22 N. W. 41, 45, 55 Mich. 568, 54 Am. Rep. 386.

A statute provided that "every conveyance or mortgage of lands \* \* \* and every lease for more than three years" shall be recorded, "and every conveyance or lease not so recorded" shall be fraudulent and void as against any subsequent purchaser. And in *Routh v. Spencer*, 38 Ind. 393, *Gilchrist v. Gough*, 63 Ind. 576, 30 Am. Rep. 250, and authorities there cited, it was held that the word "conveyance" in the second clause referred to a mortgage as well as a deed. Another statute provided that a widow marrying a second time, and holding real estate in virtue of any previous marriage, with a child or children alive by such marriage, should not alienate such real estate, during such second or subsequent marriage, with or without the assent of her husband; and it was held that the inhibition upon alienation, which, as used in the section, meant the same as "conveyance," prohibited the widow from mortgaging the premises during the subsequent marriage. *Vinnedge v. Shaffer*, 35 Ind. 341; *Bowers v. Van Winkle*, 41 Ind. 432; *McCullough v. Davis*, 108 Ind. 292, 9 N. E. 276; *Ætna Life Ins. Co. v. Buck*, 108 Ind. 174, 9 N. E. 153. Hence a statute forbidding an infant feme covert under certain conditions to disaffirm a sale of lands belonging to her, in which sale and conveyance her husband had joined, forbade a disaffirmance by an infant feme covert of a mortgage so executed. *United States Sav. Fund & Investment Co. v. Harris*, 40 N. E. 1072, 1075, 142 Ind. 226.

Code Civ. Proc. § 963, providing that an appeal may be taken from a judgment or order against or in favor of directing the par-



tion, sale, or "conveyance" of real estate, is to be construed in a broad and comprehensive sense, embracing every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or incumbered, or by which the title to any real property may be affected, except wills. Hence a mortgage of real estate is a conveyance. In *re McConnell's Estate*, 15 Pac. 748, 74 Cal. 217 (citing *Hassey v. Wilke*, 55 Cal. 525, 528).

A "mortgage" may be described as a conveyance of land from a debtor to his creditor by way of security for a debt to become void on the payment of it. A deed of trust executed to secure the payment of a debt is a mortgage. A mortgage or deed of trust to secure the payment of a debt is therefore a "conveyance," within the meaning of Pasch. Dig. art. 1003, and hence a trustee in a deed of trust is not precluded from the power to sell on a default in the grantor's payment of the debt because of the want of title in himself sufficient to enable him to convey the fee in the land mortgaged to a purchaser. *Jordan v. Peak*, 38 Tex. 429, 442.

The act concerning conveyances, passed April 16, 1850, provides, in section 41, that "all conveyances of real estate heretofore made, acknowledged, or proved according to the laws in force at the time of such making, and acknowledgment or proof, shall have the same force as evidence, and be recorded in the same manner and with the like effect as conveyances executed and acknowledged in pursuance of this act," and in section 30 that the term "conveyances," as used in the act, shall embrace mortgages. *Call v. Hastings*, 3 Cal. 179, 184.

#### **Mortgage of leasehold or personalty.**

Under the provisions of a statute providing that the term "conveyance" shall embrace every instrument in writing by which any estate or interest in real property is created, aliened, mortgaged, or assigned, the mortgage of a leasehold interest is a conveyance. *State Trust Co. v. Casino Co.*, 46 N. Y. Supp. 492, 493, 19 App. Div. 344.

"Conveyances of property" as used in Code 1886, § 1798, authorizing the admission of conveyances of property in evidence without proof of execution when they have been acknowledged or proved and recorded as required by law, includes a mortgage of personal property. *Patterson v. Jones*, 3 South. 77, 78, 89 Ala. 388.

#### **Note.**

A note is not a conveyance, mortgage, or like formal instrument in writing, within Acts 1887, which provide that such instruments executed by a married woman shall be effectual to convey or charge her separate estate when the intention to do so is declared

in them. *Singluff v. Tindal*, 19 S. E. 137, 138, 40 S. C. 504.

#### **Payment of money.**

The words "conveyance, transfer, assignment, or incumbrance," as used in the bankruptcy act, § 67, providing that all conveyances, transfers, assignments, or incumbrances of his property, or any part thereof, made or given by a person adjudged a bankrupt within four months prior to the filing of a petition, with intent to hinder, delay, or defraud creditors, shall be void, applies to a transfer or incumbrance of property, real or personal, rather than to the payment of money upon a pre-existing debt. *Blakey v. Boonville Nat. Bank* (U. S.) 95 Fed. 267, 268.

#### **Quitclaim or bargain and sale.**

See, also, "Bargain and Sale."

The term "conveyance" is defined in the recording act to embrace every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged, or assigned, or by which the title to any real estate may be affected in law or equity. The elasticity of the term "conveyance" thus appears to be quite sufficient to comprehend a grant by way of quitclaim or of bargain and sale. *Wilhelm v. Wilken*, 44 N. E. 82, 83, 149 N. Y. 447, 82 L. R. A. 370, 52 Am. St. Rep. 743.

"As a quitclaim deed will transfer the title and right actually held by the grantor therein, it is a 'conveyance,' within Code Iowa, § 1940, providing that no vendor's lien shall be enforced after a 'conveyance' by the vendee, unless such lien is reserved by written instrument, acknowledged and recorded." *Chrisman v. Hay* (U. S.) 43 Fed. 552, 554.

Rev. St. § 2241, provides in effect that every conveyance of real estate which shall not be recorded as provided by law shall be void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall first be recorded. Section 2242 declares in effect that the term "conveyance" as used in that section shall be construed to embrace every instrument in writing by which any estate or interest in real estate is created, alienated, mortgaged, or assigned, or by which the title to any real estate may be affected in law or equity, except wills, liens for a term not exceeding three years, and executory contracts for the sale or purchase of land. Under these sections a quitclaim deed executed subsequent to an unrecorded warranty deed, and reformed by a judgment subsequent to its recording, had the same effect, with such recorded judgment, as the original deed, with the description corrected, and re-executed, and re-recorded, would have had. *Cutler v. James*,

24 N. W. 874, 875, 64 Wis. 173, 54 Am. Rep. 603.

#### **Receipt of receiver of land office.**

Rev. St. Wis. 1878, § 4211, provides that when the occupant, or those under whom he claims, entered into the possession of any premises under claim of title, exclusive of another right, founding such claim on some written instrument as being a "conveyance" of the premises in question, and that there has been a continual occupation under such instrument for 10 years, the premises so included shall be deemed to have been held adversely. It is not essential that the written instrument should constitute in itself an actual title or conveyance, but only one on which may be founded a claim of adverse possession as being a conveyance. The receipt issued by the receiver of the land office on payment of the purchase price of land to the government, containing a description of the land, constitutes a "conveyance" within its meaning. *Cawley v. Johnson* (U. S.) 21 Fed. 492, 495.

#### **Release or satisfaction of mortgage.**

4 Rev. St. (8th Ed.) p. 2475, § 83, declares that the term "conveyance" shall embrace every instrument in writing by which any estate or interest in real estate is created, aliened, mortgaged, or assigned, or by which title to any real estate may be affected in law or equity. Held, that under such statutory definition the word "conveyance" should be construed to include a release of a mortgage, which is required by section 1, p. 2469, to be recorded in order that the mortgage may be discharged as against a subsequent assignee thereof in good faith for value. *Baker v. Thomas*, 15 N. Y. Supp. 359, 363, 61 Hun, 17. So, also, a satisfaction of a mortgage. *Bacon v. Van Schoonhoven*, 87 N. Y. 446, 449.

Gen. St. c. 40, § 21, provides that unrecorded conveyances shall be void as against subsequent purchasers. Held, that the word "conveyance" as used in such act included every transfer of an interest in land, and therefore included a release by a mortgagee, whether done by entry in the margin of the record, by a certificate of discharge, or decree of the court. *Merchant v. Woods*, 7 N. W. 826, 27 Minn. 396.

A partial release of mortgaged premises is a "conveyance," as that term is used in Gen. St. c. 40, § 21, which chapter declares that every conveyance of real estate not recorded, etc., shall be void as against the purchaser in good faith, etc. *Palmer v. Bates*, 22 Minn. 582, 584.

#### **Reservation of land.**

As used in 1 Rev. St. p. 762, § 38, defining the term "conveyance" as embracing every instrument in writing by which any es-

tate or interest in real estate is created or sold, or by which the title may be affected, the term would include an agreement among adjacent lot owners covenanting to reserve an open space in front of their lots and not to build thereon. *Bradley v. Walker*, 33 N. E. 1079, 1080, 188 N. Y. 291.

#### **Voluntary conveyance by wife.**

"Conveyances," as used in Rev. St. 1871, c. 61, providing that a married woman may manage, sell, and convey her estate, but that real estate directly or indirectly conveyed to her by her husband, or paid for by him, or given or devised to her by his relatives, cannot be conveyed by her without the joinder of her husband in such conveyance, meant such conveyances as were voluntary on the part of the wife, the result of a contract to which she should be a party, receiving their force and effect from her consent alone, and did not apply to voluntary conveyances. *Virgie v. Stetson*, 1 Atl. 481, 482, 77 Me. 520.

#### **Will.**

See, also, "Will."

A "conveyance" is an instrument in writing by which property or title to property is conveyed or transmitted from one person to another. Webster. In the narrower sense of the word, "conveyance" signifies the instrument employed to effectuate an ordinary purchase of freehold land, as opposed to settlements, wills, leases, and partitions. So that, as used in the Constitution of Washington, art. 2, § 33, providing that all conveyances of land hereafter made to any alien, in trust or directly, shall be void, it does not render a will void because it contains an item devising land to an alien. *Brigham v. Kenyon* (U. S.) 76 Fed. 80, 83.

While in a technical sense a will may be said to be a "conveyance," the ordinary rule is that it is not included when that term is used. Thus Pub. St. c. 176, § 8, authorizing a married woman living separate from a nonresident husband to manage, sell, and "convey" her property as if unmarried, does not defeat the interest of the husband in the estate of the wife on her death, so as to render her will disinheriting him valid. *Foote v. Nickerson*, 48 Atl. 1083, 1069, 70 N. H. 496, 54 L. R. A. 554 (citing *Jenckes v. Probate Court of Smithfield*, 2 R. I. 255, 256; *May's Heirs v. Slaughter*, 10 Ky. [3 A. K. Marsh.] 505, 509).

Laws 1875, c. 38, providing that aliens may inherit from a citizen who has purchased and taken a conveyance to real estate, is as applicable to the will in the case of a devise as it is to a deed in a case of a grant. *Stamm v. Bostwick*, 25 N. E. 233, 234, 122 N. Y. 48, 9 L. R. A. 597.

A will is never a "conveyance." A conveyance operates in the lifetime of the gran-

tor, while a will does not operate until after the death of the maker. Of course, death transfers all property, and a will says where it shall go; but this does not render a will a "conveyance." It is the death that transfers the property. *Comstock v. Adams*, 23 Kan. 513, 524, 33 Am. Rep. 191.

While a will is a "conveyance" of real estate in a certain sense, we may say in legal language it is not so understood or referred to. The one who takes comes to his estate by purchase, and not by descent, but he is a devisee, and not a grantee; and we do not think, looking to the purpose of the Legislature, that the word "conveyances," as used in Laws 1885, c. 147, requiring conveyances, in order to be valid against bona fide purchasers, to be recorded, includes wills. *Bell v. Couch*, 43 S. E. 911, 912, 132 N. C. 346.

"Convey," as used in an act relative to transfers of interests in realty "regards the passing of titles by 'conveyances,' technically so called, and not wills, which are only quasi conveyances, and are not properly described by the term 'conveyance.'" *May's Heirs v. Slaughter*, 10 Ky. (3 A. K. Marsh.) 505, 509.

#### Writing under seal.

The fourteenth section of the act concerning conveyances (Revision, p. 155) providing that every "deed or conveyance" of or for any lands, etc., shall be recorded, did not refer to writings not under seal. *Bramhall v. Hutchinson* (N. J.) 7 Atl. 873, 875.

#### CONVEYANCING.

When we speak of "conveyancing" we are understood to mean the practice of preparing deeds for execution. A "book on conveyancing" means a book containing precedents or forms of the various kinds of deeds or sealed instruments. *Livermore v. Bagley*, 3 Mass. 487, 505.

#### CONVICT.

See "County Convicts"; "Ex-Convict"; "State Convicts."

The word "convict," as ordinarily used, carries with it the idea that the person of whom it is spoken is guilty of crime of such infamous character as to be punishable by imprisonment in the state prison, and of such imprisonment; and therefore the word is to be taken *prima facie* as importing guilt of such crime, and imprisonment in consequence; and therefore to charge in writing that a man is an ex-convict is libelous *per se*. *Morrissey Providence Telegram Pub. Co.*, 32 Atl. 19, 19 R. I. 124.

"Convicts," as used in the federal immigration laws declaring that convicts shall not be admitted, means any person who has been charged, found guilty, and suffered pun-

ishment for a crime. Thus an immigrant who has been convicted in the country from which he came of assault with a deadly weapon, and has served a term of imprisonment imposed therefor, is a "convict" within the meaning of the term, and was not entitled to admission. *In re Aliano* (U. S.) 43 Fed. 517.

An accused person is termed a "convict" after final condemnation by the highest court of resort which, by law, has jurisdiction of his case, and to which he may have thought proper to appeal. *Pen. Code Tex.* 1895, art. 27; *Arcia v. State*, 26 Tex. App. 193, 205, 9 S. W. 685; *Brannan v. State*, 72 S. W. 184, 185, 44 Tex. Cr. R. 399 (citing *Woods v. State*, 26 Tex. App. 490, 10 S. W. 108; *Jones v. State*, 32 Tex. Cr. R. 135, 22 S. W. 404).

One against whom a judgment of conviction has been entered, but whose sentence has not been pronounced, who has an appeal pending, is not a "convict" within the meaning of the statute declaring that an accused person is termed a "convict" after final condemnation by the highest court of resort which has jurisdiction of his case. *Jones v. State*, 22 S. W. 404, 32 Tex. Cr. R. 135.

#### Commit distinguished.

See "Commit."

#### CONVICTED—CONVICTION.

See "Abiding Conviction"; "Absolute Conviction"; "Deliberate Conviction"; "Full Conviction."

See "Former Conviction"; "Summary Conviction"; "Prosecute to Conviction."

Before conviction, see "Before."

Crompton saith that conviction is either when a man is outlawed, or appeareth and confesseth, or is found guilty by the inquest; and when a statute excludes clergy to persons found guilty of felony, etc., it extends to those who are convicted by confession. *Crompt. Just.* 9. *Bouvier* says "conviction" means a condemnation. In its most extensive sense, this word signifies the giving judgment against a defendant, whether criminal or civil. In a more limited sense it means the judgment given against a criminal, and in its most restricted sense it is a record of the summary proceeding, upon any penal statute, before one or more justices of the peace or other person duly authorized, in a case where the offender has been convicted and sentenced, and this last has usually been termed a "summary conviction." *Blair v. Commonwealth* (Va.) 25 Grat. 850, 853 (citing 1 *Bouv. Law Dict.*).

"Conviction" is usually defined as the legal proceedings of record which ascertain the guilt of a party and on which the sentence of judgment is founded. *Bouv. Law*

**Dict.** The term is sometimes applied to finding a person guilty by verdict of a jury, and is sometimes used to denote final judgment. *People v. Rodrigo*, 11 Pac. 481, 484, 69 Cal. 601 (citing 1 *Bish. Cr. Law*, 223); *White v. Commonwealth*, 79 Va. 611, 615; *Fanning v. State*, 2 S. W. 70, 71, 47 Ark. 442.

The word "convicted" has a well-defined meaning. Webster defines the word as the past participle of the verb "to convict," which means "to prove or find guilty of an offense or crime charged," and Bouvier defines it to mean "the finding of a person guilty of an offense." *Egan v. Jones*, 82 Pac. 929, 930, 21 Nev. 433.

A "conviction" is an adjudication that the accused is guilty. It imports all that the statute requires before holding one to bail, and more. It involves not only the corpus delicti and the probable guilt of the accused, but the actual guilt. *Nason v. Staples*, 48 Me. 123, 127.

"Conviction," as its composition, "convincio, convictio," sufficiently indicates, signifies the act of convicting or overcoming one, and in criminal procedure the overthrow of the defendant by the establishment of his guilt by some known legal mode. These modes are, first, by the plea of guilty, and, second, by the verdict of a jury. *United States v. Watkins* (U. S.) 6 Fed. 152, 158.

A "conviction" is the finding of guilt. As is said by Gray, J., in *Commonwealth v. Lockwood*, 109 Mass. 323, 12 Am. Rep. 699, the ordinary meaning of "conviction," when used to designate a particular stage of a criminal prosecution triable by a jury, is the confession of the accused in open court, or the verdict returned against him by the jury. *People v. Adams*, 95 Mich. 543, 55 N. W. 461.

The phrase "on conviction of such refusal," in a statute authorizing grand jurors, on the refusal of witnesses to appear and testify, to require a justice to commit to jail such witnesses on conviction of such refusal, does not mean on conviction of an offense after trial, but simply meant on being convinced of such refusal in any satisfactory manner, and especially by the persistence of the witness in his refusal. In *re Clark*, 31 Atl. 522, 523, 65 Conn. 17, 28 L. R. A. 242.

#### Accusation and trial included.

As used in Pen. Code, § 497, declaring that a defendant doing the acts outlined by that section shall be "convicted and punished" in the same manner as if such larceny or receiving had been committed in this state, the word "punish" refers to the penalty to be affixed to the crime; but the word "convicted" is much broader in meaning, and includes the accusation and the trial, and hence gives jurisdiction to the courts in

the states. *People v. Black*, 54 Pac. 385, 386, 122 Cal. 73.

Const. art. 4, § 10, declaring that any person who may be "convicted" of having given or offered a bribe to procure his election or appointment to office shall be disqualified to hold any office of trust or profit in the state, means when a person has been indicted by a grand jury, tried by a court and jury, and found guilty of the offense charged in the indictment. *Egan v. Jones*, 82 Pac. 929, 930, 21 Nev. 433.

#### As after judgment.

When the law speaks of "conviction," it means a judgment, and not merely a verdict, which in common parlance is called a "conviction." *Smith v. Commonwealth*, 14 Serg. & R. (Pa.) 69, 70.

"Conviction" is used in different senses. In its most common use it signified the finding of the jury that the prisoner is guilty, but it is frequently used as implying a judgment and sentence of the court on a verdict or confession. As used in Gen. St. c. 131, § 13, providing that the "conviction" of any crime may be shown to affect the credibility of a witness, etc., it means a judgment of the court. *Commonwealth v. Gorham*, 99 Mass. 420, 422. See, also, *Marion v. State*, 20 N. W. 289, 295, 16 Neb. 349; *Barker v. Almy*, 89 Atl. 185, 20 R. I. 367; *Hackett v. Freeman*, 72 N. W. 528, 529, 108 Iowa, 296.

While in its ordinary sense the word "conviction" is used to indicate the ascertainment of the guilt of the prisoner by his plea of guilty or by the verdict of the jury, it is often used in a broader sense to include the sentence of judgment of the court. At common law persons who had been convicted of certain crimes were disqualified from testifying as witnesses, but the "conviction" contemplated by the common-law rule included the sentence or judgment of the court, and was satisfied with nothing less. *State v. Barnes*, 24 Fla. 153, 4 South. 560. Such is its use in Rev. St. § 1096, relating to the competency of witnesses. *Bishop v. State*, 26 South. 703, 41 Fla. 522. See, also, *Keithler v. State*, 18 Miss. (10 Smedes & M.) 192, 236. So, too, in Code Cr. Proc. art. 730, declaring that a "conviction" of a felony renders the convict incompetent to testify. *Arcia v. State*, 9 S. W. 685, 686, 26 Tex. App. 193. And in Code, § 832, declaring that persons "convicted" of a crime are, notwithstanding competent witnesses. *Sacia v. Decker* (N. Y.) 1 Civ. Proc. R. 47, 56.

"After conviction," in a clause of the Constitution giving the Governor power to grant pardons after conviction for all offenses, means after conviction by the verdict and the judgment of the court. The court says: "You have a conviction of the truth of the Christian religion; that is, that you are convinced of it. The jury has a convic-

tion of the prisoner's guilt according to the evidence, and the prisoner is said to be 'convicted' by the verdict. The court has a conviction of the prisoner's guilt according to the verdict of the jury and according to the law of the case, and pronounces sentence; and the prisoner is then fully convicted according to the law and facts. By the corruptibility of the meaning of the words in our language, a verdict of guilty signifies the conviction of the prisoner, and the judgment of the court also signifies the conviction of the prisoner. In this sense we say of prisoners confined in the penitentiary that they are 'convicts'; that they are 'under conviction' by the sentence of the law." *State v. Alexander*, 76 N. C. 231, 235, 22 Am. Rep. 675. And such was held to be its meaning, as used in Const. art. 3, § 6, providing that the Governor can only pardon a criminal "after conviction," though it was said that perhaps it has not been generally held that, in order to constitute a conviction, the judgment should be actually entered before the pardon can be imposed. *Smith v. State*, 74 Tenn. (6 Lea) 637, 639.

Under a statute providing that every person who shall willfully and corruptly swear falsely shall upon conviction be adjudged guilty of perjury, and shall not thereafter be received as a witness, one who has been indicted and put on trial for perjury and found guilty by a jury, and is awaiting sentence upon the verdict, is not "convicted" so as to render him incompetent as a witness. There is no conviction merely upon the finding of a question of fact, but there must be also the judgment of the court. *Blaufus v. People*, 69 N. Y. 107, 109, 25 Am. Rep. 148.

It has generally been held that the word "convicted" includes the final judgment, and that one who has been found guilty by the jury but has not yet been sentenced is not a "convicted" person. In *Gallagher v. State*, 10 Tex. App. 469, it is said that the word "convicted" has a definite signification in law. It means that a judgment of final condemnation has been pronounced against the accused. To say that a party had been "convicted," and then to add that he stood to his trial and that final judgment was entered against him, would be tautology. One is not convicted when he pleads guilty, but when judgment is rendered, within Act March, 1897, § 5, declaring that any boy under the age of 18 years convicted of any other felony than those punishable by death or imprisonment for 10 years or more, either upon a plea of guilty or upon trial, shall be committed to the state reform school. *State v. Townley*, 48 S. W. 833, 147 Mo. 205.

"Conviction," as used in Cr. Code, § 235, providing that each and every person convicted of certain crimes shall be deemed infamous and incapable of holding office, etc., means the judgment on a verdict of

guilty, and not the verdict alone. *Faunce v. People*, 51 Ill. 311, 312.

The term "conviction," as used in St. 1887, c. 392, providing that the conviction of a person licensed to sell intoxicating liquors, for violation of the provisions relating to such sale, shall make void his license, means a final judgment conclusively establishing such person's guilt, though such is not the meaning of the word in its most ordinary sense. *Commonwealth v. Kiley*, 23 N. E. 55, 150 Mass. 325.

In Acts 1883, c. 8459, § 2, fixing the conviction fees of state attorneys and of government solicitors, the term "conviction" is used in the sense of "judgment" or "sentence pronounced." *State v. Barnes*, 4 South. 560, 561, 24 Fla. 153.

"Convicted," as used in Code, c. 195, § 19, which declares that, except where it is otherwise expressly provided, a person convicted of a felony shall not be a witness unless he has been pardoned or punished, and a person convicted of perjury shall not be a witness though pardoned and punished, means "adjudged guilty." *Blair v. Commonwealth (Va.)* 25 Grat. 850, 858.

The word "conviction" is sometimes used as meaning the verdict of a jury, and at other times in its more strictly legal sense for the sentence of the court. Under a statute rendering overseers of the poor of a parish liable to informers on conviction of persons informed against, the overseers in office when the judgment was pronounced are liable. *Burgess v. Boetefeur*, 7 Man. & G. 481, 504.

In common parlance the word "convicted" "is taken to mean the verdict at the time of the trial, but in strict legal sense it is used to denote the judgment of the court." *Francis v. Weaver*, 25 Atl. 413, 415, 76 Md. 457.

Chief Justice Marshall defines "conviction" as a "technical term applicable to judgment in a criminal prosecution." *Ammidon v. Smith*, 1 Wheat. 461, 4 L. Ed. 132. It may be true that "conviction" ordinarily signifies the finding of a verdict of guilty, but it also sometimes denotes the final judgment of the court; and, in support of personal liberty and a right of appeal, the latter meaning may be given it. *Hill v. State*, 41 Tex. 253, 255.

#### As after verdict of jury.

When it is said that one is "convicted," the meaning usually is not that sentence has been pronounced, but only that the verdict has been rendered; so a plea of guilty by the defendant constitutes a "conviction." Lord Coke distinguishes thus: "The difference between a man 'attainted' and 'convicted' is that a man is said to be 'convicted'

before he hath judgment, as if a man be convicted by confession, verdict, or recreancy; and when he hath his judgment on verdict, confession, or recreancy, or upon outlawry or adjuration, then he is said to be 'attaint.'" *Quintard v. Knoedler*, 53 Conn. 487, 2 Atl. 752, 55 Am. Rep. 149.

The term "convicted," as used in the Constitution, declaring that the power of pardoning offenses, except such as persons may be "convicted" of before the Senate by an impeachment of the House, shall be in the Governor, meant a verdict, and did not necessarily include a judgment, the term being used in its ordinary meaning at the time of the adoption of the Constitution. *Commonwealth v. Lockwood*, 109 Mass. 323, 325, 12 Am. Rep. 699. Such is its meaning in Const. art. 4, § 5, authorizing the Governor to grant reprieves and pardons "after conviction." *Blair v. Commonwealth (Va.)* 25 Grat. 850, 852. So, also, in a like provision in Const. art. 3, § 6. *Parker v. State*, 53 S. W. 1092, 1093, 103 Tenn. 547. And in Const. art. 5, § 8, authorizing the Governor "after conviction" to grant commutation for all offenses except certain defined ones. *Ex parte Collins*, 6 S. W. 345, 346, 94 Mo. 22.

Within the provision of Code Civ. Proc. § 2051, providing that a witness may be impeached by evidence that he has been convicted of a felony, a person may be said to be "convicted" where a jury has rendered a verdict of guilty, though he has not yet been sentenced. Thus Blackstone, after speaking of the verdict of acquittal, says: "But if the jury find him guilty, he is then to be convicted of the crime whereof he stands indicted, which conviction may accrue two ways—either by his confessing the offense and pleading guilty, or being found so by the verdict of his country;" and the words "convicted" and "conviction" are used in the Penal Code in such sense. Thus Pen. Code, § 1151, provides a general verdict upon the plea of not guilty is either guilty or not guilty, which imports an acquittal or conviction of the offense charged in the indictment. Section 1157 provides that, whenever the crime is distinguished into degrees, the jury, if they convict the defendant, must, etc. *People v. Ward*, 66 Pac. 372, 374, 134 Cal. 801.

As used in a statute providing that all persons shall be bailable, unless after conviction for any crime or offense punishable with death or hard labor, the term "after conviction" signifies after the verdict of a jury finding the accused guilty. *State ex rel. Butler v. Moise*, 18 South. 943, 947, 48 La. Ann. 109, 35 L. R. A. 701.

In Const. Or. art. 2, § 3, which declares that the privilege of an elector shall be forfeited by a conviction of any crime which is punishable by imprisonment in the penitentiary, the word "conviction" is employed in

its primary and ordinary sense, and signifies a proving or finding that the defendant is guilty, either by the verdict of a jury or his plea to that effect, and does not embrace the sentence which falls thereon. *United States v. Watkins* (U. S.) 6 Fed. 152, 159.

An offer of reward for the "conviction" of a person charged with crime means the return of a verdict of guilty against such person, which is the meaning of the word in its popular sense. *Willmoth v. Hensel*, 25 Atl. 86, 91, 151 Pa. 200, 31 Am. St. Rep. 738; *Williams v. United States*, 12 Ct. Cl. 192, 200.

#### Appeal as affecting.

As often used, the word "conviction" includes both the ascertaining of the guilt of the accused and judgment thereon by the court, and such is its use in Code 1873, § 3648, which permits evidence of a conviction for a felony to be given as affecting the credibility of a witness, but the taking of an appeal from the judgment does not annul it so as to prevent evidence thereof from being given to affect the credibility of the convicted person. *Hackett v. Freeman*, 72 N. W. 528, 529, 103 Iowa, 296.

"After conviction," as used in Const. art. 1, § 13, authorizing the Governor to pardon a criminal after conviction, means after a verdict of the jury finding the defendant guilty, and the Governor was authorized to pardon the criminal after a judgment of conviction has been entered against him, notwithstanding the defendant had taken an appeal from the judgment to the Supreme Court; and it is not necessary that the defendant should abandon his appeal in order to render the pardon valid, since the appeal did not vacate the sentence or judgment against the defendant, and therefore it cannot be contended that there was no conviction remaining to support the pardon after the defendant had taken his appeal. *State v. Alexander*, 76 N. C. 231, 233, 22 Am. Rep. 675.

Under Wag. St. p. 465, § 67, providing that every person who shall be "convicted" of arson, burglary, robbery, or larceny shall be incompetent to be sworn as a witness, a person is disqualified who had been sentenced to the penitentiary, though the sentence had been suspended by an appeal to the Supreme Court, since the order of superseas did not remove or suspend the disqualification. *Ritter v. Democratic Press Co.*, 68 Mo. 458, 461.

"Conviction" means the verdict of the jury finding the party guilty, and does not refer to the termination of the legal proceedings. So a party is said to be "convicted" immediately after a verdict of guilty, though there may at the time be proceedings on appeal still pending. *Quintard v. Knoed-*

ler, 2 Atl. 752, 754, 53 Conn. 485, 55 Am. Rep. 149.

Without deciding that a writ of error and supersedeas rendered the conviction less than the essential final judicial action to constitute a "conviction," a prosecution for a second offense, the penalty for which was greater on account of a former conviction, was continued until determination of the writ of error. *White v. Commonwealth*, 79 Va. 611, 615.

#### **Attainted distinguished.**

"The difference between a man 'attainted' and 'convicted' is that a man is said to be a 'convict' before he hath judgment, as if a man be convict by confession, verdict, or recusance; and, when he hath his judgment on the verdict, he is said to be 'attainted.' It is further said: "By a conviction of a felon his goods and chattels are forfeited; but by attainder—that is, by judgment given—his lands and tenements are forfeited, and his blood corrupted, and not before." 1 Inst. 391. In Jacob's Law Dictionary it is said: "Attainder of a criminal is larger than conviction. A man is 'convicted' when he is found guilty or confesses the crime before judgment had, but not 'attainted' until judgment is passed on him." This is the technical common-law definition of the word "convict" or "convicted". A felon was "convicted" by the verdict of a jury; he was "attainted" by the judgment rendered on the verdict. *Shepherd v. People* (N. Y.) 24 How. Prac. 388, 401; *Ex parte Brown*, 8 Pac. 829, 830, 68 Cal. 176.

#### **As conviction in state court.**

The term "conviction," as used in a provision that "no reward shall be paid except after the conviction of the person engaged in the robbery of, or in the attempt to rob, any persons having charge of any conveyance engaged at the time in conveying passengers," etc., a conviction in the state court was referred to. There was no intention to aid the United States government in the arrest and conviction of its criminals. *Sias v. Hallock*, 14 Nev. 332, 335.

#### **As conviction on direct proceeding.**

1 Rev. St. (6th Ed.) p. 420, § 40, subd. 5, declaring that the office shall become vacant in case the incumbent shall be "convicted of an infamous crime," means a conviction by direct proceeding against the incumbent on criminal indictment. *People v. Thornton* (N. Y.) 25 Hun, 456, 465.

#### **As conviction in penal action.**

Act 1807, § 23, made the offense of altering or defacing the marks or brands of any hogs punishable by a fine of \$20 and by whipping, and the twenty-fourth section provided that if any person should be "con-

victed" of branding a hog not his own he should be punished by a fine of \$20 for every hog so branded. Held, that the word "convicted" meant convicted on the trial of a penal action for the recovery of the penalty, and did not mean a previous conviction on the indictment when no punishment was affixed to the offense except a forfeiture to the party aggrieved. *Reagh v. Spann* (Ala.) 3 Stew. 100, 107.

The word "conviction" and the word "offense" are legally pertinent to criminal rather than to civil proceedings. Although the words were used in a statute for a penalty or forfeiture, it was held that a *qui tam* action brought under such a statute was a civil action, and might be appealed as such. *Canfield v. Mitchell*, 43 Conn. 169, 172.

#### **Criminal proceedings implied.**

The use of the term "conviction," in a statute providing that any county treasurer failing to comply with the requirements of this section shall upon conviction thereof be punished, indicated that the proceedings against him should be on the criminal and not on the civil side of the court, the word "conviction" being used in law to designate certain stages and extent in a criminal prosecution. In *re Howe*, 37 Pac. 536, 537, 26 Or. 181.

The term "conviction," as used in the Rhode Island statute enacting that, if any prisoner for debt shall be convicted of having disposed of any part of his estate contrary to his oath or affirmation made for the purpose of securing his discharge, he shall not only be liable to the pains and penalties of perjury, but shall receive no benefit from such oath, is a technical term applicable to a judgment on a criminal prosecution, and not to a proceeding on a poor debtor's bond. *Ammidon v. Smith*, 14 U. S. (1 Wheat.) 447, 461, 4 L. Ed. 132.

#### **Decision of police commissioners.**

In ordinary phrase, the meaning of the word "conviction" is the finding of the jury of a verdict that the accused is guilty, but in legal parlance it often denotes the final judgment of the court. To shut a person from the witness box because of conviction, guilt must be shown by the judgment. Until a person found guilty of forgery by an order of the jury has received judgment and sentence from the court, he is not incompetent to speak as a witness. *Blaufus v. People*, 69 N. Y. 107, 25 Am. Rep. 148. So, also, *Schiffer v. Pruden*, 64 N. Y. 47, 52; *Sacia v. Decker* (N. Y.) 1 Civ. Proc. R. 47, 56. The decision of police commissioners finding a policeman guilty of certain crimes is not a conviction within the meaning of the law authorizing evidence of a conviction to be introduced as affecting the credibility of a witness. *People v. Sullivan*, 54 N. Y. Supp. 538, 541, 34 App. Div. 544.

**Escape before trial as affecting.**

Rev. Code, p. 159, § 6, providing that the Supreme Court may strike from the rolls any attorney who shall have been convicted of any felony, means an actual "conviction" in its strict legal sense, and an attorney cannot be struck from the rolls under this section merely because it has been proved that he has passed counterfeit notes, knowing them to be such, been indicted therefor, confined in jail, and escaped before trial. *State v. Foreman*, 8 Mo. 602, 603.

**Judgment and sentence distinguished.**

The ordinary legal meaning of "conviction," when used to designate a particular stage of a criminal prosecution triable by a jury, is the confession of the accused in open court, or the verdict returned against him by the jury which ascertains and publishes the fact of his guilt; while "judgment" or "sentence" is the appropriate word to denote the action of the court, before which the trial is had, declaring the consequences to the convict of the fact thus ascertained. Blackstone uniformly speaks of the verdict of a jury on a plea of not guilty as constituting the "conviction," even while the case is still open to a motion for a new trial or in arrest of judgment. He says, if the jury find a prisoner guilty, he is then said to be "convicted" of the crime whereof he stands indicted, which conviction may accrue two ways, either by his confessing the offense of being guilty, or by his being found so by the verdict of his country. He also says there is a great difference between a man "convicted" and "attainted," though they are frequently, through inaccuracy, confounded together. After conviction only, a man is liable to none of these disabilities, for there is still in contemplation of law a possibility of his innocence. 4 Bl. Comm. 362 et seq. Mr. Dane, who was admitted to the bar before the adoption of the Constitution, and was peculiarly learned in the law of his time, says a man is "convict" by a verdict, but not "attainted" before judgment. *Commonwealth v. Lockwood*, 109 Mass. 323, 325, 12 Am. Rep. 699 (citing 6 Dane, Ab. 534); *State v. Henson*, 50 Atl. 468, 470, 66 N. J. Law, 601; *State ex rel. Butler v. Moise*, 18 South. 943, 948, 48 La. Ann. 109, 35 L. R. A. 701; *Munkley v. Hoyt*, 60 N. E. 413, 179 Mass. 108; *People v. Adams*, 55 N. W. 461, 95 Mich. 541; *Bugbee v. Boyce*, 35 Atl. 330, 331, 68 Vt. 311.

"The word 'conviction,' as used in Pen. Code, § 1272, providing that after conviction of an offense not punishable with death a defendant who has appealed may be admitted to bail, signifies a finding by the jury of a verdict that the accused is guilty. Bishop on Statutory Crimes, § 348, says: 'A "conviction," in ordinary legal language, consists of a plea or verdict of guilty, and it is immaterial whether final judgment has been rendered

thereon.' And while the word may be used as signifying the sentence pronounced upon the verdict or the record of conviction, including, *inter alia*, the verdict and sentence, still such meaning ought not to be attributed to it unless there is something in the context to indicate that it was used in this sense." In explanation of the foregoing, the court adds that there can be conviction by other modes than by the verdict of a jury, as by plea of guilty, etc. *Ex parte Brown*, 8 Pac. 829, 830, 68 Cal. 176.

The term "conviction" may refer to the judgment or sentence of a court declaring the punishment of the defendant in a criminal prosecution, but it ordinarily refers to the ascertainment of the defendant's guilt. *Bugbee v. Boyce*, 35 Atl. 330, 331, 68 Vt. 311.

To indicate the successful prosecution of a party charged with crime, we almost invariably use the phrase, "He has been convicted and sentenced," both ingredients being necessary to accomplish the final result. They are distinct acts or processes towards a result. The one is the act of the jury, the other of the court without the jury. They are expressed by appropriated and well-understood terms, and, while it is possible that the result of the co-operation of both may be expressed by the simple term "conviction," yet this is far from the ordinary use of that word. In summary convictions, where the act of conviction and sentence is one and the same, it is quite proper to hold that the conviction is complete without sentence. They are indivisible. It is the sentence that discloses the conviction. *York County v. Dalhousen*, 45 Pa. 372, 375.

**Judgment for contempt.**

A judgment imposing a fine for contempt is a conviction within Const. art. 3, § 6, providing that the Governor shall have power to grant, reprieve, and pardon after conviction, except in cases of impeachment. *Sharp v. State*, 49 S. W. 752, 753, 102 Tenn. 9, 43 L. R. A. 788, 73 Am. St. Rep. 851.

A "conviction" means the adjudging of a person guilty of an offense by a court or other authority of competent jurisdiction. Thus when the House of Commons adjudged a person in contempt, or an act to be a contempt or breach of privilege, their adjudication is a "conviction," and their commitment in consequence is an "execution." *Ex parte Kearney*, 20 U. S. (7 Wheat.) 38, 44, 5 L. Ed. 391.

**Judgment of divorce.**

"Conviction," as used in 2 Rev. St. p. 146, § 48, depriving a wife who has been convicted of adultery of her right of dower in her husband's real estate, does not mean only the establishing her adultery as a fact by proof, but is charged with the fuller meaning that, on the proof and finding or verdict of her



adultery, the court has given judgment of divorce against her, and dissolved the marriage between her and the husband. *Schiffer v. Pruden*, 64 N. Y. 47, 50.

#### As judgment on each count.

"Conviction" is the finding of a person guilty of an offense. It is the final consummation of every step in the procedure from the indictment to the judgment. Where a defendant was found guilty on two counts in an indictment, and was sentenced for both offenses, the judgment sentencing defendant constituted two "convictions," within the meaning of the statute allowing a prosecuting attorney a fee for each conviction. *Hempstead County v. McCollum*, 24 S. W. 2, 58 Ark. 159.

#### Order of deportation of Chinese.

The term "convicted and adjudged," as used in Act Cong. May 5, 1892 (27 Stat. 25, c. 60 [U. S. Comp. St. 1901, p. 1319]), declaring that any person of Chinese descent convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be imprisoned and thereafter removed from the United States, means found or decided by a United States commissioner representing, not the criminal law, but the political department of the government. *United States v. Hing Quong Chow* (U. S.) 53 Fed. 233, 234.

Within the Chinese Exclusion Act, § 13 (Act Cong. Sept. 13, 1888, 25 Stat. 479 [U. S. Comp. St. 1901, p. 1317]), "provided that any Chinese person convicted before a commissioner of any United States court may within ten days after such conviction appeal to the judge of the District Court for the district," the word "conviction" refers to an order that the Chinese person in question shall be removed from the United States to the country from whence he came, and does not refer to any "conviction," in the proper sense of the word, of a criminal offense. In *re Crow Loy* (U. S.) 110 Fed. 952, 953.

#### Plea of guilty or nolo contendere.

A "conviction," within the meaning of the statute which imposes a heavier penalty on a conviction for a second offense, is not to be construed as limited merely to convictions had after trial by jury, but includes as well a conviction of guilt on a plea of guilty, and authorizes an imposition of such heavier penalty where the defendant has once pleaded guilty and thereafter been convicted. *People v. Adams*, 55 N. W. 461, 95 Mich. 541.

A person who makes a plea of guilty is "convicted," within an act providing that the license of a pharmacist may be revoked for the illegal sale of liquor, but not until he has been convicted in a court. *Munkley v. Hoyt*, 60 N. E. 413, 179 Mass. 103.

The term "convicted" means that a man has been found guilty of a crime, or has confessed such crime before judgment. *Shepherd v. People*, 25 N. Y. 406, 419.

A defendant who has been sentenced on a plea of nolo contendere is deemed "convicted," within Gen. Laws, c. 233, § 16, which provides that a person convicted of larceny shall be liable to the owner of the goods, etc., a plea of nolo contendere being an implied confession of guilt. *Barker v. Almy*, 39 Atl. 185, 20 R. I. 367.

In the strictest sense, a "conviction" is not complete until it has become a judgment of the court by a sentence, since before that time a verdict may be set aside or a new trial granted for various causes. The term is commonly used, however, to denote the finding of fact that the accused is guilty. A plea of nolo contendere does not amount to a conviction. *Doughty v. De Amoreel*, 46 Atl. 838, 22 R. I. 158.

Mill. & V. Code, § 5526, provides that any civil officer who shall arrest and prosecute to conviction any person guilty of carrying a bowie knife shall be entitled to \$50. Certain policemen arrested defendant in the first instance for the specific offense charged, furnished the evidence by their own testimony upon which he was indicted, and by standing ready to testify against him on trial induced him to plead guilty. Held, that the defendant had been "arrested and prosecuted to conviction," within the meaning of the statute, in as full a sense as though the state had established its case by the fullest proof. *Porterfield v. State*, 21 S. W. 519, 520, 92 Tenn. (8 Pickle) 289.

A conviction under an indictment to which a defendant has pleaded guilty operates in legal effect as a conviction for any offense provable against him under the indictment. Such a plea is a record admission of whatever is well alleged in the indictment. *People v. Satchwell*, 70 N. Y. Supp. 307, 309, 61 App. Div. 312.

#### Suspension of sentence as affecting.

"When it is said that there has been a 'conviction,' the meaning usually is, not that the sentence has been pronounced, but that the verdict has been returned." "Conviction may accrue in two ways, either by his confessing the offense and pleading guilty, or by his being found so by the verdict of the country." 4 Bl. Comm. 362. In *People v. Goldstein*, 32 Cal. 432, it was held that a plea of guilty on which no judgment was given was nevertheless a conviction. Mr. Justice Gray says, in *Commonwealth v. Lockwood*, 109 Mass. 323, 325, 12 Am. Rep. 699, that: "When the word 'conviction' is used to describe the effect of the guilt of the accused as judicially proved in one case when pleaded or given in evidence in another

er, it is sometimes used in a more comprehensive sense, including the judgment of the court on the verdict or confession of guilt, but, when used to designate a particular stage of criminal prosecution triable by a jury, is the confession of the accused in open court or the verdict rendered against him by the jury which ascertains and publishes the fact of his guilt; while 'judgment' or 'sentence' is the appropriate word to denote the action of the court before which the trial is had, declaring the consequences to the convict of the facts thus ascertained." A plea of guilty, followed by a suspension of sentence, amounts to a "conviction," within section 23 of the liquor tax law, providing that no person convicted of felony shall be authorized to sell liquors under a liquor tax certificate. *People v. Lyman*, 68 N. Y. Supp. 331, 334, 33 Misc. Rep. 243; *Commonwealth v. Lockwood*, 109 Mass. 323, 325, 12 Am. Rep. 699.

"Conviction," as used in the offer of a reward for information which should lead to the conviction of a person engaged in operating an illicit distillery, was not used in a technical sense, requiring judgment to be rendered on a verdict of guilty, but it is sufficient if the party was found guilty of the offense charged by the verdict of a jury, though judgment was suspended on the verdict on motion of the district attorney. (*Williams v. United States*, 12 Ct. Cl. 192, 200); or though sentence is indefinitely postponed (*Willmoth v. Hensel*, 25 Atl. 86, 91, 151 Pa. 200, 21 Am. St. Rep. 738).

#### CONVICTED A SECOND TIME.

Under a statute providing for an increased punishment where a person is convicted a second time of felony, it is held that the phrase "convicted a second time" refers only to felonies committed subsequent to the date of the conviction relied on to increase the penalty. *Huyser v. Commonwealth*, 76 S. W. 174, 177, 25 Ky. Law Rep. 608.

#### CONVINCE.

See "Reasonably Convinced."

To "convince" is primarily to "overcome" or "subdue," and, in logic, "to satisfy the mind by proof." When one is "convinced" he cannot be more convinced. If evidence is convincing, it is sufficient in any case, and to say it ought to be "more convincing" in one case than in another is giving the word degrees of comparison when the word itself is superlative. *Evans v. Rutge*, 16 N. W. 49, 50, 57 Wis. 623.

The statement that in a criminal case the jury must "be convinced beyond doubt" means that "the evidence must be such that the reason sees no doubt left of the defend-

ant's guilt. The law does not deal with doubts that the imagination may conjure up. The mind may not run outside the evidence in search for doubts; the reason must detect and point them out in the evidence alone, and direct the mind to stop short of being convinced. When the mind so hesitates from conviction, there exists a reasonable doubt. If, on the other hand, the mind rests satisfied and convinced, all reasonable doubt is removed. It is that condition of mind which leads reasonable men in the common affairs of life to act with confidence, and not to pause and hesitate and say, 'I am not satisfied,' after a consideration of all the facts bearing on the proposition." *Territory v. Barth*, 15 Pac. 673, 676, 2 Ariz. 319.

#### CONVINCING PROOF.

"Convincing proof" may be said to be that degree of certainty required to sustain a given postulate. *French v. Day*, 36 Atl. 909, 89 Me. 441.

The statement that the party alleging fraud or mistake is bound to prove his allegation by "clear and convincing" evidence means that the evidence which tends to prove the alleged fraud or mistake, if standing alone and uncontradicted, would establish a prima facie case of fraud or mistake. *Ward v. Waterman*, 24 Pac. 930, 934, 85 Cal. 488.

A higher and more satisfactory character of proof is required to establish that an instrument or conveyance is not what it purports to be than is necessary in ordinary civil cases, some of the courts declaring that in some cases the proof must be "clear," some that it must be "convincing," some that it must be "satisfactory," and still some that it must be "clear of all reasonable doubt." These substantially convey the same idea, and require the same degree of proof. And a general rule that facts must be established by a "fair preponderance of the proof" means that the proof must be clear of all reasonable doubt. *Winston v. Burnell*, 24 Pac. 477, 478, 44 Kan. 367, 21 Am. St. Rep. 289.

#### CONVOY.

See "Sail with Convoy."

#### COOKING STOVE.

A cooking stove is an article of household furniture, calculated for no other use, and is not an article of ornament or luxury, but is a necessary. Though of modern invention, it is in the present state of the country as necessary as any other article of household furniture. A cooking stove is an article of household furniture necessary for upholding life, within the meaning of

the statute exempting certain articles of personal property from attachment and execution. *Crocker v. Spencer* (Vt.) 2 D. Chp. 68, 15 Am. Dec. 652.

## COOLER.

A "cooler," as used in connection with a packing house, consists of two or more rooms at least, one of which is refrigerated, the temperature being kept down from about 34 to 40 degrees Fahrenheit. Fresh meat is taken from the packing house and placed in this refrigerating room for sale to the butchers in a city where the cooler is located. At each cooler is a cooler manager in charge thereof, and one or more city solicitors. As a rule, the butcher goes to the cooler and inspects the meat, and if it suits he purchases it, and he pays therefor at the cooler. *State ex inf. Crow v. Armour Packing Co.*, 73 S. W. 645, 649, 173 Mo. 356, 96 Am. St. Rep. 515.

## COOLING TIME.

"Cooling time," in the law of homicide, means such time as would give the blood reasonable time or opportunity to cool. In *re McWhirt* (Va.) 3 Grat. 594, 606, 46 Am. Dec. 196.

Cooling time "is time for the mind to become so calm and sedate as that it is supposed to contemplate, comprehend, and coolly act with reference to the consequences likely to ensue." *Eanes v. State*, 10 Tex. App. 421, 447.

"Cooling time," in the law of homicide, is that time lapsing after an assault upon or injury to another during which it is to be presumed that the latter has had ample opportunity to hear the voice of reason and humanity, so that, if he afterwards kill the one making the assault or inflicting the injury, it is reasonable to attribute such action to deliberate revenge. *May v. People*, 6 Pac. 816, 822, 8 Colo. 210.

"Cooling time" is a term used in criminal law to designate the time in which a man of ordinary prudence would so far recover from the effect of a provocation or assault that it could not be said that the act was the spontaneous result of the provocation or assault. *Keiser v. Smith*, 71 Ala. 481, 483, 46 Am. Rep. 312.

In holding under the facts, as a matter of law, that there had been a sufficient cooling time, which would preclude the defendant in homicide from the defense that the crime was committed in heat of passion, rendering the crime manslaughter, and not murder, *Keiser v. Smith*, 71 Ala. 481, 485, 46 Am. Rep. 312, held that the criterion is not how many days or hours had elapsed since provocation was given, although this is a consideration of vast significance in ascer-

taining the main inquiry. What constitutes a sufficiency of cooling time of any provocation is necessarily a question of law, and not of fact, the court being required to decide it preliminary to the admission or exclusion of evidence offered in mitigation. *Ragland v. State*, 27 South. 983, 987, 125 Ala. 12.

The statute fixes no time in which an excited mind is required to become cool and sedate. This question must depend upon the facts attendant upon the particular case. An instruction in a prosecution for murder, in which the question of "cooling time" is made a matter of law—that is, if a sufficient length of time, under the circumstances of the case, has elapsed for the mind to cool as a matter of law it must be cool—was error, as the condition of the mind at the time of a homicide is a question of fact, and it is fundamental in this state that the jury should view the homicide as nearly as possible as did the accused at the time he committed the act.—*Jones v. State*, 33 Tex. Cr. R. 492, 499, 26 S. W. 1082, 1086, 47 Am. St. Rep. 46.

## COOPER.

A "cooper" is a seaman in contemplation of law, though he has peculiar duties on board ship. He is so treated in the shipping articles, and is, like common seamen, bound to do ordinary ship's duty, such as standing watch, assisting in navigation, handling sails, etc. He receives an extraordinary compensation for his duties as cooper, not as superseding, but as adding to, the common seaman's duty. *United States v. Thompson* (U. S.) 28 Fed. Cas. 102.

## CO-OPERATE—CO-OPERATION.

In the case of *Hoffman v. Young*, 2 Fed. 74, the court clearly defines the meaning of "co-operation," and says the courts do not mean merely acting together or simultaneously, but unitedly to a common end, a unitary result. Each and every part must have its subfunction to perform, and each must have a certain relation to or dependence upon the other. *Paul Boynton Co. v. Morris Chute Co.* (U. S.) 82 Fed. 440, 444.

Servants may be directly "co-operating" with each other in a particular business; in the same line of employment, and yet not be such that their duties bring them into habitual association, so that they may exercise a mutual influence over each other, promotive of proper caution. *Swisher v. Illinois Cent. R. Co.*, 182 Ill. 533, 547, 55 N. E. 555, 556.

The term "co-operation," in the patent law, does not mean acting together, but united to a common end. *Holmes Burglar Alarm Telegraph Co. v. Domestic Telegraph & Telephone Co.* (U. S.) 42 Fed. 220, 227

(citing *Birdsall v. McDonald*, 1 Ban. & A. 165).

A general rule of patent law requires that separate inventions should be separately patented, but an exception to the rule is happily expressed in the statement that distinct inventions may be joined in the same patent where they "co-operate" in the use of the same article. Thus separate machines may be included in the same patent, though distinct and independent, where each is the same as the other in the accomplishment of the same general end, or which co-operate to accomplish a single result. *Wilkins Shoe-Button Fastener Co. v. Webb* (U. S.) 89 Fed. 982, 987.

### CO-OPERATIVE.

"Co-operative," within the title of an act requiring cheese factories on the co-operative plan to give bond, sufficiently describes the business referred to in the act, though it is carried on by the dividend plan, as the term "co-operative" means promoting the same end, helping, acting together to accomplish the same end; whereby it seems to describe the business transacted both by those who manufacture the cheese and those who furnish the milk to be manufactured. They all promote the same end, and hence are co-operative; the farmers by furnishing the milk, and the others by manufacturing the product. *Hawthorne v. People*, 109 Ill. 302, 313, 50 Am. Rep. 610.

### CO-OPERATIVE ASSOCIATION.

"In a broad sense all associations, whether corporations or partnerships, are 'co-operative,' if all the members, either by their labor or capital or both, co-operate to a common purpose. There is, undoubtedly, in the popular use of the terms, a more limited sense, though the precise limits are not well defined. There is no legal, as distinguishable from their popular, signification. In the *Century Dictionary* the term 'co-operative society' is defined as a union of individuals, commonly laborers, or small capitalists, framed for the prosecution in common of a productive enterprise, the profits being shared in accordance with the amount of capital or labor contributed by each member." *Finnegan v. Noerenberg*, 53 N. W. 1150, 1151, 52 Minn. 239, 18 L. R. A. 778, 38 Am. St. Rep. 552.

### CO-OPERATIVE INSURANCE COMPANY.

As charity, see "Charity."

### COPARTNERS.

All partners are copartners, but all copartners are not partners. Whether they

are partners or not depends on the nature of the act performed, and the kind and scope of the business in which the act was done; and, in determining whether there is a joint interest in the contract, the benefit accruing from the contract has an important bearing. *Dumanoise v. Townsend*, 45 N. W. 179, 180, 80 Mich. 302.

### COPARTNERSHIP.

See, also, "Partnership."

A copartnership is a voluntary contract between two or more competent persons to place their money, effects, labor, skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of profits thereof between them. *Lott v. Young* (U. S.) 109 Fed. 798, 802.

A copartnership is, in its essence, a contract of agency. Each partner is the general agent of the firm, and the firm is the agent of each partner, with power to bind him to a personal liability in favor of partnership creditors. This agency continues only so long as the partnership continues, and on the dissolution of the partnership, as by the withdrawal of a member or otherwise, the agency terminates. *Lapenta v. Lettieri*, 44 Atl. 730, 732, 72 Conn. 377, 77 Am. St. Rep. 315.

### CO-PARTY.

The word "co-parties," as used in Code, § 551, requiring that coparties to the judgment appealed from shall join or be notified, means parties to the judgment appealed from, not coplaintiffs or codefendants to the action. *Logan v. Logan*, 77 Ind. 558, 560.

Under a statute of Indiana, providing that a part of several co-parties may appeal, etc., the word "co-parties" means co-parties to the judgment, and not co-parties plaintiff or defendant, either on the complaint or cross-complaint. *Gregory v. Smith*, 38 N. E. 395, 396, 139 Ind. 48 (citing *Hadley v. Hill*, 73 Ind. 442); *Hildebrand v. Sattley Mfg. Co.*, 57 N. E. 594, 595, 25 Ind. App. 218; *Inman v. Vogel*, 40 N. E. 665, 666, 141 Ind. 138.

### COPPER.

The word "copper," as used by a witness in a prosecution for burglary, while reciting the words of one of the burglars in a conversation with the nightwatchman who detected him, in which the burglar was alleged to have said "Don't tell the 'coppers,'" signifies "policeman." *People v. Connor*, 22 N. Y. Supp. 669, 670, 68 Hun, 78.

**COPPER CASH.**

A "cash" is a Chinese coin composed of copper and lead, and copper and nickel, used in China as money by count, and as such is not entitled to importation duty free under Tariff Act July 30, 1846 (9 Stat. 49), as "coins, gold, silver, and copper," unless it can be imported to be used as part of the currency of the United States. *Crocker v. Redfield* (U. S.) 6 Fed. Cas. 835.

**COPPER-FASTENED.**

"Copper-fastened," in reference to a ship copper-fastened, means that all the bolts under the water which go through the keel, keelson, stern box, stern post, and stern should be copper. *Freeman v. Baker*, 5 Car. & P. 475, 476.

**COPPERED SHIP.**

A "coppered" ship is one which has the bottom of the keel and the sides of the keel, as well as the sides of the vessel, covered with copper. *Hazard v. New England Marine Ins. Co.* (U. S.) 11 Fed. Cas. 934, 935.

Where insurance was effected in Boston on a ship from New York to the Pacific, and the letter ordering the insurance was written in New York by the owner of the ship, who resided there, and the letter represented that the ship was a coppered one, the word "coppered" meant such a ship as was known as a "coppered" one according to the usage and custom of the port of New York. *Hazard's Adm'r's v. New England Marine Ins. Co.*, 33 U. S. (8 Pet.) 557, 582, 8 L. Ed. 1043.

**COPY.**

See "Certified Copy"; "Complete Copy or Statement"; "Correct Copy"; "Exemplified Copy"; "Full Copy"; "Let-terpress Copy"; "Office Copy"; "True Copy."

Attested copy, see "Attest—Attestation." Every copy, see "Every."

The word "copy" is defined in Webster's Dictionary as a writing like another writing, a transcript from an original. In Bouvier's Law Dictionary a copy is a true transcript of an original writing. In the common and in the legal acceptance of the word, a "copy" is not an original. *Kaalaea Plantation v. Balabola*, 3 Haw. 818, 822; *State v. Champion*, 116 N. C. 987, 989, 21 S. E. 700; *McCuaig v. City Sav. Bank*, 111 Mich. 356, 358, 69 N. W. 500.

A copy is a transcript of an original writing. The proof of records may be made by copy, and the copy may be of three kinds, and only three: (1) Exemplification; (2) copies made by an authorized officer; (3) sworn copies. *Stamper v. Gay*, 23 Pac. 69, 70, 3 Wyo. 322 (citing 1 Greenl. Ev. § 501).

"A copy is a transcript from an original, whereas a certificate is a declaration in writing which, when under the hand and seal of the notary, becomes a protest." The word is used in such sense in St. 1841, c. 44, § 6, providing that all copies of certificates rendered by a notary public shall be under his hand and notarial seal, and shall be received as evidence of such transaction. *Ticonic Bank v. Stackpole*, 41 Me. 302, 305.

**Abstract.**

As a copy, see "Abstract."

**Change of language or appearance as affecting.**

A "copy of any print," as used in 17 Geo. III, c. 57, prohibiting the sale of a copy of any print, applies to a copy of a print in which there exists small variations from the original, a copy being deemed that which comes so near to the original as to give every person seeing it the idea created by the original. *West v. Francis*, 5 Barn. & Ald. 737.

A "copy" of a book, to be an infringement thereof, must be a transcript of the language in which the conceptions of the author are clothed; of something printed, and embodied in a tangible shape. The mere conceptions clothed in another language cannot constitute the same composition, and cannot be called a "copy." *Stowe v. Thomas* (U. S.) 23 Fed. Cas. 201, 207.

Code, c. 130, § 5, providing that a "copy of any record or paper in the clerk's office of any court attested by the officer in whose office the same is may be admitted in evidence in lieu of the original," means that a "copy is a true transcript of an original writing," and hence a writing which is not a true transcript of a judgment is not a copy thereof. *Dickinson v. Chesapeake & O. R. Co.*, 7 W. Va. 390, 412.

**Copy of law.**

The language, "copies of \* \* \* papers in his office," in a statute giving the Secretary of State a certain fee for every copy of a paper on file in his office, is broad enough to include copies of laws which are in the Secretary of State's office, unless its generality is otherwise restrained. This language is by other legislation so restrained and limited as to be incapable of a construction including "laws" among the "papers," copies of which the Secretary of State may make and charge for. *State v. Kelsey*, 44 N. J. Law (15 Vroom) 1, 40.

**As copy of whole.**

A certificate that a copy of a docket entry is a true "copy" is insufficient to show that it is a copy of the whole record, but rather the contrary. In most cases the language would be understood to mean some-

thing less than the whole. *Undergraff v. Perry*, 4 Pa. (4 Barr) 291, 294.

In ordinary parlance the word "copy" means, not a reproduction of only a portion of the thing copied, but of the whole of it. The Century Dictionary defines the word as follows: "A completed reproduction, or one of a set or number of reproductions, containing the same matter, or having the same form or appearance." Webster's Dictionary gives the following definition: "A writing like another writing, a transcript from an original; hence (2) any single book or set of books containing a composition resembling the original work, as the 'copy' of a deed, or of a bond, a 'copy' of Addison's works, etc." The Standard Dictionary defines "copy" as a "single book or set of books, or a sheet reproducing any literary composition; as a fully illustrated copy of Dante's *Inferno*, etc." Thus the word "copy," in a contract providing that a party thereto should turn over the plates and stock for binding of certain books, consisting of sets of two volumes, each, on the consideration of the payment of 20 cents "per copy," did not mean a single volume of the work, but a reproduction of the entire work. *Johnson v. Weed-Parsons Printing Co.*, 74 N. Y. Supp. 873, 874, 86 Misc. Rep. 628.

A copy of an application for insurance, which does not contain a copy of the applicant's name appended thereto, is not a "copy" within the meaning of Rev. St. § 1945a, precluding an insurance company from proving the contents of such application, unless a copy is attached and made a part of the policy. The signature is a very material part of the instrument. The signature is the thing which gives force to the application, and, when signed with the knowledge of its contents, is conclusive upon the insured. *Dunbar v. Phoenix Ins. Co.*, 72 Wis. 492, 497, 40 N. W. 886.

#### As duplicate original.

Duplicate distinguished, see "Duplicate."

In Bankr. Form (18 Sup. Ct. xx), directing that the "copy" of the petition in involuntary bankruptcy, together with a writ of subpoena, shall be served as therein provided, the term "copy" means duplicate original. In re *Stevenson* (U. S.) 94 Fed. 110, 116.

#### As an individual book.

"Copy" is defined in Webster's Dictionary as "an individual book, as a copy of the Bible"; and it is in this sense that the word "copies" is used in Rev. St. § 4962, requiring a notice of copyright to be inserted in the several copies of the edition of a copyrighted book. *Pierce & Bushnell Mfg. Co. v. Werckmeister* (U. S.) 72 Fed. 54, 57, 18 C. C. A. 431.

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#### Original.

"Copy," as used in Code, § 550, requiring a "copy of appellant's case on appeal" to be left with appellee, is sufficiently complied with by a service of the original statement of the case, and it does not require that the same be a copy of it. *McDaniel v. Scurlock*, 20 S. E. 451, 115 N. C. 295.

Within the provision of Code Civ. Proc. § 1906, providing that a copy of judicial record of a foreign country may be admitted in evidence without the certificate of the clerk, if it be accompanied by the oral testimony of the witness that he had compared the copy with the original, etc., the stress is not laid upon the word "copy" so as to distinguish it from the original, and thus tending to show that the original must be introduced under the preceding section providing that a judicial record of the foreign country may be admitted in evidence when proved by the attestation of the clerk of the court. *Wickersham v. Johnston*, 88 Pac. 89, 90, 104 Cal. 407, 43 Am. St. Rep. 118.

Under a statute allowing the supervisor of elections a certain price for a "copy" of any paper on file, the words mean a copy certified and issued by the supervisor as a copy, not a duplicate printed copy of the original paper issued as an original document. *Muirhead v. United States*, 18 Ct. Cl. 251, 256.

#### Photograph.

"Copy," as used in Act Feb. 3, 1831 (4 Stat. 486), providing that any person who shall invent, design, etch, engrave, or work any print or engraving shall have the sole right and liberty of printing it, and that any person who shall engrave, etch, or work, sell, or copy the main design shall forfeit the plate on which it has been copied, should be construed to cover the photographic method. "Copy" is a general term, added to the more specific terms before used for the very purpose of covering methods of reproduction not included in the words "engrave, etch or work," and if it covers anything should cover the photographic method, which, more nearly than any other, produces a perfect "copy." *Rossiter v. Hall* (U. S.) 20 Fed. Cas. 1253; *Rossiter v. Hall* (N. Y.) 82 How. Prac. 226, 228.

#### Translation distinguished.

"Copy" is defined as a reproduction or imitation, as of a writing, printing, drawing, painting, or other work of art, so as to have another or others similar to the original. It is a document which is taken or written from another, as opposed to an original; and hence a translation in another language or dialect does not constitute a "copy." *Rasmussen v. Baker*, 50 Pac. 819, 825, 7 Wyo.

117, 38 L. R. A. 773 (citing *Stowe v. Thomas* [U. S.] 23 Fed. Cas. 201).

### COPY OF ACCOUNT.

The "copy of account," as used in the statute requiring the copy of an account to be filed in certain cases in justice courts, "is a substitute for the bill of particulars directed in the practice act, and ought to be equally minute and particular, the same reasons subsisting in both cases;" and, in order to comply with the statute, must give the items of the account, and not a mere statement that the debt was due for merchandise per bill. *Clark v. Hillyer*, 2 N. J. Law (1 Penning.) 102.

The word "copy," as used in an act authorizing the defendant to file a copy of his account or state of his demand, means a copy of the items as entered in the book, so that the opposite party, seeing the particulars, may be prepared to answer and defend. There must be a copy, and not merely a recital of the substance, amount, or balance thereof. *McCormick v. Brookfield*, 4 N. J. Law (1 Southard) 69-71.

### COPYHOLD.

As freehold, see "Freehold."

The tenancy of copyhold is a peculiar one, and the incidents of it are seemingly contradictory, for it is said of copyholders that though they are tenants at will, yet their estate shall descend to their heirs, and such descent shall be governed by the rules of the common law. They had their estates granted them in fee, but still at the will of the lord. But in fact they do not hold by the precarious tenure of the lord's will; for, the good nature of many lords of manors having time out of mind permitted their vassals and their children to enjoy their possession without interruption in their regular course of descent, the common law gave them title to prescribe against their lords, and, on performance of the customary service, to hold their lands in spite of any determination of the lord's will. *Choate v. Tighe*, 57 Tenn. (10 Heisk.) 621.

### COPYRIGHT.

A copyright is the grant of an exclusive privilege by the government for the purpose of protecting and encouraging, like a patent, the product of a mental effort, which secures to the author the fruit of his toil, or enables him to dispose of it with his incidental rights. A copyright gives to the owner the sole right to print, publish, and vend copies of a written composition. In *re Rider*, 15 Atl. 72, 16 R. I. 271; *Davis v. Vories*, 42 S. W. 707, 708, 141 Mo. 234; *Per-*

*ris v. Hexamer*, 99 U. S. 674, 675, 25 L. Ed. 308; *Kennedy v. McTammany* (U. S.) 33 Fed. 584; *Stowe v. Thomas* (U. S.) 23 Fed. Cas. 201, 207.

The word "copyright," which was provided by an act of Parliament, was construed to mean the "sole and exclusive right of printing or otherwise multiplying copies of any subject to which the said work is herein applied." *J. L. Mott Iron Works v. Clow* (U. S.) 82 Fed. 316, 320, 27 C. C. A. 250.

The word "copyright" signifies an exclusive right of an author and his assigns to print his literary composition, and publish and republish it in print. *Keene v. Wheatley* (U. S.) 14 Fed. Cas. 180, 185.

The right of "copyright" is the right of an author or proprietor of a literary work to multiply copies of it, to the exclusion of others. *Palmer v. De Witt*, 47 N. Y. 532, 536, 7 Am. Rep. 480.

"Copyright before publication," or the common-law right of first publication, is the exclusive privilege of first publishing any original material product of intellectual labor. *Palmer v. De Witt*, 47 N. Y. 532, 537, 7 Am. Rep. 480.

"Copyright after publication" is the right secured by statute to multiply copies of a literary work, to the exclusion of others. *Palmer v. De Witt*, 47 N. Y. 532, 537, 7 Am. Rep. 480.

A "copyright," under the statute, is the exclusive right to publish a literary or artistic work. Such work may be a transcript or reproduction from some original manuscript, plate, or negative, as a book, engraving, or photograph; or may itself be an original, as a painting, model, or design; and such work may or may not be published in multiple form. *Pierce & Bushnell Mfg. Co. v. Werckmeister* (U. S.) 72 Fed. 54, 56, 18 C. C. A. 431.

The law undertakes to encourage the publication of works of authors by providing that upon certain conditions no one but the author, or one deriving the right from him, shall have the liberty of publishing or copying his works for a certain time. The copyright thus secured to an author by state is an incorporeal right, not a corporeal thing. *Werckmeister v. Springer Lithographing Co.* (U. S.) 63 Fed. 808, 810; *Stephens v. Cady*, 55 U. S. (14 How.) 528, 530, 14 L. Ed. 528. At the same time it is property capable of being assigned by the author at his pleasure. It cannot, like tangible property, be made the subject of seizure and sale on execution. *Werckmeister v. Springer Lithographing Co.* (U. S.) 63 Fed. 808, 810.

"Copyright" signifies an exclusive right of an author and his assigns to print his literary composition, and republish it in print."

The term is narrower than the word "literary property." *Keene v. Wheatley* (U. S.) 14 Fed. Cas. 180, 185.

An owner of a copyright has an exclusive right to sell his book in any manner anywhere in the United States. This right he can transfer to another as to the whole or any particular part of the country. *Davis v. Vorles*, 42 S. W. 707, 708, 141 Mo. 234.

A "copyright of a book," within the meaning of the copyright laws, includes the copyright of a newspaper. The copyright of a book is not always infringed by reproducing a part of the work. The copyright of the book is not infringed by making a plate from which a copy of a picture in an illustrated paper that is copyrighted can be produced. *Harper v. Shoppell* (U. S.) 26 Fed. 519.

When an author has sold his book, the only property which he reserves to himself, or which the law gives to him, is the exclusive right to multiply the copies of that particular combination of characters which exhibits to the eyes of another the ideas intended to be conveyed. This is what the law terms "copy" or "copyright." *Stowe v. Thomas*, 2 Am. Law Reg. (O. S.) 210, 223.

"Copyright" has been extended, so that it now includes what the old guild of authors would have disdained—catalogues, mathematical tables, statistics, designs, guidebooks, directories, and other works of similar character. Nothing, it would seem, evincing in its make-up that there has been underneath it in some substantial way the mind of a creator or originator, is now excluded. *National Tel. News Co. v. Western Union Tel. Co.* (U. S.) 119 Fed. 294, 297, 56 C. A. 198, 60 L. R. A. 805.

A "copyright" of a map, secured to the author under the act of Congress, is an exclusive right to the multiplication of the copies for the benefit of the author or his assigns, disconnected from the engraved plate of the map or any physical existence. It is an incorporeal right to print and publish the map, or, as said by Lord Mansfield in *Millar v. Taylor*, 4 Burrows, 2303, 2396, "a property in notion, and has no corporeal, tangible substance." It is not the subject of seizure and sale by execution, but can be reached by a creditors' bill in chancery. *Stephens v. Cady*, 55 U. S. (14 How.) 528, 530, 14 L. Ed. 528.

#### Letters patent distinguished.

There is no doubt that a work on the subject of bookkeeping, though only explanatory of well-known systems, may be the subject of a copyright; but then it is claimed only as a book. But there is a clear distinction between the book, as such, and the art which it is intended to illustrate. The

novelty of the art or thing described or explained has nothing to do with the validity of the copyright. To give the author of the book an exclusive property in the art described therein, when no examination of its novelty has ever been officially made, would be a surprise and a fraud upon the public. That is the province of letters patent, not of copyright. The claim to an invention or discovery of an art or manufacture must be subjected to the examination of the Patent Office before an exclusive right therein can be obtained, and it can only be secured by a patent from the government. The difference between letters patent and copyright may be illustrated by reference to the case of medicines. Certain mixtures are found to be of great value in the healing art. If the discoverer writes and publishes a book on the subject, as regular physicians generally do, he gains no exclusive right to the manufacture and sale of the medicine; he gives that to the public. If he desires to acquire such exclusive right, he must obtain a patent for the mixture as a new art, manufacture, or composition of matter. He may copyright his book if he pleases, but that only secures to him the exclusive right of printing and publishing his book. So of all other inventions or discoveries. And the court held that the publication of a work on bookkeeping, and the copyright of such work, did not give an exclusive right to the methods of bookkeeping therein explained and described. *Baker v. Selden*, 101 U. S. 99, 102, 103, 25 L. Ed. 841.

#### Renewal included.

The word "copyright," in a contract by an author for the sale of his copyright, was construed to only pass the first term, and not his right to renew the copyright. *Pierpont v. Fowle* (U. S.) 19 Fed. Cas. 652, 658.

#### COPYRIGHTED.

The word "copyrighted," when printed on a trade label, is a word having a well-defined meaning, to wit, that the protection of the statute of copyrights had been secured, and that the label was protected from infringement by the statute regulating copyrights. *Solis Cigar Co. v. Pozo*, 26 Pac. 556, 558, 16 Colo. 388, 25 Am. St. Rep. 279.

#### CORAL

"Coral, cut or manufactured," as used in Tariff Act July 30, 1846 (9 Stat. 44), as amended by Act March 3, 1857 (11 Stat. 192), would include coral cut in the form of a cameo, and not set and known as coral cameo in commerce, and the same was therefore not taxable under the provisions for "cameos not set." The specific designation must prevail over the commercial designation. *Bailey v. Schell* (U. S.) 2 Fed. Cas. 382, 383.



**CORAM JUDICE.**

It is "coram judice" whenever a case is presented which brings the power to hear and determine a cause into action. *Belles v. Miller*, 38 Pac. 1050, 1052, 10 Wash. 259 (citing *United States v. Arredondo*, 31 U. S. [6 Pet.] 691, 8 L. Ed. 547); *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 90 N. W. 378, 380, 86 Minn. 140.

**CORAM NOBIS.**

See "Writ of Error Coram Nobis."

**CORAM NON JUDICE.**

Acts done by a court which has no jurisdiction, either over the person, the cause, or the process, are said to be "coram non judice." *St. Lawrence Boom & Mfg. Co. v. Holt*, 41 S. E. 351, 355, 51 W. Va. 352 (citing *Bouv. Law Dict.*).

**CORD.****Of stone.**

"Cord," as used in a contract for the purchase of stone for so much a cord, measured in the wall, where both parties knew that 128 cubic feet of rough stone makes only 99 cubic feet of masonry, will be held to mean 99 cubic feet. *Robinson v. Grannis*, 33 N. Y. Supp. 291.

**Of wood.**

"Cord," as used in a contract for the sale of a given number of cords of wood, means 128 cubic feet for each cord. *Kennedy v. Oswego & S. R. Co.*, 67 Barb. 169, 177.

A statute imposed a penalty on the sale of cord wood without having the same measured by a sworn surveyor at a certain amount per cord. Held, that in order to come within the terms of the statute the sale must be of at least a cord, and hence, where less than a cord was sold without being measured as prescribed, there was no violation of the statute. *Pray v. Burbank*, 12 N. H. 267.

The word "cords," as used in a written contract for the purchase of a stated number of cords of wood, without explanation, relates to the quantity of wood to be delivered, and does not necessarily fix either the lengths or shapes of the sticks of wood. *Maynard v. Render*, 23 S. E. 194, 195, 95 Ga. 652.

The words "25 cords of wood" are sufficient, when used in an indictment to designate the property stolen, to show that the wood stolen was personal property. *State v. Parker*, 34 Ark. 158, 159, 36 Am. Rep. 5.

The word "cord," as used in a declaration for the sale and delivery of wood, must

be interpreted as meaning "cord" as defined by Rev. St. 28, § 200. *Colton v. King*, 84 Mass. (2 Allen) 317, 319.

**CORD WOOD.**

The word "cords," as used in a written contract for the purchase of a stated number of cords of wood, without explanation, relates to the quantity of wood to be delivered, and does not necessarily fix either the lengths or shapes of the sticks of wood. The contrary would have been true if the contract had been for the delivery of so much "cord wood." The employment of the latter term would have signified an undertaking to deliver wood cut in cordwood lengths, and parol evidence was admissible to show what was the real agreement of the parties in this respect. *Maynard v. Render*, 23 S. E. 194, 195, 95 Ga. 652.

**CORDIAL.**

See "Sweet Cordial."

"Cordial," as used in the customs act of 1883, providing that cordials containing spirits should pay certain tariff duties, includes the liquor known as "benedictine," prepared in France after a secret formula, derived from the Benedictine monks at the abbey of Fécamp, in that country, and put up in bottles with labels signed and trademarked by the proprietors, and accompanied in the case of each bottle by a circular, claiming for the liquor certain therapeutic and prophylactic qualities. *In re Gourd* (U. S.) 49 Fed. 723, 729.

"Common store cordial is sweetened whisky sold as spirituous liquor. Godfrey's Cordial is a very different thing, known for and sold as medicine. The sale of the former is in violation of a statute prohibiting the sale of spirituous liquors, but the sale of the latter is not within the prohibition of the statute." *State v. Bennet* (Del.) 3 Har. 565, 567.

**CORDUROY.**

The phrase, "corduroy composed of cotton and other vegetable fiber," within Tariff Act July 24, 1897, c. 11, § 1, Schedule I, par. 315, 30 Stat. 178 [U. S. Comp. St. 1901, p. 1659], imposing a duty thereon, does not include a pile fabric, commercially known as "velvet cord," "ribbed velvet," or "corded velvet," which is made of cotton with a fine rib. These goods are never bought or sold as "corduroys," though that circumstance would be immaterial if they were in fact corduroys. They are not within the definition of "corduroy" given in the Century Dictionary, which describes a thick stuff especially used for the outer garments of men engaged in rough labor, field sports, and the

like. It seems to have been assumed below that the word "cords" is an abbreviation of "corduroy," the latter word being a generic term covering a group of several species. Reference to these words in the new English Dictionary of the Philological Society, however, shows that cords came first into use, and corduroy, or "corde du roy," was a term of subsequent invention. Evidently the broader word of the two is "cords." Corduroys, in fact, are not made by the manufacturers who make velvet cords, nor velvet cords by the manufacturers who make corduroys. *Stewart, Howe & May Co. v. United States (U. S.) 113 Fed. 928, 51 C. C. A. 558.*

## CO-RESPONDENT.

Neither in our law nor in the dictionary has the word "co-respondent" any such meaning as "paramour." In England, in an action for divorce, the "plaintiff" and the "defendant," as we call them, are the "petitioner" and the "respondent." In such an action there, the defendant makes the paramour a party respondent, and in that way he is and is called "co-respondent." With us, if the paramour can be so joined, he would be a "codefendant," and not a "co-respondent." *Lowe v. Bennett, 58 N. Y. Supp. 88, 90, 27 Misc. Rep. 356.*

## CORN.

Authorities in great abundance have been produced to show that in England, by the term "corn," all kinds of grain used for bread stuff is understood; but as maize is an article not cultivated there, except as a curiosity, it may well be questioned whether English authorities are entitled to equal weight with those of our own country, where the article is extensively grown and used. Webster says expressly that the term "corn" is appropriated in the United States to maize. This is undoubtedly in conformity to the universal usage and understanding in the United States with regard to corn. "Corn" in this country is not understood to be a generic term, including all kinds of grain, but is known to be confined in its meaning to the single article of Indian corn, and therefore an indictment for stealing "corn in the ear" is sustained by evidence of the larceny of Indian corn. *Commonwealth v. Pine, 3 Pa. Law J. 411, 412.*

An indictment for setting fire to a "stack of barley" was equivalent to the words "stack of corn or grain" in the statute of 7 & 8 Geo. IV, § 30, c. 17, describing the punishment for such offense. *Rex v. Swatkins, 4 Car. & P. 548.*

"Corn and grain," within the meaning of a statute exempting a debtor's corn and grain necessary and sufficient for the subsistence of himself and family, not exceeding 30 bush-

els, from execution, does not extend to those species of corn and grain which may, by sales or exchanges, indirectly contribute to the same end, where they are, by their nature and the general custom of the community, not suitable to be used in the making of bread, and are not so designed by the owner. *Blake v. Baker, 41 Me. 78, 80.*

### As maize or Indian corn.

In this country the word "corn" is now generally and popularly restricted in its meaning to maize or Indian corn. *Webster Dict.* That is the ordinary import of the word, unless the meaning is enlarged by the circumstances of its employment. *Kerrick v. G. W. Van Dusen & Co., 20 N. W. 228, 32 Minn. 317; Wood v. State, 18 Fla. 967, 969.*

"Corn" here, whatever it may elsewhere signify, or whatever it may have signified elsewhere, does not mean a cereal, or wheat or barley or oats, or mere grain; it means that which is termed 'Indian maize,' and is and has been the principal bread stuff here." It is used in such sense in Act Feb. 20, 1875, making it criminal to steal an outstanding crop of corn. *Sullins v. State, 53 Ala. 474, 476.*

### As shelled corn.

"Corn" applies mainly to maize or Indian corn, and does not necessarily imply shelled corn. In a general sense, one in common use, it implies corn, either shelled or in the ear. Thus it is said of a farmer that he produced on his farm a thousand bushels of corn, without reference to whether it is shelled or not, and so it is said there is stored in a house a thousand bushels of corn. This implies that quantity, shelled or unshelled; and, under an indictment that defendant stole three bushels of corn, the evidence is sufficient if it shows that he stole three bushels of corn in the ear. *State v. Nipper, 95 N. C. 653, 654.*

### As standing or harvested corn.

A charge that another "has stolen corn out of the field" is susceptible of two meanings, either that he has stolen harvested corn from the field, or that he has stolen corn which has not been harvested; and, as the latter corn is not the subject of larceny, it is erroneous, in an action for slander, to refuse to instruct that, if the jury find that the persons to whom the language was spoken understood it as referring to standing corn, there can be no recovery. *Stitzell v. Reynolds, 67 Pa. (17 P. F. Smith) 54, 56, 5 Am. Rep. 396.*

### Rice.

"Corn," as used in a memorandum of an insurance policy describing the property insured, does not include rice. *Scott v. Bourdillion, 2 Bos. & P. (N. R.) 213.*

**CORNCRIB.**

The character of a building as a "corner" arises apparently from the style in which and the purpose for which the building was originally constructed, and not the use to which a building may temporarily be put; so that a building erected for and usually occupied as a dwelling house cannot be considered a "corner," though temporarily used for the storage of corn. Where an indictment charged conspiracy to burn a "corner" containing corn, and the proof showed that the building was a cabin which had been inhabited up to within a month or two before the attempt to burn it, when the owner had deposited corn in it, there was a fatal variance. *Thomas v. State*, 22 South. 666, 116 Ala. 461.

Sess. Acts 1885, p. 105, defining the burning of a "corn bin" containing corn to be arson in the second degree, includes also the burning of a "corner" containing corn. *Cook v. State*, 3 South. 849, 850, 83 Ala. 62, 3 Am. St. Rep. 688.

**As a building or house.**

See, also, "Building (In Criminal Law)."

A corner used solely for storing corn and feed is a "house" within a statute relating to burglary or larceny. *Barber v. State* (Tex.) 69 S. W. 515, 516; *Brown v. State*, 52 Ala. 345, 347.

A corner used for storing corn is a "storehouse" within the meaning of the Criminal Code. *Metz v. State*, 65 N. W. 190, 191, 46 Neb. 547.

**CORN-FED HOGS.**

The term "corn-fed hogs" is used to designate hogs which have been fed on corn. *Bartlett v. Hoppock*, 34 N. Y. 118, 119, 88 Am. Dec. 428.

**CORN MILL.**

A conveyance of a cornmill, with all the privileges and appurtenances, passes title to the land on which the mill is situated. *Gibson v. Brockway*, 8 N. H. 465, 31 Am. Dec. 200 (cited in *Indianapolis, D. & W. R. Co. v. First Nat. Bank*, 33 N. E. 679, 134 Ind. 127).

**CORNER.**

A "corner" is the intersection of two converging lines or surfaces; an angle, whether internal or external; as the "corner" of a building, the four "corners" of a square, the "corner" of two streets. A mere variation in line does not constitute a "corner." *Christian v. Gernt* (Tenn.) 64 S. W. 399, 401.

A description of a tract of land as "lying in the southwest corner of a section" is sufficiently definite, according to rules of deci-

sion that a "corner" is a base point from which two sides of the land conveyed shall extend an equal distance so as to include by parallel lines the quantity conveyed. *Walsh's Lessee v. Ringer*, 2 Ohio, 327, 333, 15 Am. Dec. 555.

**In stock speculations.**

"Corner," is a term used in speculations in stocks, grains, etc., to mean manipulations of the market in such a manner as to make the stocks, grains, etc., which is the subject of the corner, scarce or plenty in the market, at the will of the manipulators, in such a manner that the latter may fix the price thereon. *Kirkpatrick v. Bonsall*, 72 Pa. (22 P. F. Smith) 155, 158.

A "corner," according to stock-exchange parlance, is procured where somebody succeeds in buying for further delivery more property of a given kind than is possible for the seller to deliver before the day of the maturity of the contract. *Wright v. Cudahy*, 48 N. E. 39, 41, 168 Ill. 86.

The term "corner" is a term used in boards of trade, etc., to designate the condition arising when a much greater quantity of any given commodity is sold for future delivery within a given period than can be purchased in the market. The buyers who are called in the slang of the exchanges "longs," then insist on delivery, and by these means succeed in running up prices to a fictitious point, by which deals are run out between the dealers, or by exchanges, or, where the person insists upon it, by actual delivery. A very large majority of these transactions are no doubt merely speculative, but many of them are actual purchases for manufacturers and exporters. *Kent v. Miltenberger*, 13 Mo. App. 503, 506.

**CORNER TOOTH.**

The question whether a "corner tooth" shown to have been knocked out in an assault is a front tooth, and therefore constitutes a maiming, is for the jury. *High v. State*, 10 S. W. 238, 241, 26 Tex. App. 545, 8 Am. St. Rep. 488.

**CORONER.**

"A coroner is a public officer charged with the duty of holding inquests, and is clothed with general powers for that purpose; among which is the power to summon officers to make scientific examination of the body when the jury shall deem such examination requisite." *Pueblo County Com'rs v. Marshall*, 16 Pac. 837, 839, 11 Colo. 84.

Anciently, the office of coroner was of great dignity, and exercised by persons of high authority, as well as by those in lesser degree and station. Blackstone says: "There

are also particular coroners for every county of England, usually four, but sometimes six, and sometimes fewer. This office is of equal antiquity with the sheriff, and was ordained together with him to keep the peace when the earls gave up the wardship of the county. He is still chosen by all the freeholders in the county court." As ascertained in great measure from the statute (4 Edw. I, "De Officio Coronatoris"), the powers and duties of the coroner are both judicial and ministerial, his judicial authority extending to inquiries touching the manner of death of any person slain or dying suddenly, or in prison, which must be *super visum corporis*; and also to inquiries respecting treasure-trove and shipwreck. His ministerial office is only as the sheriff's substitute. *Cox v. Royal Tribe*, 71 Pac. 73, 74, 42 Or. 365, 60 L. R. A. 620, 95 Am. St. Rep. 752 (citing 1 Bl. Comm. 347, 349; 2 Bac. Abr. 428).

A coroner is an officer of great antiquity at the common law, whose powers and duties, like those of the sheriff, were both judicial and ministerial. By virtue of his office, like the sheriff, he was a conservator of the peace, and he has always had other duties attached to his office which do not pertain to that of sheriff; but his ministerial office is, and always has been, both in England and the United States, to act as the sheriff's substitute in the execution of process, when the latter cannot act. *Powell v. Wilson*, 16 Tex. 59, 60, 61 (citing 1 Bl. Comm. 346, 350).

The office of a coroner is a very ancient one, and came with the common law to this country from England. The powers and duties of a coroner here are what they were at common law, except in so far as they have been modified by our statutes or institutions. *Lancaster County v. Holyoke*, 37 Neb. 328, 331, 55 N. W. 950, 951, 21 L. R. A. 394.

The words "coroner," "justice," and "constable" mean officers of the county in which the action is brought or is pending, or in which the proceeding is had, or to whom the process is directed. *Sand. & H. Dig. Ark. 1893, § 7212*.

The term "coroner" includes any person performing the duties of such officer, either generally or in special cases. *Shannon's Code Tenn. 1896, § 66; Hurd's Rev. St. Ill. 1901, p. 1719, c. 131, § 1, subd. 8*.

### CORONER'S COURT.

A coroner's court in England is a court of record, and upon a finding of *felo de se* the executor or administrator may remove the inquest of office into the Court of the King's Bench and traverse it, for it has been said that it would be hard that he should be concluded by an inquisition which is nothing more than an inquest of office, tak-

en behind his back. In the United States they are generally denominated courts of inferior jurisdiction, and not of record, but in Oregon the organic act does not so much as dignify the office with any judicial functions whatever. *Cox v. Royal Tribe*, 71 Pac. 73, 74, 42 Or. 365, 60 L. R. A. 620, 95 Am. St. Rep. 752.

### CORONER'S INQUEST.

The object of a coroner's inquest is to ascertain the cause of death, whether it was the result of violence or criminal agency; and in order to attain this object the coroner is necessarily clothed with a discretion in the performance of his duties, being the sole judge as to the propriety or necessity of holding an inquest. The coroner, however, in that respect is not subject to revision by the county commissioners, and he is entitled to fees prescribed by the statute, notwithstanding the verdict of his jury disclosing that the deceased died a natural death, and not by casualty or violence. *Boisliniere v. Board of County Com'rs*, 32 Mo. 375, 378.

### CORPORAL

"Corporal" means relating to the body; bodily. Should be distinguished from "corporeal." *Black, Law. Dict. 278*.

### CORPORAL IMBECILITY.

"Corporal imbecility" may arise after the marriage, which will not then vacate the marriage, because there was no fraud in the original contract. 1 Bl. Comm. 440, note 12. In commenting upon this statement of Blackstone, the Supreme Court of Connecticut has said: "Here he . . . plainly rejects the idea that the term 'corporal imbecility' has a precise, technical meaning, and absolutely imports a natural, permanent, and incurable imbecility." *Griffeth v. Griffeth*, 162 Ill. 368, 376, 44 N. E. 820, 822.

"Corporal imbecility" does not, *ex vi termini*, import a permanent and incurable impotency to consummate marriage, and the term has no such technical meaning. *Ferris v. Ferris*, 8 Conn. 166, 168.

### CORPORAL OATH.

A "corporal oath" is a solemn oath, and so called from the ancient usage of touching the corporale or cloth which is used in covering the consecrated elements in the eucharist. *Jackson v. State*, 1 Ind. (1 Cart.) 184, 185.

The phrase "solemn oath" is synonymous with the phrase "corporal oath," and an oath taken with the uplifted hand may be properly described by either phrase in an

indictment for perjury. *Jackson v. State*, 1 Ind. (1 Cart.) 184, 185.

The term "corporal oath" must be construed as applying to any bodily assent to the oath of the witness. In the English authorities it is said that the oath usually administered is called a "corporal oath" because the person who takes it lays his hand on some part of the Scriptures, or other book esteemed sacred by the witness, or kisses the book. *State v. Norris*, 9 N. H. 96, 102.

"What is termed a 'corporal oath' was anciently administered by touching the cloth that covered the consecrated elements, or, as some supposed, from the fact that the party taking it was required to lay his hand upon the Bible; but a 'corporal oath,' as latterly understood, means merely a solemn oath, although the name is derived from the ancient usage just mentioned. In *Jackson v. State*, 1 Ind. (1 Cart.) 184, it was held that the terms 'corporal oath' and 'solemn oath' are now to be used as synonymous. Wharton says the oath must be solemnly administered. It is immaterial in what form it is given, if the party at the time professes such form to be binding on his conscience. A 'corporal oath' and 'solemn oath' are equivalent. Either is sustained by proof of swearing with uplifted hands." *Commonwealth v. Jarboe*, 12 S. W. 138, 89 Ky. 143 (quoting 2 Whart. Cr. Law [9th Ed.] § 1251, and note).

What is universally understood by an "oath" is that the person who takes it imprecates the vengeance of God upon him if the oath he takes is false (1 Atk. 20), and the words "corporal oath" may stand for lifting up an arm or bodily member. Therefore, where an indictment for perjury charged that the defendant did then and there in due form of law take his "corporal oath," the indictment was not faulty for its failing to state that he took the oath on the holy Gospel of God, or in the presence of Almighty God by uplifted hands. *Respublica v. Newell* (Pa.) 3 Yeates, 407, 412, 2 Am. Dec. 381.

#### CORPORAL PUNISHMENT.

"Corporal punishment," within the meaning of the rule that the master of a vessel may inflict corporal punishment on seamen, is to be construed to mean a reasonable and moderate corporal punishment. *Brown v. Howard* (N. Y.) 14 Johns. 119, 123.

"Corporal punishment," in its enlarged meaning, expresses all kinds of punishment of or inflicted upon the body, including imprisonment. But under the statute providing that, where corporal punishment is inflicted, the person shall in no case be bailed, the words do not include imprisonment, but are used in the restricted sense denoting punishment on the body, such as whipping, the

statute having been copied from an older state, and the proviso being probably of ancient origin. Corporal punishment of this nature has always been deemed so humiliating that no bail would be sufficient to induce accused's surrender upon the affirmation of a judgment requiring its infliction. *Ritchey v. People*, 43 Pac. 1026, 1027, 22 Colo. 251.

"Corporal punishment" seems to mean any kind of corporal deprivation or suffering which is inflicted by the sentence, directly by way of penalty for the offense, and in this sense, of course, includes imprisonment, as well as of the pillory. It is set in contradistinction to a fine. *People v. Winchell* (N. Y.) 7 Cow. 525, note.

#### COPORALE.

"Coporale" is a fine linen cloth used to cover the sacred elements in the eucharist, or in which the sacrament is put. *Jackson v. State*, 1 Ind. (1 Cart.) 184, 185.

#### CORPORATE.

The term "corporate," as used in Code, § 5182, exempting from taxation property used for purposes of private or corporate profit, is employed in contradistinction to "public." *Trustees of Academy of Richmond County v. Augusta City Council*, 17 S. E. 61, 65, 90 Ga. 634, 20 L. R. A. 151.

#### CORPORATE AUTHORITIES.

Const. 1848, art. 9, § 5, providing that the "corporate authorities" of cities, towns, or other municipal corporations may be vested with power to assess and collect taxes for corporate purposes, means those municipal officers who are either directly elected by the population to be taxed, or appointed in some mode to which they have given their assent. *Hessler v. Drainage Com'rs*, 53 Ill. 105, 113; *People v. City of Chicago*, 51 Ill. 17, 30, 2 Am. Rep. 278; *Gage v. Graham*, 57 Ill. 144, 146; *Cornell v. People*, 107 Ill. 372, 383; *Wilson v. Trustees of Sanitary Dist.*, 27 N. E. 203, 205, 133 Ill. 443; *People v. Knopf*, 49 N. E. 424, 426, 171 Ill. 191. The phrase does not include commissioners appointed by the Legislature to carry on some special improvement within the corporate limits. *People v. City of Chicago*, 51 Ill. 17, 30, 2 Am. Rep. 278.

#### City council.

Const. Ill. 1848, art. 9, § 5, provides that the corporate authorities of counties, townships, school districts, cities, towns, and villages may be invested with power to assess and collect taxes for corporate purposes. Held, that the "corporate authorities" of a city, within such Constitution, was the city council of such city, and not the voters there-

of. *City of Quincy v. Cooke*, 2 Sup. Ct. 614, 619, 107 U. S. 549, 27 L. Ed. 549.

Act Feb. 28, 1881, giving the "corporate authorities" of villages power to regulate the sale of intoxicating liquors, means those officers of cities and villages to whom is given the ordinance-making power. *State v. Andrews*, 10 N. W. 410, 11 Neb. 523.

#### **Park commissioners.**

Const. art. 9, § 5, providing that the corporate authorities of cities may be vested with power to assess and collect taxes for corporate purposes, will be construed to include park commissioners authorized to complete, improve, and manage public parks. *West Chicago Park Com'rs v. Western Union Tel. Co.*, 103 Ill. 33, 40.

#### **Supervisors and town clerk.**

Under Act April 15, 1884, § 4, declaring that the corporate powers of the several counties and townships shall be exercised by the commissioners or supervisors thereof, respectively, the supervisors of a town are the "corporate authorities" referred to in Act April 20, 1874, and its supplement of June 9, 1891, authorizing the corporate authorities of the township to increase indebtedness and issue bonds for the purpose of putting the roads and highways of the town in better condition. Such supervisors have no control over the auditors of the township, and cannot require that such auditors sign the bonds so to be issued. *Commonwealth v. Upper Darby Auditors*, 2 Pa. Dist. R. 89, 90.

The supervisor and assessor of a town are its "corporate authorities," within the meaning of Const. art. 9, § 9, authorizing special assessments to be made by such authorities. *Jones v. Town of Lake View*, 38 N. E. 688, 691, 151 Ill. 663 (following *Hundley v. Lincoln Park Com'rs*, 67 Ill. 559).

Under a law which authorizes the "proper corporate authorities" of a township to issue the bonds of the town when so authorized at an election called for that purpose, the supervisor and town clerk are the proper corporate authorities for the issuing and delivery of the bonds, though they are not such for the purpose of creating an indebtedness. *Town of Windsor v. Hallet*, 97 Ill. 204, 209; *Town of Prairie v. Lloyd*, 97 Ill. 179, 197; *Town of Douglas v. Niantic Sav. Bank*, 97 Ill. 228, 232.

The supervisor and town clerk of the township are but a part of the corporate authority. The Legislature cannot clothe them, without the consent of the people, with the discretionary power of taxation or creating a debt, because they are not of themselves the "corporate authority," in the sense of the Constitution. *Marshall v. Silliman*, 61 Ill. 218. A certain county which had previously adopted township organization became or-

ganized under a special system, dividing the county into four supervisors' districts. In one of these districts two supervisors were elected, neither of whom resided in a certain township, which prior to the organization had voted a donation to a certain railroad. In this state of affairs the Legislature assumed to authorize such township and others to issue bonds for the amount of its donation without any vote of the people on that subject, the bonds to be signed by the supervisors of the district in which the township was situated, and countersigned by the town clerk. Held, that the two supervisors were not the corporate authorities of the township, so as to be capable of being invested with authority to create a debt in behalf of the town without the approval of the voters. *Schaeffer v. Bonham*, 95 Ill. 868, 882.

#### **CORPORATE BODY.**

Any body corporate, see "Any."

School district as, see "School District."

A corporate body is merely a legal or artificial person substituted for a natural person. *Freeholders of Sussex County v. Strader*, 18 N. J. Law (3 Har.) 108, 117 (citing *Ang. & A. Corp.* p. 58).

The term "bodies corporate" does not include municipal corporations. *Cedar County v. Johnson*, 50 Mo. 225, 227.

The term "corporate body," in the clause of a charter of a railroad company making it lawful for all persons of lawful age, or for the agent of any corporate body, to subscribe to the capital stock of the company, manifestly refers to private corporations only, and does not include municipal corporations. It does not refer to counties, cities, towns, or townships, and cannot be held to embrace them. *Campbell v. Paris & D. R. Co.*, 71 Ill. 611, 612; *East Oakland Tp. v. Skinner*, 94 U. S. 255, 256, 24 L. Ed. 125. It means private and money-making, trading, or business corporations, and does not intend to give authority to any township, however remote from the road, authority to become one of its stockholders, for the provision manifestly refers to private corporations when it authorizes agents thereof to subscribe. *East Oakland Tp. v. Skinner*, 94 U. S. 255, 256, 24 L. Ed. 125.

"The loan officers of a county and the supervisors of a county are corporate bodies," for they have corporate power sub modo and for certain purposes only. *Denton v. Jackson* (N. Y.) 2 Johns. Ch. 408, 405.

A school district is not a body corporate within the meaning of Cr. Code, 1860, § 118, making it a misdemeanor for a director, etc., to falsify papers, etc., of a body corporate. *Commonwealth v. Beamish*, 81 Pa. (31 P. F. Smith) 389, 391.

**CORPORATE BONDS.**

Corporate bonds are representations of money loaned to the corporation. They are issued in the form of bonds in order that they may be sold in negotiable form, but differ from certificates of stock, which are not securities for money nor negotiable security in the strict commercial sense. Bonds issued by a corporation are generally issued for money borrowed, which is necessary, in addition to the capital stock, to support the operations of the company. *Bailey v. New York Cent. & H. R. R. Co.*, 89 U. S. (22 Wall.) 604, 636, 22 L. Ed. 840.

**CORPORATE BUILDINGS.**

5 & 6 Wm. IV, c. 76, § 92, authorizing the corporation to incur indebtedness for repairs upon "corporate buildings," means buildings in the possession of the corporation, whether held under a strict legal title or not. *Regina v. Borough of Warwick*; 8 Q. B. 926, 929.

**CORPORATE CONDUCT.**

There may be actual corporate conduct which is not formal corporate action; and where that conduct is directed or produced by the whole body, both of officers and stockholders—by every living instrumentality which can possess and wield the corporate franchise—that conduct is of a corporate character, and, if illegal and injurious, may deserve and receive the penalty of dissolution. There always is and there always must be corporate conduct without formal corporate action, where the thing challenged is an omission to act at all. A corporation organized in the public interest, for the benefit of the public, and in the expectation of benefit to the community, which is the motive of the state's grant, may accept the franchise and hold it in sullen silence, doing nothing, resolving nothing, furnishing no formal corporate action on which the state can put its finger, and say, "This the corporation has done by the agency through which it is authorized to act." That is corporate conduct which the state may question and punish without searching for a formal corporate act. *People v. North River Sugar Refining Co.*, 24 N. E. 834, 838, 121 N. Y. 582, 9 L. R. A. 33, 18 Am. St. Rep. 843.

**CORPORATE EXISTENCE.**

The expression "corporate existence," as used in Gen. St. 1865, c. 62, § 2, declaring that whenever any corporation shall be organized under the laws of the state it shall be the duty of the officers of the corporation to file with the Secretary of State a copy of the articles of the association or corporation, and the corporate existence of the corporation should date from the time of the

filing said copy of such articles, means when the corporation is fully authorized to transact all business for which it was created. *Hurt v. Salisbury*, 55 Mo. 310, 314.

Under Rev. St. § 2664, providing that if any railroad corporation shall not within two years begin the construction of its road, and within one year thereafter expend thereon not less than 10 per cent. of its capital stock, "its corporate existence and powers shall cease," the charter of a corporation failing to comply with such requirements is absolutely forfeited, and the corporation ipso facto ceases to be a corporation without any action whatever on the part of the state. *Ford v. Kansas City & I. Short Line Ry. Co.*, 52 Mo. App. 439, 455, 458.

**CORPORATE FRANCHISE.**

As a commodity, see "Commodity."

Powers distinguished, see "Corporate Powers and Privileges."

"Corporate franchises are, properly speaking, legal estates vested in the corporation itself as soon as it is in esse." *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 700, 4 L. Ed. 629; *Society for Savings v. Coite*, 73 U. S. (6 Wall.) 594, 606, 18 L. Ed. 897; *Commonwealth v. Standard Oil Co.*, 101 Pa. 119, 127. They are not mere naked powers granted to the corporation, but powers coupled with an interest, which vest in the corporation upon the possession of its franchisees; and, whatever may be thought of the corporation, it cannot be denied that the corporation itself has a legal interest in such franchises. *Society for Savings v. Coite*, 73 U. S. (6 Wall.) 594, 606, 18 L. Ed. 897; *Hamilton Mfg. Co. v. Massachusetts*, 73 U. S. (6 Wall.) 632, 638, 18 L. Ed. 904; *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 700, 4 L. Ed. 629; They are privileges or immunities of a public nature, which cannot be legally exercised without legislative authority. It is private property affected with a public use. Acts granting such franchises are declared to be contracts by many decisions of the Supreme Court of the United States and all the highest American state courts. *State v. Real Estate Bank*, 5 Ark. (5 Pike) 595, 599, 41 Am. Dec. 109. They are the rights or privileges which, when the Legislature grants a charter of incorporation, it confers upon the grantees of the charter—the right or privilege of forming a corporate association, and of acting, within certain limits, in a corporate capacity; and this right or privilege is called the "corporate franchise." *Jersey City Gaslight Co. v. United Gas Imp. Co.* (U. S.) 48 Fed. 264-266 (citing 2 Mor. Priv. Corp. § 922). They are franchises essential to corporate existence, and granted as part of the organic act of incorporation, and that can be forfeited only by quo warranto proceedings, or the statutory substitute thereof, to

vacate the charter of the corporation; but the term is often used as applicable to all the franchises which a corporation may lawfully acquire. *State v. Portage City Water Co.*, 83 N. W. 697, 699, 107 Wis. 441.

A corporate franchise is a franchise acquired by act of incorporation. *Brady v. Moulton*, 61 Minn. 185, 186, 63 N. W. 489.

By the term "corporate franchise or business" is meant the right or privilege given by the state to two or more persons of being a corporation—that is, of doing business in a corporate capacity—and not the privilege or franchise which, when incorporated, the company may exercise. It is a right or privilege by which several individuals may unite themselves under a common name, and act as a single person with a succession of members, without dissolution or suspension of business and with a limited individual liability. The granting of such right or privilege rests entirely in the discretion of the state, and may be accompanied with such conditions as the legislature may judge most fitting to its interests and policy. *Cobb v. Durham County Com'rs*, 80 S. E. 338, 122 N. C. 307 (citing *Home Ins. Co. v. State of New York*, 134 U. S. 595, 10 Sup. Ct. 593, 33 L. Ed. 1025).

The term "corporate franchise or business," as used in the statute providing for a tax on such property, means the right or privilege given by the state to two or more persons of being a corporation; that is, of doing business in a corporate capacity. The granting of such right or privilege rests in the discretion of the state, and may be accompanied by such conditions as its Legislature may deem best. From the nature of the tax, being laid on a franchise given by the state and revocable at pleasure, it cannot be affected in any way by the character of the property in which the capital stock is invested. The power of the state over the corporate franchises and conditions on which it shall be exercised is as ample and plenary in the one case as the other. *People v. Knight*, 67 N. E. 65, 67, 174 N. Y. 475, 63 L. R. A. 87 (citing *Home Ins. Co. v. New York*, 134 U. S. 594, 10 Sup. Ct. 593, 33 L. Ed. 1025).

The phrase "corporate franchise," in Const. 1890, § 180, providing that grants of corporate franchises under which organizations have not taken place shall be subject to constitutional provisions, one of which prohibits exemptions from taxation, means the right to exist as a corporation. *Adams v. Yazoo & M. V. R. Co. (Miss.)* 24 South. 200, 209, 60 L. R. A. 33.

Laws 1901, p. 316, c. 182, § 187a, enacts that every trust company shall pay, for the privilege of exercising its corporate franchise, a certain annual tax. Held, that the phrase "corporate franchise" means the right or privilege of being a corporation—of doing

business in a corporate capacity. *People v. Miller*, 83 N. Y. Supp. 185, 187, 85 App. Div. 211.

### CORPORATE NAME.

A corporate name is an artificial name, and is selected with an object, and may be changed, and a new one taken. *Royal Baking Powder Co. v. Royal (U. S.)* 122 Fed. 337, 345, 58 C. C. A. 499.

The choice of the name of a corporation is voluntary. Such name is an artificial thing, which can be selected by its incorporators from the entire vocabulary of names. A body of associates who organize a corporation, selling a particular product, are not lawfully entitled to employ, as their corporate name, the name of one of their number, when such name has been intentionally selected to compete with an established concern of the same name, engaged in a similar business, and divert the latter's trade to themselves by confusing the identity of the product of both, and leading purchasers to buy those of one for those of the other. *Rogers v. Wm. Rogers Mfg. Co. (U. S.)* 17 C. C. A. 575, 576, 70 Fed. 1019. Other courts have laid down substantially the same doctrine. *Wyckoff, Seamans & Benedict v. Howe Scale Co. (U. S.)* 122 Fed. 348, 352, 58 C. C. A. 510.

A corporate name is regarded as of the nature of a trade-mark, even though composed of individual names, and its simulation may be restrained. After adoption it follows the corporation. *Fite v. Dorman (Tenn.)* 57 S. W. 129, 147.

### CORPORATE OFFICE.

By the act incorporating the university at Lewisburg, approved Feb. 5, 1846 (P. L. 32), it was provided that the trustees named therein, and their successors, should constitute a body politic; that they should have power to transact all the business of the university, to elect a chairman, secretary, and other officers to manage its affairs, to enact proper ordinances for its government, to appoint the necessary professors and other instructors, and to remove them, or any of them, on sufficient cause being shown. The powers and duties of the professors thus appointed were, by the terms of the said act, defined, and they were empowered, *inter alia*, to grant diplomas upon certain specified terms. Held, that a professorship in said university was not a "corporate office in a private corporation," within the meaning of Act June 14, 1836, § 2 (P. L. 621), and that therefore a writ of quo warranto could not be issued under the provisions of the said act to any person to show cause why he acted in the capacity of professor in said university. *Phillips v. Commonwealth*, 98 Pa. 394, 401, 402.



The term "office of a corporation" means its principal office within the state, or principal place of business within the state if it has no principal office therein. *Revere Rubber Co. v. Genesee Valley Blue Stone Co.*, 20 App. Div. 166, 167, 48 N. Y. Supp. 989.

#### **CORPORATE OFFICER.**

See "Officer (of corporation)."

#### **CORPORATE PAPER.**

"Corporate paper," as used in a contract that the parties to it, being stockholders of a certain company, would indemnify those who are or become indorsers of the corporate paper of such company, is synonymous with "company's paper," and includes any and all obligations for the payment of money made by the corporation or for its use and benefit. *Taylor v. Coon*, 48 N. W. 123, 125, 79 Wis. 76.

#### **CORPORATE POWERS AND PRIVILEGES.**

The expression "corporate powers and privileges," as used in Const. Ga. 1868, art. 3, § 6, giving the General Assembly power to grant "corporate powers and privileges" to private companies, excepting banking institutions, etc., signified the corporate franchises—the aggregate powers and privileges which constitute a corporation; not every separate power and privilege which may be conferred on a corporate body. *Jones v. Habersham*, 2 Sup. Ct. 336, 343, 107 U. S. 174, 27 L. Ed. 401; *Id.* (U. S.) 13 Fed. Cas. 964, 967.

Though it might be difficult to give a conceptual definition of "corporate powers" which would be found complete and accurate in all cases, an accurate descriptive definition readily occurs: They are such powers as are usually conferred upon corporations. *State v. Jones*, 64 N. E. 424, 427, 66 Ohio St. 453 (quoting *Dill. Mun. Corp.*).

Const. art. 4, § 7, par. 11, declaring that the Legislature shall pass no special act conferring corporate powers, means that no special act shall be passed conferring corporate powers on private corporations, and it does not apply to municipal corporations. *Pell v. City of Newark*, 40 N. J. Law (11 Vroom) 71, 76, 29 Am. Rep. 266.

An act which authorizes councils of certain villages to nominate to the county commissioners two freeholders as trustees in the making of contemplated improvements is an attempt to confer on such municipalities corporate powers, within a provision of the Constitution that the Assembly shall pass no special act conferring such powers. *Hamilton County Com'rs v. State*, 35 N. E. 887, 889, 50 Ohio St. 653.

By the "powers" of a corporation is meant the privileges and franchises which are created in the charter, and which control and circumscribe the legal acts of the corporate body. Whenever it goes beyond the privileges and franchises therein mentioned, its act becomes illegal and void. *Dalles Lumber & Mfg. Co. v. Wasco Woolen Mfg. Co.*, 3 Or. 527, 530.

#### **Franchises distinguished.**

There is a distinction between the "powers" and the "franchises" of a corporation. The kinds of business which corporations organized either under title 2, c. 34, Gen. St., or under Act 1873, are authorized to do, are powers, but not franchises. The only franchise which such corporations possess is a general franchise to be or exist as a corporate entity. *State v. Minnesota Thresher Mfg. Co.*, 41 N. W. 1020, 1025, 40 Minn. 213, 3 L. R. A. 510.

#### **CORPORATE PROPERTY.**

Within the meaning of an act providing for the division of a town, and appointing commissioners to apportion between the towns the corporate debts and corporate property, an ancient public common or training field, the title to which became vested in the town, not for its own use, but for the use of those who were or might become inhabitants, and who might have occasion to use it, was not corporate property. But the school funds of the town, the income of which is applied to the relief of the town from a burden imposed by general laws, and for which it is obliged to raise money by taxation, is corporate property and should be apportioned. *Inhabitants of Wrentham v. Inhabitants of Norfolk*, 114 Mass. 555, 561, 562.

#### **CORPORATE PURPOSE.**

A tax for a corporate purpose is one which is to be expended in a manner which shall promote the general prosperity and the welfare of the municipality which levies it. *Wetherell v. Devine*, 6 N. E. 24, 26, 116 Ill. 631.

Const. art. 5, § 9, provided that corporate authorities of counties, townships, school districts, cities, towns, and villages may be vested with authority to assess and collect taxes for corporate purposes. Held, that a "corporate purpose," within the meaning of the Constitution, is that purpose necessary or proper to carry into effect the object of the creation of the corporate body. *People v. Trustees of Schools*, 73 Ill. 138, 140.

A corporate purpose is a purpose which is germane to the general scope of the object for which the corporation was created, or such as has a legitimate connection with that object and a manifest relation thereto.

*Weightman v. Clark*, 103 U. S. 256, 26 L. Ed. 392; *Wetherell v. Devine*, 6 N. E. 24, 28, 116 Ill. 681; *People v. Dupuyt*, 71 Ill. 651, 655; *Livingston County Sup'rs v. Welder*, 64 Ill. 427, 432.

Within Const. art. 9, § 5, the phrase "corporate purposes" may be defined to mean a tax to be expended in a manner which will promote the general prosperity and welfare of the municipality which levies it. That every individual taxpayer shall have a direct interest in the object for which the tax is levied, or be directly benefited by its expenditure, is unattainable. General results are all that can be expected; and if it appear that a tax has been voted and levied with an honest purpose to promote the general well-being of the municipality, and was not designed merely for the benefit of individuals, its collection will not be stayed by the courts on the ground that it is not for a corporate purpose. *Taylor v. Thompson*, 42 Ill. 8, 13; *Burr v. City of Carbondale*, 76 Ill. 455, 461; *Hackett v. Ottawa*, 99 U. S. 86, 98, 25 L. Ed. 363.

It is impracticable to lay down an exact rule by which to determine what is a "corporation purpose," within Const. art. 2, § 9, providing that a city shall not become indebted for any other than a corporation purpose. The question must necessarily be decided in view of the facts of each particular case. It is not necessary that the object for which a tax is imposed by the corporate authorities should be within the corporate limits to make it a corporate purpose. It is sufficient if it be of vital importance to the permanent interests of the corporation, although situated beyond the limits thereof. *McCallie v. Town of Chattanooga*, 40 Tenn. (3 Head) 817, 821.

To understand what is meant by a "corporate purpose," a distinction must be drawn between the powers of a corporation, and the end and purpose intended to be accomplished by it. The two must not be confused. To illustrate: The counties of a state are corporations with well-defined and distinct purposes, to wit, supervision of roads, bridges, and ferries, and other internal and county matters; and to carry out these ends certain powers are granted which are distinct and separate from the ends. So, too, municipal governments are provided for cities, towns, and villages for the purpose of enabling them to preserve peace and order, to construct and repair streets, and for various other corporate objects; and, to enable these governments to meet the ends designed, certain powers are granted, but these powers and the corporate purpose are widely different. True, the one follows the other and is necessary thereto, but the corporate purpose must exist before the power can be granted to carry it out. Act Dec. 23, 1882, declaring, as amended, townships along the line of a railroad bodies corporate, with power to sub-

scribe stock and assess and collect taxes to pay the subscription, but not declaring for what purpose the power is given, is in violation of Const. art. 9, § 8, providing that counties, townships, etc., may be vested with power to assess and collect taxes for corporate purposes. *Floyd v. Perrin*, 30 S. O. 1, 27, 8 S. E. 14-17, 2 L. R. A. 242.

The words "corporate purposes," as used in a statute authorizing a corporation to take land for corporate purposes, does not include private purposes, even though in some sense it might be necessary to the corporation; hence the act is not unconstitutional as authorizing a taking for other than public purposes. In re *Rhode Island Suburban Ry. Co.*, 48 Atl. 590, 591, 22 R. I. 455.

Providing a site for a state institution is not a corporate purpose, within the meaning of the Constitution. *Livingston County Sup'rs v. Welder*, 64 Ill. 427, 432.

The expression "corporate purposes," as used in Const. 1848, art. 9, § 5, means a purpose necessary or proper to carry into effect the object of the creation of the corporate bodies; and a tax by a school township or district to aid in the construction of a railroad, or to pay interest on bonds issued in aid of such road, is not for a corporate purpose. *People v. Trustees of Schools*, 78 Ill. 136, 139; *People v. Dupuyt*, 71 Ill. 651, 655.

A "corporate purpose," within Const. art. 9, § 586, includes the levy of a tax to pay bounties to persons who should thereafter enlist or be drafted into the United States army. *Taylor v. Thompson*, 42 Ill. 8, 13.

## CORPORATE RIGHTS.

Privilege distinguished, see "Privilege."

"Corporate rights are well defined by Chancellor Kent and others to be franchises or peculiar privileged grants of the nature of incorporeal property." *Warner v. Beers* (N. Y.) 23 Wend. 103, 154.

"Corporate rights," as used in Act Feb. 13, 1855, § 22, providing that every railway company formed under the act should pay a certain sum on the whole amount of capital stock paid in, in lieu of all other taxes, and section 31, providing that any alteration, amendment, or repeal of the act should not operate as an alteration or amendment of the corporate rights of companies formed under it unless specially named in the act so altering or amending, mean the essential and important rights of corporations formed for the particular purposes which the act had in view, as distinguished from the privileges and immunities which are not so fundamental, but which may nevertheless have value. The standard of taxation provided by section 22 was a privilege which had value, no doubt, while it remained the law;

but in so far as it operated to the advantage of those corporations it was a disadvantage to all other corporations and persons, and therefore lacked the elements of equality which we expect to find in whatever we dignify as a "right" in contradistinction to a "privilege" or "immunity," either of which suggests advantage, discrimination, or favor. *Detroit St. Ry. Co. v. Guthard*, 16 N. W. 328, 51 Mich. 180.

### CORPORATE SEAL.

An imprint in red ink of what purports to be a corporate seal, bearing the title of the corporation with the year of its charter, as prescribed by a vote of directors, placed on a bond executed in the name of the corporation, opposite the words, "In testimony of which, pursuant to authority vested in us for this purpose by the directors of said company, the seal of said company and the signatures of the president and treasurer thereof are hereunto affixed," is sufficient as an impression of the corporate seal. Here there is a substance affixed to the instrument more tenacious than wax or wafer, adopted and declared by the company to be their seal, and we know of no decision in this enlightened age which declares it to be otherwise. *Woodman v. York & C. R. Co.*, 50 Me. 549, 550.

Corporations, like individuals, may use a seal with a peculiar device, if they have adopted such, or they may adopt for the occasion a seal of any device, or a paper and wafer without any mark. *Tenney v. East Warren Lumber Co.*, 43 N. H. 343, 354.

### CORPORATE STOCK.

See "Stock."

### CORPORATION.

See "Banking Corporation"; "Business Corporation"; "Close Corporation"; "Commercial Corporations"; "De Facto Corporation"; "De Jure Corporation"; "Domestic Corporation"; "Ecclesiastical Corporations"; "Express Corporation"; "Foreign Corporation"; "Head of Corporation"; "Implied Corporation"; "Moneyed Corporation"; "Municipal Corporation"; "Open Corporation"; "Political Corporation"; "Private Corporations"; "Public Corporation"; "Quasi Corporation"; "Quasi Public Corporation"; "Religious Corporation"; "Stock Corporation"; "Street Railway Corporation"; "Trading Corporation"; "Tramp Corporation."

Any corporation, see "Any."

Articles of, see "Articles of Incorporation."

Assets of, see "Assets."

Body of, see "Body."

Business of, see "Business."

Charitable corporation, see "Charity."

Charter of, see "Charter."

Corporation engaged in interstate business, see "Interstate Business."

Corporation for pecuniary profits, see "Pecuniary Profit."

Other corporations, see "Other."

A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 513, 636, 4 L. Ed. 629; *Ross v. Chicago, M. & St. P. Ry. Co.* (U. S.) 8 Fed. 544; *Bank of United States v. Deveaux*, 9 U. S. (5 Cranch) 61, 86, 3 L. Ed. 38; *Marshall v. Baltimore & O. R. Co.*, 57 U. S. (16 How.) 314, 327, 14 L. Ed. 953; *Runyan v. Coster*, 39 U. S. (14 Pet.) 122, 129, 10 L. Ed. 382; *Seattle Gas & Electric Co. v. Citizens' Light & Power Co.* (U. S.) 123 Fed. 588, 592; *Codd v. Rathbone*, 19 N. Y. 37, 40; *Anglo-American Provision Co. v. Davis Provision Co.*, 62 N. E. 587, 589, 169 N. Y. 506, 88 Am. St. Rep. 608; *Coyle v. Gray* (Del.) 30 Atl. 728, 730, 7 Houst. 44; *Deringer's Adm'r v. Deringer's Adm'r* (Del.) 5 Houst. 416, 429, 1 Am. St. Rep. 150; *Udley v. Clark-Gardener Lode Min. Co.*, 4 Colo. 369, 372; *Hartford Fire Ins. Co. v. Town of Hartford*, 3 Conn. 15, 25; *McCandless v. Richmond & D. R. Co.*, 38 S. C. 103, 110, 16 S. E. 429, 431, 18 L. R. A. 440; *Richards v. Town of Clarksburg*, 30 W. Va. 491, 494, 4 S. E. 774, 776; *Swan v. Williams*, 2 Mich. 427, 434; *Jones v. Williams*, 39 S. W. 486, 490, 139 Mo. 1, 37 L. R. A. 682, 61 Am. St. Rep. 436.

Other definitions: "A franchise possessed by one or more individuals who subsist as a body politic under a special denomination, and are vested by the policy of the law with the capacity of perpetual succession, and by acting in several respects, however numerous the association may be, as a single individual." *Porter v. Rockford, R. I. & St. L. R. Co.*, 76 Ill. 561, 573, 574 (quoting Kent); *State ex rel. Walker v. Payne*, 31 S. W. 797, 798, 129 Mo. 468, 33 L. R. A. 576 (citing 2 Kent, Comm. 268); *Farmers' Loan & Trust Co. v. City of New York* (N. Y.) 7 Hill, 261, 283. An artificial person, a creature of the law, and manifesting its existence only by the exercise, after a prescribed form, of certain franchises and functions given to it by law. *Charleston Ins. & Trust Co. v. Sebring* (S. C.) 5 Rich. Eq. 342, 346. An artificial person created by law as the representative of those persons, natural or artificial, who contribute to or become holders of shares in the property intrusted to it for a common purpose. *In re Gibbs' Estate*, 27 Atl. 383, 386, 157 Pa. 59, 33 Wkly. Notes Cas. 120, 122, 22 L. R. A. 276. An ideal body, subsisting only in contemplation of law, which may be composed of members, constantly changing, which is deemed for useful purposes to have an existence inde-

pendent of that of all the members of which it is composed, to be capable of perpetual succession, and of acquiring, holding, and conveying property. *Pratt v. Bacon*, 27 Mass. (10 Pick.) 123, 125. A collection of many individuals united in one body, having perpetual succession under an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual. Its essential characteristic is the collective unity of the whole body in all property and other external relations. In re German Lutheran Reformed Wyomissing Church, 9 Pa. Co. Ct. R. 12, 13. A permanent thing that may have succession, an assembly of many into one body, an artificial body constituted of several members, united by its franchises and liberties, which form its ligaments and are its frame and essence, which never dies, but exists only in its political capacity, which unites and knits them together, as a natural person or person who is made by policy and direction of law a body politic with a capacity of succession in perpetuity, and which exists in both a natural and political capacity. *Magill v. Brown* (U. S.) 16 Fed. Cas. 408, 412. A legal person with a special name, and composed of such members and endowed with such powers, and such only, as the law prescribes. *State v. New Orleans Debenture Redemption Co.*, 26 South. 586, 588, 51 La. Ann. 1827; *Coyle v. McIntire* (Del.) 30 Atl. 728, 730, 7 Houst. 44, 40 Am. St. Rep. 109. A collection of many individuals united in one body under a special denomination, and invested by the policy of the law with the capacity of acting in several respects as an individual. *State v. Standard Oil Co.*, 30 N. E. 279, 287, 49 Ohio St. 137, 15 L. R. A. 145, 34 Am. St. Rep. 541. A legal entity, a fictitious person, vested by law with the capacity of taking and granting property and transacting business as an individual. *Jones v. Williams*, 39 S. W. 486, 490, 139 Mo. 1, 87 L. R. A. 682, 61 Am. St. Rep. 436; *State v. Smart* (S. C.) 4 Rich. Law, 356, 363, 55 Am. Dec. 683; *State v. City of Charleston* (S. C.) 10 Rich. Law, 491, 503. An artificial person created by statute, and vested with power and capacity to make contracts within the scope of the powers conferred on it by the act of incorporation and the by-laws which the organizers may see fit to adopt. *Edwards v. Carson Water Co.*, 21 Nev. 469, 479, 34 Pac. 381; *Central Bridge Corp. v. Bailey*, 62 Mass. (8 Cush.) 319, 322. A body consisting of one or more persons, established by law for certain specific purposes, with the capacity of succession, either perpetual or for a limited period, and other special privileges not possessed by individuals, yet acting in many respects as an individual. *State v. Turley*, 44 S. W. 267, 268, 142 Mo. 403. An association of individuals with a common stock, a common business, and a common name. *Barber v. International Co. of Mexico*, 48 Atl. 758, 765, 73 Conn. 587;

*Detwiller v. Commonwealth*, 18 Atl. 990, 991, 131 Pa. 614, 7 L. R. A. 357, 360. Organized capital; capital consisting of money and property. *Ames v. Union Pac. Ry. Co.* (U. S.) 62 Fed. 7, 14. An artificial being called into life by acts of individuals thereunto authorized by the laws of a sovereign state. *Sovereign Camp Woodmen of the World v. Fraley* (Tex.) 59 S. W. 905, 906, 51 L. R. A. 898. A body consisting of one or more natural persons, established by law, usually for some specific purpose, and continued by a succession of members. *Weyeth Hardware & Mfg. Co. v. James-Spencer-Bateman Co.*, 47 Pac. 604, 607, 15 Utah, 110 (citing *Bouv. Law Dict.*). An aggregation of individuals so united by operation of law as to form but one person, artificial, invisible, intangible, it is true, but nevertheless a distinct entity, and endowed with the power of succession. *Weyeth Hardware & Mfg. Co. v. James-Spencer-Bateman Co.*, 47 Pac. 604, 607, 15 Utah, 110. An artificial thing created by law, clothed with certain powers. It acts through its board of directors and officers, and its property is not subject to the control or disposition of its members or stockholders. *Sellers v. Greer*, 50 N. E. 246, 248, 172 Ill. 549, 40 L. R. A. 589. An artificial being, invisible and intangible, which is composed of a collection of individuals, and which acts and speaks through its officers and agents. *North Hudson County Ry. Co. v. May*, 5 Atl. 276, 48 N. J. Law (19 Vroom) 401. An association of persons. *People v. North River Sugar Refining Co.*, 3 N. Y. Supp. 401, 408, 22 Abb. N. C. 164, 16 Civ. Proc. R. 1, 2 L. R. A. 33. Mere creatures of law, established for special purposes, and receiving all their powers from the acts creating them. *People v. Dupuyt*, 71 Ill. 651, 655 (citing *Kent*). An artificial person, the principal object of which is perpetual succession. *Purdy v. People* (N. Y.) 4 Hill, 384, 406; *Allen v. Long*, 16 S. W. 43, 45, 80 Tex. 261, 26 Am. St. Rep. 735. A body politic, a person in law, distinct from that of all its members, and which may deal with them, sue them, or be sued by them as by other parties. *Old Colony Boot & Shoe Co. v. Parker-Sampson-Adams Co.*, 67 N. E. 870, 875, 183 Mass. 557 (citing *Farnum v. Ballard Vale Mach. Shop*, 66 Mass. [12 Cush.] 507). Artificial bodies usually vested with the same rights of suing, and subject to be sued, like natural persons. *Meriwether v. Bank of Hamburg* (S. C.) Dud. 36, 37. A legal institution devised to confer, upon the individuals of which it is composed, powers, privileges, and immunities which they would not otherwise possess. *Coyle v. Gray* (Del.) 30 Atl. 728, 730, 7 Houst. 44, 40 Am. St. Rep. 109. A franchise for a number of persons, to be incorporated and exist as a body politic, with a power to maintain perpetual succession and to do corporate acts; and each individual of such corporation is also said to have a franchise or freedom. *Per Washing-*

ton, J., in *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 657 (citing Blackstone).

**Statutory definitions:** A creature of the law, having certain powers and duties of a natural person. Rev. St. Okl. 1903, § 980; Civ. Code Cal. 1903, § 283; Rev. Codes N. D. 1899, § 2850; Civ. Code S. D. 1903, § 396; Civ. Code Mont. 1895, § 390; *San Luis Water Co. v. Estrada*, 117 Cal. 168, 177, 48 Pac. 1075. An artificial person created by law for specific purposes, the limit of whose existence, powers, and liabilities are fixed by the act of incorporation, usually called its "charter." Civ. Code Ga. 1895, § 1831; *Central R. & Banking Co. v. State*, 54 Ga. 401, 406. An intellectual body created by law, composed of individuals united under a common name, the members of which succeed each other so that the body continues always the same, notwithstanding the change of the individuals which compose it, and which for certain purposes is considered a natural person. Civ. Code La. 1900, art. 427; *State ex rel. Saunders v. Kohnke*, 33 South. 793, 795, 109 La. 838.

The word "corporation," as used in the Constitution, providing that corporations may be formed under general laws, is here used to denote such ideal bodies as had formerly been created under that name by charter or by special legislative act, and that meaning must be given to the word "corporation" in construing the general law that provides the mode of forming corporations. *Oregon Cascade R. Co. v. Bally*, 3 Or. 164, 173.

"A body corporate or corporation is an artificial person created by the supreme power of the state, with the like powers and liabilities of a natural person in so far as they are given or constituted by the creator. It is called a 'body corporate,' says Lord Coke, because the persons composing it are made into one body. It is only in abstracto, and rests only in contemplation of law. 10 R. 50. So, again, he says (1 Inst. 202, 250) persons capable of purchasing are of two sorts—persons naturally created by God, and persons created by the policy of man, as persons incorporated into a body politic. If, leaving the quaint scholastic teaching of the father of the English law, we come to the clearer and directer sense of our own Marshall, we find the same prevailing idea. *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 636, 4 L. Ed. 629. In corporations, says Prof. Woodeson, individuals are invested by the law with a politic character and a personality wholly distinct from their natural capacity. \* \* \* Thus, then, the essential legal definition that covers the whole ground and expresses the very essence of the being of a body corporate is this: It is an artificial, legal person, a succession of individuals, or an aggregate body, considered by the law as a single continuous person limited to

one peculiar mode of action, and having power only of the kind and degree described by the law which confers them. Such is the established notion of our common law. Such, too, as far as I can trace, is the doctrine of the modern civil law, modified by the jurisprudence of the European continent." *Warner v. Beers* (N. Y.) 23 Wend. 103, 129, 142.

"There are many definitions of a corporation more or less expressive, but the essence of all is that it is a legal or artificial person with prescribed powers, having a capacity of succession or of duration without regard to the changes in its membership." *Askew v. Hale County*, 54 Ala. 639, 642, 25 Am. Rep. 730.

A corporation of necessity is composed of one or more persons, and the object of the persons composing it is to obtain some privilege or franchise which was not theretofore allowed to them as individuals. *Louisville Tobacco Warehouse Co. v. Commonwealth* (Ky.) 48 S. W. 420, 421.

As was said by Chief Justice Marshall in *Providence Bank v. Billings*, 29 U. S. (4 Pet.) 514, 562, 7 L. Ed. 939, the grant of corporation is to bestow the character and properties of individuality on a collective and changing body of men. *Kansas Pac. Ry. Co. v. Atchison, T. & S. F. R. Co.*, 5 Sup. Ct. 208, 209, 112 U. S. 414, 28 L. Ed. 794; *Santa Clara County v. Southern Pac. R. Co.* (U. S.) 18 Fed. 885, 402.

All corporations, whether public or private, are in contemplation of the law founded on the principle that they will promote the interest or convenience of the public. *Directors for Leveeing Wabash River v. Houston*, 71 Ill. 818, 822.

Corporations are but aggregated individuals acting through the agency of man. They may consist of a single individual, or more, and they are no more ideal beings when thus acting than the individual thus acting. *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 202, 241.

#### As association.

See "Association."

#### Characteristics and kinds.

Corporations are of two kinds—public and private. *Coyle v. McIntire* (Del.) 30 Atl. 728, 730, 7 *Houst.* 44, 40 Am. St. Rep. 109.

The general term "corporation" is divided into those which are private only, formed by voluntary agreement for private purposes, and those which are created by the state for the purposes of government and management of public affairs, which are public or quasi public corporations. *Murphy v. Chosen Freeholders of Mercer County*, 31 Atl. 229, 232, 57 N. J. Law (28 Vroom) 245.

"Corporations," using that term to designate organizations merely claiming or alleged to be corporations as well as those in all respects legally constituted, have been divided into three classes—corporations de jure, corporations de facto, and corporations by estoppel. *Brown v. Atlanta Ry. & Power Co.*, 39 S. E. 71, 73, 113 Ga. 462.

Corporations are in a certain sense legislative bodies. They have a legislative power when the directors or shareholders are duly convened—that is, fully adequate to settle all questions affecting their business interests or policy. *Republican Mountain Silver Mines v. Brown* (U. S.) 58 Fed. 644, 647, 7 C. C. A. 412, 24 L. R. A. 776.

A corporation is an intelligent, though artificial, person, its board of directors is its controlling mind, and it may be bound like a natural person by the consent implied by law from a course of conduct permitted and recognized by its governing body. *Salem Iron Co. v. Lake Superior Consol. Iron Mines* (U. S.) 112 Fed. 239, 241, 50 C. C. A. 213.

A corporation is defined by an eminent jurist as the personification of certain legal rights under a description imposed on it by the power which created it. "Residence, habitancy, and individuality are among the qualities of a corporation." *Bank of United States v. State*, 20 Miss (12 Smedes & M.) 456, 460.

A corporation, it was said in *Ohio Ins. Co. v. Nunnemacher*, 15 Ind. 294, is a creature existing, not by contract, but by statute. There may be a contract among individuals to enter into a corporation said the court in that case, but, when they have become a corporation, the charter, not contract, determines their rights. *Huter v. Union Trust Co.* (Ind.) 51 N. E. 1071, 1072.

A corporation, as to its property, is a mere trustee for its stockholders. *Lenawee County Sav. Bank v. City of Adrian*, 33 N. W. 304, 305, 66 Mich. 273.

The term "corporations," as used in the article relating to corporations, shall include all associations and joint-stock companies having powers and privileges not possessed by individuals or partnerships. Gen. St. Kan. 1901, § 215; V. S. 1894, 3675; Rev. St. Mo. 1899, § 943.

In the construction of statutes the words "corporation" and "company" may be construed as including any corporation, company, person, persons, partnership, joint-stock company, or association. Ky. St. 1903, § 457.

"Corporations," as used in the bankruptcy act, shall mean all bodies which have any of the powers and privileges of private corporations not possessed by individuals or partnerships, and shall include limited or other partnership associations organized un-

der laws making the capital subscribed alone responsible for the debts of the association. U. S. Comp. St. 1901, p. 3419.

#### As citizen.

See "Citizen."

#### Company distinguished.

While the word "company" is frequently used to denote an incorporated association, it does not necessarily involve that idea, either in common speech or at law. The Imperial Dictionary says the word "company" is applicable to private partnerships or to incorporated bodies, but, when there are only a few individuals associated, the concern is generally called a "copartnership," the term "company" being usually reserved for large associations; while it defines a "corporation" as a body politic or corporate formed and authorized by law to act as a single person. Bouvier's Law Dictionary defines "company" as an association of a number of individuals for the purpose of carrying on their legitimate business, and says that this term is not synonymous with "partnership," though every such incorporated company is a partnership. When these companies are authorized by the government, they are known by the name of "corporations." *Bradley Fertilizer Co. v. South Pub. Co.*, 23 N. Y. Supp. 675, 678, 4 Misc. Rep. 172.

#### Company synonymous.

"Company" and "corporation" are commonly used as interchangeable terms, and are so used in Act March 7, 1899, relating to the incorporation of street railroads. *Goddard v. Chicago & N. W. R. Co.*, 66 N. E. 1066, 1068, 202 Ill. 362.

#### Creation

A corporation aggregate is composed of natural persons. It is often stated in the books that such a corporation is created by its charter, but this is not precisely correct. The charter only confers the power of life or the right to come into existence, and provides the instruments by which it may become an artificial being. *Miller v. Ewer*, 27 Me. 509, 518.

A corporation is a creature of, and created by, the law. *People v. Golden Gate Lodge No. 6*, 60 Pac. 865, 866, 128 Cal. 257. A corporation is a creation of the statute. *People v. Dederick*, 55 N. E. 927, 929, 161 N. Y. 195. A corporation is an artificial person, and in this country is solely the creature of the lawmaking power. *Ex parte Selma & G. R. Co.*, 45 Ala. 696, 725, 6 Am. Rep. 722.

A corporation, in Colorado, is undoubtedly a creature of the statute. To create it the statutory requirements must be followed, and all the prescribed formalities which relate to the essentials of corporate existence must unquestionably be observed. Thus, a

corporation which has issued no stock, and has received no stock subscription, has no power to contract. *Aspen Water & Light Co. v. City of Aspen*, 87 Pac. 728, 730, 5 Colo. App. 12.

The power of creating corporations is one appertaining to sovereignty, and is exercised by that branch of the government in which it is constitutionally vested. Formerly the right to corporate existence was always by a special charter or act of incorporation, but the power of special legislation of this kind is now restricted or abolished in nearly all of the states, and corporations are usually formed by persons complying with the general laws of the state on the subject. A corporation must have a full and complete organization and existence as an entity, and in accordance with the law to which it owes its origin, before it can assume its franchises, or enter into any kind of contract, or transact any business. When, however, it has fully complied with the law under which it is organized, it is a corporation *de jure*; but where the persons desiring to form such a corporation have made the attempt to comply with the law, and have failed in some essential matter, and afterwards have done business under such defective organization, then it is known as a corporation *de facto*. *Bradley Fertilizer Co. v. South Pub. Co.*, 23 N. Y. Supp. 675, 676, 4 Misc. Rep. 172.

The creating or chartering of corporations involves an exercise of legislative power. They may be created by a particular statute granting the charter, or organized by virtue of general statutes prescribing the mode, specifying the powers and privileges to be enjoyed. In either mode the corporation is in a legal sense created by statute, and a law providing that no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise clearly refers to such charters only as were granted by a statute of this state or organized under a general statute of the state. Any other construction would work a complete revolution of the policy of the state. Such law does not include or authorize a corporation created under the laws of another state to take a devise in this state, although it might take a devise in the state in which it was organized. *White v. Howard*, 46 N. Y. 144, 165.

#### As distinct from stockholders.

While a corporation may, from one point of view, be considered as an entity, without regard to the corporators who compose it, the fact remains self-evident that a corporation is not in reality a person or thing distinct from its constituent parts. The word "corporation" is but a collective name for the corporators or members who compose an incorporated association. *Home Fire Ins. Co. v. Barber* (Neb.) 93 N. W. 1024, 1032; *City of Nashville v. Ward*, 84 Tenn. (16 Lea) 27, 30.

A corporation is an artificial being, the creature of positive law, wholly distinct from the natural persons composing it, its identity being unaffected by changes, however extensive and frequent, of these. *State v. Hood* (S. C.) 15 Rich. Law, 177, 188.

Const. § 211, declares that no railroad corporation, organized under the laws of another state, doing business in Kentucky, shall have the right of eminent domain or the power to acquire real estate until it shall have become a body corporate in accordance with the laws of Kentucky. Ky. St. 1899, § 841, provides that no company or corporation organized under the laws of any other state shall maintain any railway in Kentucky until it shall have become a citizen, resident, and corporation of the state. Held, in a suit against a foreign railroad corporation which attempted to remove the case to the federal court, that the word "corporation" in Const. § 211, and the words, "company," etc., in Ky. St. 1899, § 841, referred to the corporation as a legal entity, and not to its stockholders, and the court would presume, for purposes of jurisdiction, that the stockholders were citizens of the foreign state. *Lewis v. Mayville & B. S. R. Co.*, 76 S. W. 526, 527, 25 Ky. Law Rep. 948.

A corporation, in law, constitutes an entity separate and distinct from its stockholders doing business by its officers and agents. *Ross v. Chicago, M. & St. P. R. Co.* (U. S.) 6 Fed. 544. It is legally defined to be an artificial person separate and distinct from its stockholders. *Gaskell v. Beard*, 11 N. Y. Supp. 399, 401, 58 Hun, 101; *Niagara County Sup'rs v. People* (N. Y.) 7 Hill, 504, 507. Its officers are its agents, not the agents of the stockholders. *Central R. & Banking Co. v. Smith*, 76 Ala. 572, 585, 52 Am. Rep. 353.

"A corporation is a something—a legal entity, an artificial being or person—entirely distinct from both the stockholders, president, and directors." *McCabe v. Illinois Cent. R. Co.* (U. S.) 13 Fed. 827, 828.

"A corporation, says Mr. Cook in his work on Corporations, is an entity, an existence, irrespective of the persons who own all its stock. The fact that one person owns all of the stock does not make him and the corporation one and the same person." *Rhawn v. Edge Hill Furnace Co.*, 51 Atl. 360, 362, 201 Pa. 637; *Monongahela Bridge Co. v. Pittsburg & B. Traction Co.*, 46 Atl. 99, 101, 196 Pa. 25.

A corporation is a collection of many individuals united into one body, under a special denomination, having perpetual succession under an artificial form, and vested by the policy of the law with the capacity of acting in several respects as an individual. 1 Kyd, Corp. 13. A corporation is in reality an association of persons, or the entire body of stockholders. It is but a col-

lective name for the corporators or members. 1 Mor. Priv. Corp. §§ 1, 227, 474. The shareholders vested with the corporate powers are the corporation or company. Tayl. Corp. § 50. While a corporation may, from one point of view, be considered as an entity without regard to the corporators who compose it, the fact remains self-evident that a corporation is not in reality a person or a thing distinct from its constituent parts. *People v. North River Sugar Refining Co.*, 3 N. Y. Supp. 401, 408, 16 Civ. Proc. R. 1, 2 L. R. A. 83.

While it is true, as a general proposition, that a corporation may be created and constituted a legal entity, existing separate and apart from the natural persons composing it, yet it cannot act independently, or against the will, or abstain from complying with the direction, of the natural persons who constitute the corporate body. A corporation is in fact an association of persons united in one body, having perpetual succession, vested with political rights conferred upon it by the body creating it. *Ford v. Chicago Milk Shippers' Ass'n*, 39 N. E. 651, 655, 155 Ill. 166, 27 L. R. A. 298.

In contemplation of law, a corporation is a legal entity, an ideal person, separate from the real persons who compose it. This fiction, however, is limited to the uses and purposes for which it was adopted—convenience in the transaction of business and in suing and being sued in its corporate name, and the continuance of its rights and liabilities, unaffected by changes in its corporate members. A corporation cannot be formed for the purpose of accomplishing a fraud or other illegal act under the disguise of the fiction; and, when this is made to appear, the fiction will be disregarded by the courts, and the acts of the real parties dealt with as though no such corporation had been formed, on the ground that fraud vitiates everything into which it enters, including the most solemn acts of men. *First Nat. Bank v. Trebein Co.*, 52 N. E. 834, 59 Ohio St. 316.

A statement that a corporation is an artificial person or entity, apart from its members, is merely a description in figurative language of a corporation viewed as a collective body. A corporation is generally an association of persons, and no judicial dictum or legislative enactment can alter this fact. *Mor. Priv. Corp. § 227*. So that the idea that a corporation may be a separate entity, in the sense that it can act independently of the natural persons composing it, or abstain from acting where it is their will that it shall, has no foundation in reason or authority, and is contrary to the fact. *Buffalo Loan, Trust & Safe Deposit Co. v. Medina Gas & Electric Light Co.*, 42 N. Y. Supp. 781, 788, 12 App. Div. 199.

A corporation is to be considered as a person *sui juris* having an independent existence distinct from the individual stockholders. It becomes subject to legal responsibilities, just as a natural person endowed with judgment and volition. The stockholders are beneficially the owners of its property, and they may control its action; but it is beyond their power to exempt it from any legal responsibility which it may incur. *Folsom v. Detrick Fertilizer & Chemical Co.*, 36 Atl. 446, 448, 85 Md. 52.

A corporation is composed of a number of individuals, authorized to act as if they were one person. The individual stockholders are the constituents or component parts, through whose intelligence, judgment, and discretion the corporation acts. *Jones v. Williams*, 39 S. W. 486, 490, 139 Mo. 1, 37 L. R. A. 682, 61 Am. St. Rep. 436.

A corporation is known and acts only in its corporate name. *Niagara County Sup'rs v. People* (N. Y.) 7 Hill, 504, 507.

The word "corporation" is but the collective name for the corporators or members. *People v. North River Sugar Refining Co.*, 3 N. Y. Supp. 401, 407, 22 Abb. N. C. 164, 16 Civ. Proc. R. 1, 2 L. R. A. 83.

#### As employé.

See "Employé."

#### Extraterritorial rights.

A corporation has no legal existence beyond the locality of its creation. *Diamond Glue Co. v. United States Glue Co.* (U. S.) 103 Fed. 838, 839; *Runyan v. Coster*, 39 U. S. (14 Pet.) 122, 129, 10 L. Ed. 382; *Paul v. Virginia*, 75 U. S. (8 Wall.) 168, 181, 19 L. Ed. 357; *Van Steuben v. Central R. Co.*, 35 Atl. 992, 993, 178 Pa. 367, 34 L. R. A. 577; *Alleghany Co. v. Allen*, 52 Atl. 298, 299, 68 N. J. Law, 68; *Anglo-American Provision Co. v. Davis Provision Co.*, 62 N. E. 587, 589, 169 N. Y. 506, 88 Am. St. Rep. 608; *Sullivan v. La Crosse & M. Steam Packet Co.*, 10 Minn. 386, 389 (Gil. 308, 311). What rights it may exercise in other jurisdictions are permitted upon the principle of comity. *Anglo-American Provision Co. v. Davis Provision Co.*, 62 N. E. 587, 589, 169 N. Y. 506; *St. Louis v. Wiggins Ferry Co.*, 78 U. S. (11 Wall.) 423, 20 L. Ed. 192. The recognition of its existence, even by other states, and the enforcement of its contracts made therein, depend purely upon the comity of these states—a comity which is never extended where the existence of the corporation or the exercise of its powers are prejudicial to their interests or repugnant to their policy. *Van Steuben v. Central R. Co.*, 35 Atl. 992, 993, 178 Pa. 367, 39 Wkly. Notes Cas. 217, 219, 34 L. R. A. 577; *Paul v. Virginia*, 75 U. S. (8 Wall.) 168, 181, 19 L. Ed. 357; *Hartford Fire Ins. Co. v. Raymond*, 38 N. W. 474.



483, 70 Mich. 485; *Home Ins. Co. v. Davis*, 29 Mich. 238.

The tenure of its life and the limits of its powers are fixed by the laws of the state which permits its creation. A state cannot impose one of its artificial creatures on another sovereignty, or confer upon its corporations powers which they can lawfully exercise beyond its jurisdiction. By the comity existing between states, a corporation created in one state may, through its agents, carry on its ordinary business in another state, upon such conditions as may be prescribed by the alien state. But, strictly, corporate acts must be done in the home state, and all attempts to perform such acts outside the state of the corporation's domicile is a usurpation of power and wholly void. The migratory corporation is under the ban of the law, into whatever land it comes. Its pretensions to extraterritorial powers are in conflict with the sovereignty of the states it invades, and are everywhere denied. *Sovereign Camp Woodmen of the World v. Fraley* (Tex.) 59 S. W. 905, 906.

"Corporations are artificial persons, existing only in contemplation of law. They must dwell in the place of their creation, and cannot migrate to another state." *Rush v. Foos Mfg. Co.*, 51 N. E. 143, 147, 20 Ind. App. 515; *Land Grant Ry. & Trust Co. v. Coffey County Com'rs*, 6 Kan. 245, 253; *Commonwealth v. Standard Oil Co.*, 101 Pa. 119, 132; *Foster-Cherry Commission Co. v. Caskey*, 72 Pac. 268, 269, 66 Kan. 600. But they may be sued, like natural persons, in transitory actions arising ex contractu or ex delicto, in any state where legal service of process may be had. *Rush v. Foos Mfg. Co.*, 51 N. E. 143, 147, 20 Ind. App. 515.

A corporation exists only in contemplation of law and by force of the law, and when the law ceases to operate, and is no longer obligatory, the corporation can have no existence. It must dwell in the place of its creation, and cannot migrate to another sovereignty. But although it must live and have its being in that state only, yet it does not follow that its existence there will not be recognized in other places; and its residence in one state creates no insuperable objection to its power of contracting in another. The corporation must show that the law of its creation gave it authority to make such contracts; yet, as in the case of a natural person, it is not necessary that it should actually exist in the sovereignty in which the contract is made. It is sufficient that its existence as an artificial person in the state of its creation is acknowledged and recognized by the state or nation where the dealing takes place, and that it is permitted by the laws of that place to exercise there the powers with which it is endowed. Every power, however, which a corporation exercises in another state, depends for its validity

upon the laws of the sovereignty in which it is exercised, and a corporation can make no valid contract without the sanction, express or implied, of such sovereignty. *Runyan v. Coster*, 39 U. S. (14 Pet.) 122-129, 10 L. Ed. 382. See, also, *North British & Mercantile Co. v. Craig*, 62 S. W. 155, 157, 106 Tenn. 621.

#### Foreign corporations included.

As used in the Code of Tennessee, providing that when a corporation, company, or individual has an office or agency in the county other than that in which the principal resides, the service of process may be made on any agent or clerk employed therein in all actions growing out of or connected with the business of the office or agency, the word "corporation" means either a foreign or domestic corporation. *Brooks v. Dun* (U. S.) 51 Fed. 138, 142.

In Pub. St. c. 66, § 5, providing that actions may be commenced against corporations in the same manner as other civil actions, the word "corporations" includes foreign as well as domestic corporations. *Sullivan v. La Crosse & M. Steam Packet Co.*, 10 Minn. 386, 392 (Gil. 308, 313).

New York City Charter (Laws 1897, c. 378, § 936), providing that any tax for personal property on any "corporation or person in the city of New York," which is in default, may be recovered by an action in any court of record in the state, includes only such persons or corporations as are residents of the city, and therefore does not include a nonresident. *City of New York v. McLean*, 63 N. E. 380, 381, 170 N. Y. 374.

Act March 24, 1870, providing that a railroad corporation in this state leasing its road to a "corporation of another state" shall remain liable as if it operated the road itself, includes any corporation outside of the state, whether chartered by Congress or by another state. *Smith v. Pacific R. R.*, 61 Mo. 17, 18.

#### Incorporation distinguished.

A corporation is a civil institution. It is established by a law of the state from considerations of public policy. Its existence, its capacities, and its powers are all conferred by law from some real or supposed public benefit to result from it. It is a political institution of the state. "The words 'corporation' and 'incorporation' are frequently confounded, particularly in the old books. The distinction between them is, however, obvious; the one is a political institution; the other only the act by which that institution is created. When a corporation is said to be a person, it is understood to be so only in certain respects and for certain purposes, for it is strictly a political institution." *Toledo Bank v. Bond*, 1 Ohio St. 622, 642 (citing *Ang. & A. Corp.* pp. 3, 4).

**As individual or person.**

See "Individual"; "Person."

**As inhabitant or resident.**

See "Inhabitancy—Inhabitant"; "Resident."

**Natural personal distinguished.**

A corporation may be differentiated from a natural person thus: The natural person may make any contract or do any business not inhibited by law or public policy. The corporation cannot make any contract or do any business except as authorized by legislative grant. *Parsons v. Tacoma Smelting & Refining Co.*, 65 Pac. 765, 770, 25 Wash. 492 (citing *City of Spokane v. Amsterdamsch Trustees Kantoor*, 22 Wash. 172, 179, 60 Pac. 140).

A corporation is an artificial person which must act within certain limits. It differs from a natural person thus: If an individual gives his note, it is not necessary to prove anything in the way of authority, but a corporation must act by way of agents, and the authority of the agents who act for it is not to be presumed, but must be shown. *Foster v. Ohio-Colorado Reduction & Mining Co.* (U. S.) 17 Fed. 130.

The term "natural persons," in Act May 8, 1852, excepting executors, administrators, and other natural persons, suing or sued in a representative character, from the payment of certain costs, does not include moneyed institutions or corporations. *Wagenhurst v. Delaware Tp.*, 4 Pa. Co. Ct. R. 533 534.

**As owner or resident freeholder.**

See "Owner"; "Resident Freeholder."

**As peddler.**

See "Peddler."

**Powers.**

A corporation is a mere creature of the law. It cannot exercise any power or authority, other than those expressly given by its charter or necessarily incident to the power and authority thus granted. *Commonwealth v. Bringham*, 103 Pa. 134, 137, 49 Am. Rep. 119; *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 636, 4 L. Ed. 629; *Seattle Gas & Electric Co. v. Citizens' Light & Power Co.* (U. S.) 123 Fed. 588, 592; *Werner v. City of Washington* (U. S.) 29 Fed. Cas. 705, 706; *City of Columbus v. Beach* (U. S.) 5 Fed. Cas. 739, 743; *Runyan v. Coster*, 39 U. S. (14 Pet.) 122, 129, 10 L. Ed. 382; *Deringer's Adm'r v. Deringer's Adm'r* (Del.) 5 Houst. 416, 429, 1 Am. St. Rep. 150; *Codd v. Rathbone*, 19 N. Y. 37, 40; *Coyle v. Gray* (Del.) 30 Atl. 728, 730, 7 Houst. 44, 40 Am. St. Rep. 109; *Utey v. Clark-Gardener Lode Min. Co.*, 4 Colo. 369, 372. These are such as are best calculated to effect the objects for

which it was created. *Swan v. Williams*, 2 Mich. 427, 434. It has such powers as are reasonably necessary to effect all the general purposes of the corporate creation, though not particularly specified in its charter, unless prohibited thereby or by some law of the state. *Interior Woodwork Co. v. Prasser*, 84 N. W. 833, 834, 108 Wis. 557 (citing *Farwell Co. v. Wolf*, 70 N. W. 289, 290, 71 N. W. 109, 96 Wis. 10). If a power is claimed for it, the words giving the power, or from which it is necessarily implied, must be found in the charter. The enumeration of the powers of a corporation in its charter implies the exclusion of all others not fairly incidental. *Central Transp. Co. v. Pullman's Palace-Car Co.*, 11 Sup. Ct. 478, 484, 139 U. S. 24, 35 L. Ed. 55; *National Home Building & Loan Ass'n v. Home Sav. Bank*, 54 N. E. 619, 620, 181 Ill. 35, 64 L. R. A. 399, 72 Am. St. Rep. 245. "It can have no other capacities than such as are necessary to carry into effect the purposes for which it was established. It is a creature of the Legislature, and can have no powers but such as are given to it by its creator, either at the time of its creation or subsequently, or such powers as are incidental to those granted." *New York Firemen Ins. Co. v. Ely* (N. Y.) 2 Cow. 678, 709. Its power to do business and make contracts is limited by its charter. Powers not conferred by its charter or by necessary implication cannot be exercised. It can bind itself, and others can become bound to it, only in the mode prescribed by the law of its creation, and such by-laws as it may lawfully enact. *State Ins. Co. of Missouri v. Redmond* (U. S.) 3 Fed. 764, 766. None of its powers are original. They are precisely what the incorporating act has made them, and can only be exercised in the manner which that act authorizes; in other words, the state prescribes the purposes of a corporation and the means of executing those purposes. Purposes and means are within the state's control. This is true as to domestic corporations. It has even a broader application to foreign corporations, as to which the right to do business within the state depends entirely on the will of the state, and may be refused at any time, especially if the foreign corporation fails to comply with the laws of the state. *Waters-Pierce Oil Co. v. Texas*, 20 Sup. Ct. 518, 524, 177 U. S. 28, 44 L. Ed. 657. It has no such general powers or rights of property as those which belong to a private citizen. Its powers are limited to the ends for which it was instituted. *Robins v. Embry* (Miss.) *Smedes & M. Ch.* 207, 264. Its power is derived only from the act, grant, charter, or patent which creates things. *Davis v. Old Colony R. Co.*, 131 Mass. 258, 271, 41 Am. Rep. 221. It possesses only those powers which are imparted to it by the law of its creation, either expressly or impliedly, as necessary to its existence. The implied pow-

ers, however, are as much granted as express powers. If a banking or other corporation could do no act except in terms prescribed in its charter, its movements for all practical purposes would not last for a day. By the grant of a bank charter all the incidental and necessary facts required to carry the expressly granted powers into effect are implied. *Bank of Kentucky v. Schuylkill* (Pa.) 1 Pars. Eq. Cas. 180, 235.

A corporation is a creature of positive law, its rights, powers, and duties are prescribed by the law, and, beyond the legitimate purposes which it was created to serve, and the lines of limitation the law has drawn around it, it is without power to act or capacity to take. Thus, a banking corporation, while fully competent to do what is usual and necessary in its own business, may not own and operate a railroad or engage permanently in another business than that for which it was created. In *re Gibbs' Estate*, 27 Atl. 383, 157 Pa. 59, 33 Wkly. Notes Cas. 120, 122, 22 L. R. A. 276.

Among the most important of the powers incident to a corporation are immortality, and if the expression may be allowed, individuality, properties by which a perpetual succession of many persons are considered as the same and may act as a single individual. *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 636, 4 L. Ed. 629 (cited in *Codd v. Rathbone*, 19 N. Y. 37, 40). And see *Coyle v. McIntire* (Del.) 30 Atl. 728, 730, 7 Houst. 44, 40 Am. St. Rep. 109.

To corporations, however created, there are said to be certain incidents attached, without any express words or authority for this purpose, such as the power to plead and to be impleaded, to purchase and sell, to make a common seal, and to pass by-laws. *United States Bank v. Dandridge*, 25 U. S. (12 Wheat.) 64, 67, 6 L. Ed. 552.

It has inherent powers incident to its corporate character, such as perpetual succession, a capacity to sue and be sued by its corporate name, to take by devise, to purchase lands where not limited or restrained by statute, and the right to have a common seal. Primarily all these powers are essential and necessary to the very existence of a corporation, although they may be modified, limited, and controlled by any special provision which the legislative power may choose to adopt. *Niagara County Sup'rs v. People* (N. Y.) 7 Hill, 504, 507.

"Professor Erskine, the learned Scotch civilian, says: 'A corporation is composed of any number of persons united or erected by a proper authority into a body politic, to endure in continual succession with certain rights and capacities of purchasing, suing, etc., as appear most suitable to the nature of that special community, and most necessary for answering the purpose intended by

it.'" *Warner v. Beers* (N. Y.) 23 Wend. 103, 124 (quoting 1 Ersk. Inst. by Macallan, 190).

Kyd defines a corporation thus: "Though many things be incident to a corporation, yet, to form a complete idea of a corporation aggregate, it is sufficient to suppose it vested with the three following capacities: (1) To have perpetual succession under a special denomination and under an artificial form; (2) to take and grant property, to contract obligations, and to sue and be sued by its corporate name in the same manner as an individual; (3) to receive grants of privileges and immunities, and to enjoy them in common. These alone are sufficient to the essence of a corporation." The same definition is given by Justice Nelson in *Thomas v. Dakin*, 22 Wend. 9, 70. Judge Dillon defines it thus: "A corporation is a legal institution devised to confer, upon the individuals of which it is composed, powers, privileges, and immunities which they would not otherwise possess, the most important of which are continuous legal identity, and perpetual succession under the corporate name, notwithstanding successive changes by death or otherwise in the corporators or members of the corporation." Angell & Ames define a corporation as a body created by law, composed of individuals united under a common name, the members of which succeed each other, so that the body continues the same notwithstanding the changes of individuals which compose it, and is for certain purposes considered as a natural person. It is not essential to the idea of a corporation that it shall have perpetual existence, for limited corporations are a matter of most common occurrence. Neither is it essential that it shall have capacity to sue or be sued under its corporate name, for it may be authorized to sue only in the name of one of its officers. That it shall have capacity to sue or be sued under some name standing for its collective body is all that is necessary. In the last analysis the only absolutely essential attribute of the corporation is the capacity to exist and act within the powers granted as a legal identity, apart from the individuals who constitute its members. *Andrews Bros. Co. v. Youngstown Coke Co.* (U. S.) 86 Fed. 585, 588, 30 C. C. A. 293.

Corporations have power in general to make contracts and incur debts in the prosecution of their legitimate business, and to give their promissory note for such indebtedness. *Chaska Co. v. Carver County Sup'rs*, 6 Minn. 204, 215 (Gil. 130, 137).

Corporations cannot consolidate their funds or form partnerships unless authorized by express grant or necessary implication, nor can they enter into any agreement amounting to a practical consolidation or partnership. *People v. North River Sugar Refining Co.*, 3 N. Y. Supp. 401, 407, 22 Abb. N. C. 164, 16 Civ. Proc. R. 1, 2 L. R. A. 83.

**Stockholders included.**

The word "corporation," in a charter subjecting the corporation to certain liabilities, includes stockholders. *Starkweather & Shepley v. Brown* (R. I.) 55 Atl. 201, 204.

Within the provisions requiring every corporation doing business in this state to pay its employes at least once a month, the word "corporation" refers to the members who constitute the corporation, and the rights of the corporation are to be measured by the same laws as the rights of a person. *Johnson v. Goodyear Min. Co.*, 59 Pac. 304, 305, 127 Cal. 4, 47 L. R. A. 338, 78 Am. St. Rep. 17.

The term "corporation" does not include stockholders, and the statute imposing a liability upon a corporation does not thereby impose the same upon the stockholders. *National Park Bank v. Remsen*, 15 Sup. Ct. 891, 893, 158 U. S. 337, 39 L. Ed. 1008.

**As trustee.**

See "Trustee."

**Agricultural society.**

See "Agricultural Society."

**Association of brokers.**

The open board of brokers in the city of New York is not a corporation, the obligations and rights of its members not being determined or fixed by any statutory enactment. *White v. Brownell* (N. Y.) 3 Abb. Prac. (N. S.) §18.

**Bank.**

"Corporations most akin to this [those incorporated for purposes of trade] at common law were the creatures or favorites of the crown, created for some great public good, and as inducements to its subjects to engage in trade and commerce, so that the greatness and power of the government might be extended and enriched; hence large grants of privileges were made, and every facility and protection given to induce capital and individual enterprise to engage in pursuits that would bring back to the source of power so many corresponding benefits. Here they are regarded as monopolies, obnoxious to individual and private enterprise, and are to be restricted and governed by different rules. Such a corporation as this would not be one at common law. It lacks perpetuity, an essential element in a corporation at common law. The members are individually liable for the debts, an element utterly opposed to their very being." Said in a case construing a bank charter. *Hargroves v. Chambers*, 30 Ga. 580, 605.

**County court.**

A corporation is a legal person merely, but as used in Acts 1883, c. 168, providing that the Union Bank & Trust Company shall

have the right and power to accept and execute all trusts of every name and kind which may be imposed on it, with its consent, by any person or corporation, whether the trust be that of a guardian, executor, trustee, the committee of an estate of a non compos mentis, or any other trust, it has a broader meaning, and gives such corporation the power to act as the administrator of a decedent under an appointment of the county court. If the word "corporation" be limited to its exact meaning, it would follow that the trusts referred to could only be such as were imposed by some corporation, but when these words are tried by the connection in which they are used, and the illustration given of them in the statute, it is seen that this could not have been the meaning, for while a great variety of trusts may be created by private individuals and also by corporations, yet neither of them can appoint a guardian or committee or the estate of a lunatic. This must be done by the chancery court or the county court. *Union Bank & Trust Co. v. Wright* (Tenn.) 58 S. W. 755, 757, 52 L. R. A. 469.

**Joint-stock company.**

That which distinguishes a corporation from an unchartered joint-stock company is the difference in the extent of liability of the shareholders for the debts of the concern; in the latter the liability being that of a partner in an ordinary partnership. *Cameron v. First Nat. Bank*, 23 S. W. 334, 335, 4 Tex. Civ. App. 309.

"A corporation is an artificial person created by law, in whom the title of the property vests; and the owner of stock in a corporation has no title to the corporation property, the title vesting in the artificial person created by law, known as the 'corporation.' When we speak of a joint-stock company or copartnership, however, there is no such artificial person created, in whom the title to the property can vest." It was said by Finch, J., in *People v. Coleman*, 31 N. E. 96, 133 N. Y. 279, 16 L. R. A. 183: "We may thus see upon what the legislative intent to preserve them as separate and distinct is founded, and what distinguishing characteristics remain. The formation of the one involves the merging and destruction of the common-law liability of the members for the debts, and requires the substitution of a new or retention of the old liability by an affirmative enactment which avoids the inherent effect of the corporate creation. In the other the common law remains unchanged and unimpaired, and needing no statutory intervention to preserve or restore it. The debt of the corporation is its debt, and not that of its members. The debt of the joint-stock company is the debt of the associates, however enforced. The creation of the corporation merges and drowns the liability of its corporators. The creation of the stock com-

pany leaves unharmed and unchanged the liability of the associates. The one derives its existence from the contract of individuals; the other from the sovereignty of the state." It was held that the value of the real estate of a joint-stock association should not be taken into consideration in appraising the value of the shares of stock of such corporation held by a decedent for the purpose of levying a transfer tax. *In re Jones' Estate*, 74 N. Y. Supp. 702, 704, 69 App. Div. 237.

Rev. St. pt. 1, tit. 4, c. 13, § 1, providing that all moneyed or stock corporations deriving an income or profit from their capital or otherwise shall be liable to taxation, does not include joint-stock companies formed solely by private agreement and not formed under any statute, such companies not being "corporations" even within a liberal use of the term. *People v. Coleman*, 5 N. Y. Supp. 394.

"Corporations" and "associations" are convertible, and often used as synonymous, terms, so that as used in rule of court authorizing circuit courts to issue mandamus in proceedings involving the action of any officer or board of any county, city, etc., and an action of any private corporation or officer or board thereof, the word "corporation" will be held to include joint-stock associations, there being no reason for any distinction or discrimination between the two; and section 1255, 1 How. Ann. St., in relation to taxation, provides that the term "corporation," as used in the act, shall be construed to include all associations and joint-stock companies having any of the powers and privileges of corporations not possessed by individuals or partnership. *Attorney General v. American Exp. Co.*, 77 N. W. 317, 320, 118 Mich. 682.

The term "corporation," as used in Act 1849, § 5, providing that nothing in the act should be construed to confer on associations any of the rights and privileges of corporations, except as specially provided, was used in a liberal and enlarged sense, and might embrace what is usually known as a "joint-stock association." Thus, in *Thomas v. Dakin* (N. Y.) 22 Wend. 9, at page 70, it was said that a corporate body was known to the law by the powers and faculties bestowed on it. The use of the term "corporation" in its creation is of itself unimportant, except as it will apply to possession of its powers and faculties; hence every body which possesses the powers and faculties of a corporation is a corporation. *People v. Wemple*, 5 N. Y. Supp. 581, 582, 52 Hun. 434.

In the last analysis the only absolutely essential attribute of the corporation is the capacity to exist and act, within the powers granted, as a legal identity apart from the individuals who constitute its members. Under such definition a partnership association, limited, organized under the act of June 2,

1874, which is governed by a board of managers, with liability of members limited to the amount of their unpaid capital stock, power to sue and be sued, and to hold and convey real estate, in its associated name, is a corporation and a citizen, within the law relating to citizenship as giving jurisdiction to federal courts. *Andrews Bros. Co. v. Youngstown Coke Co.* (U. S.) 86 Fed. 585, 588, 30 C. C. A. 293.

Joint-stock companies are endowed with perpetual succession, dissolution not resulting from changes in membership, produced by death or otherwise. They may sue or be sued in the name of the president and treasurer, and a suit by or against the president or treasurer is not abated by death, resignation, or removal of such officers; and a judgment against the president or treasurer is not a lien upon their individual property, but execution is levied upon the property of the company only. These privileges not being enjoyed by natural persons and partnerships, but being attributes of a corporation, a joint-stock company will be held to be a corporation, as affecting its right to maintain an action in another state from that in which it was organized. *Fargo v. Louisville, N. A. & C. Ry. Co.* (U. S.) 6 Fed. 787, 790.

#### **Municipal or quasi public corporations.**

Municipal corporations or institutions designed for the local government of towns or cities, or, more accurately, towns and cities, with their inhabitants, are, for the purpose of subordinate local administration, invested with a corporate character. *Dill Mun. Corp. § 9*. Chief Justice Marshall's description of a corporation is in these words: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law." *Mather v. City of Ottawa*, 114 Ill. 659, 664, 3 N. E. 216, 218.

The people of a county are not a corporation, nor are they recognized in law as capable of suing or being sued. The county, however, is a corporation, and is the proper party plaintiff to object to a contract made by the board of supervisors for building a jail. *Smith v. Meyers*, 15 Cal. 33, 34.

Pen. Code, § 165, inflicting a penalty for offering bribes to any member of a common council, board of supervisors, or board of trustees of any "corporation," means only public or quasi public corporations. *People v. Turnbull*, 29 Pac. 224, 225, 93 Cal. 630.

Code, § 1025, providing a punishment for obtaining money by false pretenses from any "person or corporation," includes a board of county commissioners. The words cannot be construed so that the county is to be regarded as a corporation rather than the board, and so exempt a person indicted under the act from punishment. *State v. Wilkerson*, 3 S. E. 683, 686, 98 N. C. 696.

The term, as used in Const. art. 8, § 1, providing that no "corporation" shall be created by special laws, means corporations created for private or quasi public uses, and does not include corporations which are organized as a branch of the state government, such as a state board of examiners organized to examine applicants to practice medicine and surgery within the state. *Iowa Electric Medical College Ass'n v. Schrader*, 55 N. W. 24, 27, 87 Iowa, 659, 20 L. R. A. 355.

The term "corporations," in Act March 3, 1848, entitled "An act to provide for the recovery of damages in cases where the death of a person is caused by wrongful act, neglect, or default," and which authorizes a recovery against corporations, embraces both public and private corporations, and includes boards of chosen freeholders of the respective counties of the state. *Murphy v. Chosen Freeholders of Mercer County*, 31 Atl. 229, 231, 57 N. J. Law (28 Vroom) 245.

The word "corporation," as used in the constitutional provision that the General Assembly shall not pass any local or special law granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity, means private, and not public or municipal, corporations. Its connection with the words "association or individual" shows this. *State v. Caffery*, 22 South. 756, 757, 49 La. Ann. 1748.

"2 Rev. St. 1876, p. 231, authorizing proceedings supplementary to execution against any person or corporation, is not to be construed as including municipal corporations, but is restricted to mean private, ordinary, business corporations." *Wallace v. Lawyer*, 54 Ind. 501, 507, 23 Am. Rep. 661.

The Code gives remedy by garnishment to all persons, and defines persons to include corporations; but the term "corporations," as here used, implies private, and not public, corporations. *Brown v. Gates*, 15 W. Va. 131, 160 (citing *City of Memphis v. Leski*, 56 Tenn. [9 Heisk.] 511, 24 Am. Rep. 331).

Gen. St. c. 129, § 50, authorizing the interrogation of officers of a corporation which is a party to a suit, applies to private corporations only. *Linehan v. City of Cambridge*, 109 Mass. 212, 213.

Within Comp. Laws 1879, c. 81, § 54a, providing that, in all personal actions arising upon contract before justices of the peace, any corporation or person within the county where the action is brought, in possession of property, money, goods, chattels, credits, and effects of the defendant, may be summoned as garnishee, the term "corporation" means private corporations organized for private purposes, and does not include municipal corporations. *Switzer v. City of Wellington*, 19 Pac. 620, 621, 40 Kan. 250, 10 Am. St. Rep. 196.

Under Const. art. 4, § 17, providing that when any bill shall be presented to create a corporation it shall be continued till another election of members of the General Assembly, municipal or other public corporations are not included. Constitutional provisions are to be construed, not so much as they were understood by the framers of the Constitution, but as they were understood by the people adopting it, and, in the popular sense of the term, "corporations" is applied almost exclusively to private corporations. *State v. District of Narragansett*, 16 Atl. 901, 905, 16 R. I. 424, 3 L. R. A. 295.

The provisions of Const. Miss. art. 12, §§ 13, 20, providing that the property of all corporations for pecuniary profit shall be subject to taxation the same as the property of individuals, and that taxation shall be equal and uniform, apply to corporations wholly private, and do not prevent the grant of an exemption to a corporation of a quasi public character. *Yazoo & M. V. R. Co. v. Levee Com'rs* (U. S.) 37 Fed. 24.

The term "corporations," as used in Const. art. 9, entitled "Corporations," means private corporations, and not municipal ones. *Land Owners v. People*, 113 Ill. 296, 314.

Gen. St. 650, § 108, declaring that allegations of the existence of a corporation shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney, applies to municipal corporations as well as private ones. *Hixon v. George*, 18 Kan. 253, 259.

The term "corporation," as used in Const. Neb. art. 3, § 15, declaring that the Legislature shall not pass any local or special laws granting to any corporation any exclusive privileges, is employed in its ordinary sense, and will not include a county, as a county, if a corporation at all, is a municipal corporation. *Sherman County v. Simmonds*, 3 Sup. Ct. 502, 506, 109 U. S. 735, 27 L. Ed. 1093.

Const. art. 16, § 8, providing that municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, entered on, or destroyed by the construction of their works, highways, or improvements, includes counties. *County of Chester v. Brower*, 12 Atl. 577, 117 Pa. 647, 2 Am. St. Rep. 713.

The phrase "the societies, corporations, or institutions now exempted by law from taxation," as used in the legacy tax law of New York (Laws 1887, c. 713), declaring that bequests to the societies, corporations, or institutions now exempted by law from taxation shall not be subject thereto, has reference obviously to such associations, corporations, or institutions as would have been included within the general terms of the statute but for the exemption itself. A bequest to a city is not exempt from the legacy tax

under the exemptions to societies, etc. In re Hamilton, 42 N. E. 717, 718, 148 N. Y. 310.

The term "corporation" in Rev. Code 1852, as amended in 1893, p. 818, c. 145, relative to mechanics' liens, and applying to all building, and to corporations as well as individuals, does not extend to municipal corporations. *George W. Emory & Co. v. Commissioners of Town of Laurel (Del.)* 55 Atl. 1118, 1119.

#### School district.

Within the provisions of article 12, § 1, Const. Kan., providing that corporations must be created under general laws, and under section 5, providing that provision shall be made by general law for the organization of cities, towns, and villages, the word "corporation" relates to corporations proper—that is, to private corporations and cities, towns, and villages—and it in no way relates to counties, townships, or school districts. *Traveler's Ins. Co. v. Oswego Tp. (U. S.)* 59 Fed. 58, 63, 7 C. C. A. 609; *Beach v. Leahy*, 11 Kan. 23, 28.

#### State.

"The word 'corporations,' in its largest sense, has a more extensive meaning than people generally are aware of. Any body politic (sole or aggregate), whether its power be restricted or transcendent, is in this sense a corporation. The King, accordingly, in England, is called a 'corporation.' 10 Co. 29b. So, also, by a very respectable author (Sheppard, in his Abridgment, volume 1, § 431) is the Parliament itself. In this extensive sense, not only each state singly, but even the United States, may, without impropriety, be termed 'corporations.' I have, therefore, in contradistinction to this large and indefinite term, used the term 'subordinate corporations,' meaning to refer to such only (as alone capable of the slightest application, for the purpose of the objection) whose creation and whose powers are limited by law. The differences between such corporations and the several states in the Union, as relative to the general government, are very obvious in the following particulars: (1) A corporation is a mere creature of the King or of Parliament; very rarely of the latter; most usually of the former only. It owes its existence, its name, and its laws (except such laws as are necessarily incident to all corporations, merely as such) to the authority which creates it. A state does not owe its origin to the government of the United States, in the highest or in any of its branches. It was in existence before it. It derives its authority from the same pure and sacred source as itself—the voluntary and deliberate choice of the people. (2) A corporation can do no act but what is subject to the revision either of a court of justice or of some other authority within the government. A state is altogether exempt from the jurisdiction of the

courts of the United States or from any other exterior authority, unless in the special instances where the general government has power derived from the Constitution itself. (3) A corporation is altogether dependent on that government to which it owes its existence. Its charter may be forfeited by abuse; its authority may be annihilated, without abuse, by an act of the legislative body. A state, though subject in certain specified particulars to the authority of the government of the United States, is in every other respect totally independent of it. The people of the state created, the people of the state can only change, its Constitution. Upon this power there is no other limitation but that imposed by the Constitution of the United States—that it must be of the republican form." *Chisholm v. Georgia*, 2 U. S. (2 Dall.) 419, 447, 1 L. Ed. 440, 452.

A corporation is the creature of a sovereign power, deriving its life from its creator. The state is a sovereign having no derivative powers, exercising its sovereignty by divine right. A state gets none of its powers from the general government, and hence a state is not a corporation. *Lowenstein v. Evans (U. S.)* 69 Fed. 908, 911.

The term "corporation" includes the state, as it is a legal being capable of transacting some kinds of business like a natural person; and therefore the state is a "person," within the meaning of 1 Rev. St. p. 768, §§ 1-3, providing that all notes in writing, made and signed by any person, whereby he shall promise to pay to any other person, or his order, shall be negotiable, etc., and that the word "person" in the last two preceding sections shall be construed to extend to every corporation capable by law of making contracts. *Indiana v. Woram (N. Y.)* 6 Hill, 33-38, 40 Am. Dec. 378.

Under a constitutional provision that "the Legislature shall not authorize any county, city, borough, or township, or unincorporated district, by virtue of a vote of its citizens or otherwise, to become a stockholder in any company, association, or corporation, or to obtain money for, or loan its credit to, any corporation, association, institution, or party," it matters not whether the bounties to be paid by money borrowed by a county, township, etc., are in aid of the United States or state, of individuals liable to be drafted, or those who have advanced money to encourage volunteers or to comply with contracts made with volunteers. All these are either corporations, associations, or parties. A government is a corporation aggregate. It never dies, and it is this that gives it immortality. *Speer v. School Directors, etc., of Borough of Blairsville*, 50 Pa. (14 Wright) 150, 176.

The term "corporation," "as used in the act of Congress touching internal revenue, does not include the state, and consequently

the income of the state of Georgia from the Western & Atlantic Railroad property, owned, controlled, and managed by the state, has not been made by law a subject of taxation." *United States v. Baltimore & O. R. Co.*, 84 U. S. (17 Wall.) 322, 328; *Georgia v. Atkins* (U. S.) 10 Fed. Cas. 241, 242, 35 Ga. 315, 318. "When the term 'corporation' is applied to a nation or state, it is employed in its most extensive signification, and, thus used, the United States or the commonwealths composing the United States, may be termed 'corporations'; but when the term 'corporation' is directed or refers to those artificial persons, bodies corporate or politic, interested for the promotion or advancement of religion, learning, or commerce, and for various other objects, public or private, where charity, industry, skill, and speculation can be freely and advantageously employed, and which owe their existence, name, powers and duration to a government, it is used in its ordinary, and, to the common understanding, explicit, sense." *Georgia v. Atkins* (U. S.) 10 Fed. Cas. 241, 242, 35 Ga. 315, 318.

The words "corporation, company, or person," as used in the provisions of the Code defining and punishing forgery, include the United States, and the several states and territories, and all the several branches of government of either of them, all public and private bodies, politic and corporate, all partnerships as well as individuals. And the word "another," as used in such provisions, is as comprehensive as the words defined above. *Shannon's Code Tenn.* 1896, §§ 6612, 6613.

The term "corporation," as used in the acts of Congress touching internal revenue, does not include a state. *United States v. Baltimore & O. R. Co.*, 84 U. S. (17 Wall.) 322, 329, 21 L. Ed. 597.

#### State university.

The State University of Iowa is not a "corporation," but a creature of the Legislature, whose property belongs to the state like that of its charitable institutions. It cannot, therefore, be sued in an action at law, and the proper method of seeking relief for grievances resulting from official acts of the officers of the University is by application to the Legislature. *Weary v. State University*, 42 Iowa, 335.

While in England, and possibly in a few instances in this country, corporations exist by prescription, the presumption being that there was a grant of corporate powers, but that all evidence of the same has been lost by lapse of time, the State University of Iowa cannot be considered a corporation where it was established by an act of the Legislature, by which act ten acres of land on which buildings were situated were granted for its use, and also two townships of land

which had been granted by Congress were donated to the University, and certain persons were named in the act as trustees. The State University had no existence in any form prior to the act in question. No grant was made to an association of men acting under a collective name or otherwise, and the trustees designated were simply agents of the state whose successors were appointed by the state. These provisions were insufficient to incorporate the University. *Weary v. State University*, 42 Iowa, 335, 336.

#### United States.

In construing the statute of New York providing that a devise of lands may be made to any person capable by law to hold real estate, but no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise, the court, in an action in which it was considering the question of validity of a devise of lands to the United States, said: "The term 'corporation,' in the statute, applies only to such corporations as are created under the laws of the state." *United States v. Fox*, 94 U. S. 315-321, 24 L. Ed. 192.

#### CORPORATION AGGREGATE.

"A corporation aggregate is a collection of individuals united in one body under such a grant of privileges as secures a succession of members without changing the identity of the body, and constitutes the members, for the time being, one artificial person or legal being capable of transacting some kind of business like a natural person." *People v. Assessors of Village of Watertown* (N. Y.) 1 Hill, 618, 620; *Sanford v. New York Sup'rs* (N. Y.) 15 How. Prac. 172, 175; *Niagara County Sup'rs v. People* (N. Y.) 7 Hill, 504, 513; *Sibley v. Penobscot Lumbering Ass'n*, 45 Atl. 293, 294, 93 Me. 399.

A corporation aggregate is a collection of many individuals united into one body under a special name, having perpetual succession under an artificial form, invested by the policy of the law with the capacity of acting in several respects as an individual, and having collectively certain faculties which the individuals have not. *Trustees of Dartmouth College v. Woodward*, 1 N. H. 111, 115.

Corporations aggregate are artificial beings created for specific and limited objects, public or private, in order to conduct and continue in succession the interests pertaining to those objects, by the exercise collectively of appropriate legitimate means, such as natural persons may employ individually. The difference between the powers of corporations and individuals is to be found mainly in the limited objects of the former, and the necessity of their acting in a concrete char-



acter. *Rivanna Nav. Co. v. Dawson* (Va.) 8 Grat. 19, 20, 46 Am. Dec. 183.

An aggregate corporation consists of many persons united together into one society, which is operated by a continual succession of members. *Overseers of Poor of City of Boston v. Sears*, 39 Mass. (22 Pick.) 122, 125.

"A corporation aggregate is an artificial body of men composed of divers individuals, the ligaments of which body are the franchises and liberties bestowed upon it, which bind and unite all into one, and in which consists the whole frame and essence of the corporation." *Thomas v. Dakin* (N. Y.) 22 Wend. 9, 70; *Louisville, C. & C. R. Co. v. Letson*, 43 U. S. (2 How.) 497, 552, 11 L. Ed. 353. "It must of necessity have a name, for the name is, as it were, the very being of the constitution, the heart of their combination." *Louisville, C. & C. R. Co. v. Letson*, 43 U. S. (2 How.) 497, 552, 11 L. Ed. 353. The powers and faculties which are usually specified as creating corporate existence are: (1) The capacity of perpetual succession; (2) the power to sue and be sued and to grant and receive in its corporate name; (3) to purchase and hold real and personal estate; (4) to have a common seal; and (5) to make by-laws. *Thomas v. Dakin* (N. Y.) 22 Wend. 9, 70; *Dartmouth College v. Woodward*, 17 U. S. (4 Wheat.) 518, 667, 4 L. Ed. 629.

A corporation aggregate is an artificial person existing in contemplation of law, and endowed with certain powers and franchises, which, though they must be exercised through the medium of its natural members, are yet considered as subsisting in the corporation itself, as distinctly as if it were a real person. *Hope v. Valley City Salt Co.*, 25 W. Va. 789, 797 (citing *Dartmouth College v. Woodward*, 17 U. S. [4 Wheat.] 518, 667, 4 L. Ed. 629).

#### As distinct from members.

An aggregate corporation is a being created by law, entirely distinct from the individuals that compose it; and the essence of a corporation consists in the right to have perpetual succession under a special name, and in an artificial form to take and grant property, contract obligations, and to sue and be sued by its corporate name as an individual, and to receive and enjoy in common the grant of privileges and immunities. *Niagara County Sup'rs v. People* (N. Y.) 7 Hill, 504, 513.

A corporation aggregate is an artificial being, a mere creature of the law, composed generally of natural persons in their natural capacity, but may also be composed of persons in their political capacity of members of other corporations; and the individuals, or any of them, who in their natural capacity compose one corporation, may in the

same capacity compose another distinct and separate corporation—as, the president and directors of one bank, or any number of them, may be the president and members of another bank, or the incorporated managers of any other institution. And hence the corporation of the regents of the college of medicine and the corporation of the regents of the university are two ideal rational beings, existing only in contemplation of law, although composed of natural persons, and acting through and by the natural agents or persons composing them, respectively. *Regents of University of Maryland v. Williams* (Md.) 9 Gill & J. 365, 393, 81 Am. Dec. 72.

A corporation aggregate is but one person, having the same unity in its corporate character and existence as a natural person. However numerous they may be, the will and individuality of the corporators are lost or merged in the will and individuality of the whole. A corporation can have but one will, and one will can only be manifested by the potential and uncontrollable voice of the majority. It has, and can have, from the nature of things, no other mode of action. *Charleston Ins. & Trust Co. v. Sebring* (S. C.) 5 Rich. Eq. 342, 347.

#### CORPORATION AT LARGE.

By a "corporation at large" is meant the different ranks and orders which compose it, including the definite and indefinite bodies. Corporations in this country, however, have no ranks, orders, or integral parts corresponding to the constitution of old English corporations. *Richards v. Clarksburg*, 4 S. E. 774, 781, 80 W. Va. 491.

#### CORPORATION BY ESTOPPEL.

One who has contracted with a corporation as such is estopped to deny its existence as a corporation at the date of the contract in any suit arising thereunder, and such corporation has been, it seems to us, with great propriety designated a "corporation by estoppel." Whether or not the rule that there must be a charter or law authorizing the creation of a corporation, and a colorable compliance with the terms of such charter or law, applies to corporations by estoppel, is one upon which there is conflict of authority. The better doctrine seems to be that the estoppel prevails, notwithstanding the law under which the corporation claims to exist may be unconstitutional or otherwise invalid. *Brown v. Atlanta Ry. & Power Co.*, 89 S. E. 71, 73, 113 Ga. 462.

#### CORPORATION FOR MUNICIPAL PURPOSES.

Const. art. 11, § 6, providing that "corporations for municipal purposes" shall not be created by special laws, cannot be construed to include counties. *People v. Mc*

Fadden, 22 Pac. 851, 853, 81 Cal. 489, 15 Am. St. Rep. 66.

Const. art. 8, §§ 4, 5, declare that corporations may be created for municipal purposes by special act, but that no municipal corporations, except cities of over 5,000, shall be created by special act. Held, that a corporation for municipal purposes is either a municipality, such as a city or town, created expressly for local self-government with delegated legislative powers, or it may be a subdivision of the city for governmental purposes, such as a county, a school or a road district, but it must express some of the functions of government, either local or general. *State ex rel. Chouteau v. Leffingwell*, 54 Mo. 458, 465.

### CORPORATION OF THIS STATE.

A corporation organized under the laws of another state, though permitted to do business in Michigan, cannot maintain a proceeding to prevent a corporation organized in Michigan from taking a similar name, under How. Ann. St. § 3960d3, providing that corporations organized in this state shall not take any name in use by any other organization of this state, etc.: the foreign corporation not being a "corporation of this state," within the meaning of the law. *People v. Home Life Assur. Co.*, 69 N. W. 653, 654, 111 Mich. 405.

### CORPORATIONS ORGANIZED UNDER ACTS OF CONGRESS.

The Supreme Court has repeatedly held that, where corporations are consolidated under and by virtue of an act of Congress, they are to be treated as corporations formed and organized under the act of Congress. *United States v. Stanford* (U. S.) 70 Fed. 348, 361, 17 C. C. A. 143 (citing *United States v. Central Pac. R. Co.*, 99 U. S. 449, 450, 25 L. Ed. 287; *Ames v. Kansas*, 111 U. S. 449, 4 Sup. Ct. 437, 447, 28 L. Ed. 482; *Pacific R. Removal Cases*, 115 U. S. 1, 14, 5 Sup. Ct. 1113, 29 L. Ed. 319).

### CORPORATION SOLE.

"A corporation sole embraces but a single individual with corporate powers." *Warner v. Beers* (N. Y.) 23 Wend. 103, 172.

"A 'corporation sole,' as defined by Kent (2 Comm. 273), consists of a single person, who is made a body corporate and politic in order to give him some legal capacities and advantages, and especially that of perpetuity, which, as a natural person, he cannot have." *Codd v. Rathbone*, 19 N. Y. 37, 39; *Bank of Havanna v. Wickman* (N. Y.) 16 How. Prac. 97, 98; *Bank of Havanna v. Wickham* (N. Y.) 7 Abb. Prac. 134, 138.

"A 'sole corporation,' as its name implies, consists only of one person, to whom

and his successors belong that legal perpetuity the enjoyment of which is denied to all natural persons." *Thomas v. Dakin* (N. Y.) 22 Wend. 9, 101 (quoting *Ang. & A. Corp.* 18, 19); *Brooks v. Dinsmore*, 8 N. Y. Supp. 103, 15 Daly, 428, 18 Civ. Proc. R. 98. Such corporations, however, cannot take personal property in succession. *Brooks v. Dinsmore*, 8 N. Y. Supp. 103, 15 Daly, 428, 18 Civ. Proc. R. 98 (citing *Terrett v. Taylor*, 13 U. S. [9 Cranch] 43, 3 L. Ed. 650).

When a minister of a town or parish is seised of any lands in the right of the town or parish, which is the case of all parsonage lands or lands granted for the use of a minister, or of the minister for the time being, the minister, for this purpose, is a sole corporation, and holds the same to himself and his successors. *Inhabitants of First Parish in Brunswick v. Dunning*, 7 Mass. 445, 447.

Under Act Feb. 22, 1786, ministers hold parsonage lands in succession as sole corporations, and their rights and remedies as such are clearly defined under the common law. They stand on the same foundation as to their parsonages with all other sole corporations holding lands in succession at common law. A minister holds parsonage lands in right of his parish or church, and on his resignation, deprivation, or death the fee is in abeyance until there be a successor. *Weston v. Hunt*, 2 Mass. 500, 501.

### CORPORATORS.

A corporator is one who is a member of a corporation; one of the stockholders or constituents of the body corporate. In re *Atlantic Mut. Life Ins. Co.* (U. S.) 16 Alb. Law J. 453, 454, 2 Fed. Cas. 168, 169.

Under an act providing that the trustees and corporators of any company shall be severally liable for all debts or responsibilities of such company to the amount by him or them subscribed, until the whole amount of the capital of such company shall have been paid in, etc., it is held that stockholders are included in the terms "trustees and corporators." *Shufeldt v. Carver*, 8 Ill. App. (8 Bradw.) 545, 548. Not merely commissioners or promoters of corporations so organized. *Gulliver v. Roelle*, 100 Ill. 141, 147.

The term "corporators," as used in *Bankr. Act* March 2, 1867, c. 176, § 37 (14 Stat. 535), providing that the filing of a petition in bankruptcy on behalf of a corporation can only be duly authorized by a vote of the majority of the corporators at any meeting called for the purpose, means those who are members of the corporation; that is to say, the constituents or stockholders of the corporation. In re *Lady Bryan Min. Co.* (U. S.) 14 Fed. Cas. 928, 927.

Corporators are the associates who are the getters up of a corporation, and whose

functions cease with its organization. And so, where a charter of a corporation provided that "the trustees and corporators of any company organized under this act and those entitled to a participation in the profits" were to be held liable "until the whole amount of the capital raised by the company shall have been paid in and a certificate thereof recorded," it was presumable that the capital and certificate referred to were those required prior to the complete organization of the company. *Chase v. Lord*, 77 N. Y. 1, 11.

## CORPOREAL

"Corporeal things" are such as are made manifest to the senses, which we may touch or take, which have a body, whether animate or inanimate. Of this kind are fruits, corn, gold, silver, clothes, furniture, lands, meadows, woods, and houses. *Civ. Code La.* 1900, art. 460.

Corporeal things, in the Spanish civil law, are those things which may be seen and touched, and are either moveable or immoveable; the moveables being those which can move naturally by themselves or be moved by man, and immoveables being those which can neither move naturally nor be moved by man. *Sullivan v. Richardson*, 14 South. 692, 708, 33 Fla. 1.

## CORPOREAL HEREDITAMENTS.

Corporeal hereditaments are the substance, which may be always seen, always handled. 2 Bl. Comm. 19. Kent says corporeal hereditaments are confined to land. *Whitlock v. Greacen*, 21 Atl. 944, 48 N. J. Eq. (3 Dick.) 359 (citing 3 Kent, Comm. 402).

Leases of coal stone and other like material are corporeal hereditaments, and constitute the essential part of the land itself, and are capable of absolute grant. *Federal Oil Co. v. Western Oil Co.* (U. S.) 112 Fed. 373, 375.

The right which a party has to the use of water flowing over his own land is identified with the realty, and is a real or corporeal hereditament, and not an easement. But the right of a party to have the water of a stream or water course flow to or from his lands or mill over the land of another is an "incorporeal hereditament" and an easement. *Gary v. Daniels*, 46 Mass. (5 Metc.) 236, 238.

A railroad's franchise is an incorporeal hereditament, as distinguished from land, which is a corporeal hereditament. *Gibbs v. Drew*, 16 Fla. 147, 149, 26 Am. Rep. 700.

## CORPOREAL OATH.

The terms "corporeal oath" and "solemn oath" are used synonymously, and an oath taken with unlifted hands may be prop-

erly described by either term. "Corporeal oath" is defined by Webster as a solemn oath, so called from the ancient usage of touching the corporale, or cloth, that covered the consecrated emblems. *Jackson v. State* (Ind.) Smith, 124, 125.

## CORPS.

See "Marine Corps."

## CORPSE.

In Rev. St. § 3764, prescribing the penalty against persons, etc., having the unlawful possession of the corpse of a deceased person, the word "corpse" does not apply to the remains of persons long buried and decomposed. *Carter v. City of Zanesville*, 52 N. E. 128, 127, 59 Ohio St. 170.

## CORPUS.

*Corpus delicti* distinguished, see "Corpus Delicti."

A body or substance, as used with reference to property, means the res or thing itself. Thus, the roadway, embankment, superstructure, and equipment constitute the corpus of a railroad property. *Jackson v. Ludeling*, 99 U. S. 513, 521, 25 L. Ed. 460.

With reference to the funds of an estate, the corpus is the principal of a devise or bequest as distinguished from the income derived therefrom. In other words, it is the body of the estate, devise, or bequest from which the income is derived. *Appeal of Earp*, 75 Pa. (25 P. F. Smith) 119, 123; *Keyser v. Mitchell*, 67 Pa. (17 P. F. Smith) 473, 476.

## CORPUS DELICTI.

"Corpus delicti" means literally the body of the crime or offense. Webster defines it to be the substantial and fundamental fact of the crime having been committed; the proof essential to establish a crime; the subject of the crime itself as the body of the person murdered. *White v. State*, 49 Ala. 344, 347.

The corpus delicti is the fact that the crime charged has been actually perpetrated. *Goldman v. Commonwealth*, 42 S. E. 923, 924, 100 Va. 865.

"In a criminal case there must always be shown the fact that some crime has been committed. In other words, there must be a corpus delicti. That is, if a man openly confesses that he has killed another at a certain time, unless there is proof that the man was actually killed, even though the missing man may not come back, the confession amounts to nothing." *State v. Hand* 41 Atl. 192, 1 Marv. 545.

The corpus delicti is made up of two things: First, certain facts forming its basis; and, secondly, the existence of criminal agency as to the cause of them. *People v. Jones*, 55 Pac. 698, 699, 123 Cal. 65; *McBride v. People*, 37 Pac. 953, 955, 5 Colo. App. 91; *Pitts v. State*, 43 Miss. 472, 480.

The expression "corpus delicti" means primarily the body of the offense. This term means, when applied to any particular offense, that the particular crime charged has actually been committed by some one. It is made up of two elements: (1) That a certain result has been produced, as that a man has died or a building has been burnt or a piece of property is not in the owner's possession; (2) that some one is criminally responsible for the result. *State v. Millmeier*, 72 N. W. 275, 277, 102 Iowa, 692.

The "corpus delicti" is the body of a crime. The body upon which a crime has been committed, e. g., the corpse of a murdered man—the charred remains of a house burned down. In a derivative sense, the substance or foundation of a crime; the substantial fact that a crime has been committed, "or that the death of the person indicated in the indictment has been caused or accomplished by the acts of personal violence, or the direct criminal agency of some other human being or beings." *People v. Dick*, 37 Cal. 277, 281.

#### Agency or identity of defendant.

Proof of corpus delicti involves two things: First, a criminal act; second, the defendant's agency in the production of the act. *State v. Dickson*, 78 Mo. 438, 441.

The corpus delicti—that is, the body of the offense—includes the production of a dead body, and proof that death was caused, not by natural causes, but by violence, and excludes accident or suicide. It has generally been held by the authorities to also include the identity of the victim and the identity of the party causing the death. In *Lovelady v. State*, 14 Tex. App. 545, 560, the court said: "The corpus delicti consists of two things: First, the criminal act; and, second, the defendant's agency in the commission of such act. Generally speaking, the criminal agency of defendant in producing the death is so involved as that testimony on both issues is admitted at the same time. But, undoubtedly, there may be cases where the court should insist that the evidence of corpus delicti should first be established before any proof of criminal agency is admitted. While, as a general proposition, the corpus delicti may be proved by circumstances, yet under Pen. Code, § 654, the proof of identity must be established by evidence outside the death of the party, and the remains of deceased or portions of them must be sufficiently identified to establish

the death of the party." *Gay v. State*, 60 S. W. 771, 772, 42 Tex. Cr. R. 450.

The corpus delicti is the body or substance of the offense. This means and has always meant the existence of the criminal fact. In prosecutions for murder proof of the corpus delicti involves the establishment of fact that a murder has been committed, but includes neither the identity of the person alleged to have been killed nor the killing by the person accused. Evidence that a murder has been done, whether by the defendant or another, is proof of the offense. *State v. Calder*, 59 Pac. 903, 906, 23 Mont. 504.

"Corpus delicti" is defined in *Whart. Cr. Ev.* § 325, as follows: A corpus delicti, a proof of which is essential to sustain a conviction, consists of a criminal act, and to sustain a conviction there must be proof of the defendant's guilty agency in the production of such act. *Flower v. United States (U. S.)* 116 Fed. 241, 53 C. C. A. 271.

The corpus delicti in all cases of homicide must be proved as an essential condition of conviction. To the corpus delicti, in this sense, it is requisite (1) that the deceased should have been shown to have died from the effect of the wound; (2) that it should appear that this wound was unlawfully inflicted, and that the defendant was implicated in the crime. 2 *Whart. Cr. Law*, § 811. Proof of drunken quarrels ending in no serious injury, which are shown by the autopsy not to be the cause of the death, are not proof of corpus delicti. *McBride v. People*, 37 Pac. 953, 955, 5 Colo. App. 91.

#### Corpus distinguished.

The term "corpus delicti" involves the element of crime on a charge of homicide. Producing the dead body does not establish a corpus delicti; it would simply establish the corpus. On a charge of arson mere proof that a building was destroyed by fire does not establish the corpus delicti. *People v. Simonsen*, 40 Pac. 440, 107 Cal. 845.

#### In homicide.

This expression "corpus delicti" figured largely in criminal trials from an early day, and yet its precise scope, force, and application have not been and cannot be embodied in a proposition or rule applicable to all cases. The idea indicated by it is not obscure. Thus, on a charge of murder, the corpus delicti is the killing of a human being, and is proved by evidence of the finding of a dead body under such circumstances as would indicate that the killing was felonious. *State v. Potter*, 52 Vt. 33, 38.

"Corpus delicti" is a term used in criminal law, which means the commission of the offense as charged; and in the case of homicide must not only include a death by vio

lence, but must "to a reasonable extent exclude the hypothesis of suicide or death by the act of another person." *Commonwealth v. Webster*, 59 Mass. (5 Cush.) 295, 319, 52 Am. Dec. 711.

The term "corpus delicti" involves the element of crime, and in murder it is that the death was caused by criminal means used by another person, and not by his own act or by accident, where the death had been proved by identification of the body of the deceased. *People v. Tapia*, 63 Pac. 1001, 1003, 181 Cal. 647.

The first branch of a case of murder, the "corpus delicti," as it is termed in the law, by which is meant the body of the crime, the fact that the murder has been committed, must be clearly and conclusively proved by the government. The corpus delicti is made up of two things: (1) Of certain facts forming the basis of the corpus delicti, by which is meant the fact that a human being has been killed; the second, the existence of criminal and human agency as the cause of the death. *Ruloff v. People*, 18 N. Y. 179, 182. "Corpus delicti" which must be proved in a prosecution for homicide means the fact that deceased is dead, and that his death was criminally caused. *State v. Miller*, 32 Atl. 137, 139, 9 Houst. 564; *United States v. Williams*, 28 Fed. Cas. 636, 644; *Pitts v. State*, 48 Miss. 472, 480.

## CORRAL

To "corral" means to surround or inclose; to coop up; to put into a close place. This need not necessarily be done by means of an artificial structure, but may also be done by means of, or through the agency of, men and dogs, either alone or in conjunction with natural or artificial barriers of an inanimate nature, and is so used in Pen. Code, § 374, as amended March 3, 1893. *People v. Borda*, 38 Pac. 1110, 1112, 105 Cal. 636.

## CORRECT.

In an agreement submitting mutual accounts between the parties to arbitration, a stipulation that the party shall accept the annexed statement of disbursements and collections as correct to date, the word "correct" could not have meant complete, so as to exclude all omitted items of disbursements or collections, but the meaning and intent of the phrase was that the schedule should be taken to be correct as far as they went and as to the items therein specified. *Adams v. MacFarlane*, 65 Me. 143, 151.

In Tax Law, art. 11, §§ 250-256, providing that a petition for writ of certiorari to review an action of the commissioners must contain a statement that application has been made in due time to the proper officers to correct such assessment, the word

"correct" was employed in its ordinary sense, and in accordance with its proper meaning, in connection with the particular subject-matter to which it referred. Where the assessment is illegal, it is appropriately required to be stricken from the assessment roll; but where there was authority to make it, but error only in the manner of making it, the direction, with equal aptness, is that it should be corrected. *People v. Feitner*, 64 N. Y. Supp. 321, 324, 80 Misc. Rep. 641

### As revise.

Militia Act 1834 directs that the roll of the company shall be annually revised on the first Tuesday of May, and corrected from time to time, as the company may require. Held, that the words "corrected" and "revised" as there used were synonymous, and the word "corrected" implied and contained the term "revised." *Cox v. Stevens*, 14 Me. (2 Shep.) 205, 207.

The words "revision" and "correction," as used in the statute providing that a property owner may by petition to the city council object to its acts and proceedings, and show wherein he may have been or may be wronged or injured thereby, and ask for a revision or correction of the same, mean that the council may be called upon to review that which had been done, and make the proceeding conform to the law. *Hutcherson v. Storie*, 51 S. W. 848, 852, 92 Tex. 685, 45 L. R. A. 289, 71 Am. St. Rep. 884.

### Validity of debt implied.

The word "correct" in a statute providing that the final settlement of an executor's account in the statutory method shall be evidence that the charges for moneys paid to creditors, legatees, and next of kin are correct, cannot mean less than that the validity of a debt and the right of a legatee are as much pronounced correct as is the fact of his reception of the money. *Wright v. Trustees of Methodist Episcopal Church*, 1 Hoff. Ch. 202, 214.

## CORRECT COPY.

See "Complete Transcript."

St. 1890, c. 421, § 21, relating to insurance, and providing that a correct copy of the application shall be attached to every policy which refers to it as part of the policy or as having any bearing on the contract, etc., includes one which does not differ in substance from the original, mere clerical errors not affecting the meaning of the application and misspelling being immaterial. *Nugent v. Greenfield Life Ass'n*, 52 N. E. 440, 441, 173 Mass. 278.

A transcript of a justice of the peace exhibiting a complete proceeding and judgment against the defendant therein named, and certified as a "true and correct copy," is ad-

missible as evidence in support of a deed on a sale of real estate on execution thereunder, under Rev. St. 1894, § 624, Rev. St. 1881, § 612, which requires such justice to make out and certify a "true and complete transcript" of the proceedings and judgment; the phrases "true and correct copy" and "true and complete transcript" being equivalent terms. *Collier v. Collier*, 49 N. E. 1063, 1064, 150 Ind. 276.

The clerk in his certificate stated that the transcript of the judgment is a true and correct copy. A point was made that the certificate was insufficient for the reason that the word "correct" is used instead of the word "complete"; that the certificate should have stated that the transcript of the judgment is a true and complete copy. There is nothing in this objection. *Bailey v. Martin*, 21 N. E. 346, 347, 119 Ind. 103; *Yeager v. Wright*, 13 N. E. 707, 709, 112 Ind. 230.

#### CORRECT DESCRIPTION.

The mechanic's lien statute, requiring notice of lien to contain a "correct description" of the property on which the lien is intended to be enforced, means a description "which identifies the individual object intended to be designated." It does not mean a technical description. *Gordon v. South Fork Canal Co.* (U. S.), 10 Fed. Cas. 817, 819; *Springer v. Kroeschell*, 43 N. E. 1084, 1088, 161 Ill. 358.

#### CORRECT ENTRY.

An indorsement of an examiner in the appraiser's department on an entry that it was correct merely meant that the entry was sufficient to cover the market value of the goods. *Robertson v. Bradbury*, 10 Sup. Ct. 158, 159, 132 U. S. 491, 33 L. Ed. 405.

#### CORRECT PLAT.

The statement in a surveyor's affidavit that the "plat is a correct plat" meant that the land is correctly platted and laid out. *Timothy v. Chambers*, 11 S. E. 598, 85 Ga. 267, 21 Am. St. Rep. 163.

#### CORRECTION.

The words "revision" and "correction," as contained in a city charter (Sp. Laws 1893, p. 25, § 27), relating to special assessments, and providing that any person might present a petition to the city council showing wherein he had been or may be injured by a proposed improvement, and asking for a "revision or correction of the same," means that the council may be called upon to review that which had been done, and to make the proceedings conform to the law, but it does not empower the council to do anything that it or its officers could not have done in the first instance. *Hutcheson v. Storrie*, 51 S. W. 848,

852, 92 Tex. 685, 45 L. R. A. 289, 71 Am. St. Rep. 884.

### CORROBORATE.

As defined in Black's Law Dictionary, the word "corroborate" means "to strengthen; to add weight or credibility to a thing"; and an instruction by the court that the term means to strengthen, to make more certain, to give additional strength, is correct. *Still v. State* (Tex.) 60 S. W. 355, 358.

To corroborate means to strengthen. Therefore Comp. Laws, § 7384, providing that a conviction cannot be had upon the testimony of an accomplice unless he be "corroborated" by other evidence tending to connect the defendant with the commission of the offense, does not require that the corroborative evidence be such as will of itself support a conviction, but only that it shall support or strengthen that of the accomplice in the respect that it tends to connect the defendant with the commission of the crime. *State v. Hicks*, 60 N. W. 66, 67, 6 S. D. 325.

"The usual sense of the word 'corroborate' is strengthen, and in a legal sense, especially as used in the Criminal Code, evidence is said to be corroborated when it is fortified by other evidence of consistent facts, or facts which increase the probability of the truth of the testimony in question. But in another, but still a proper, sense, a witness may be said, and often is said, to be corroborated by his manner, his character, the circumstances surrounding the transaction; in short, as serve to strengthen his testimony, to render it more probable to impress a jury with a belief in its truth." *Scheffer v. Hatch*, 25 N. Y. Supp. 240, 241, 70 Hun, 597.

#### CORROBORATING CIRCUMSTANCES.

See "Strong Corroborating Circumstances"; "Strongly Corroborated."

The expression "corroborating circumstances," as employed in Hill's Code, § 1778, requiring two witnesses, or one witness and "corroborating circumstances," to convict a prisoner of the crime of perjury, means evidence allunde which tends to prove the prisoner's guilt independent of his declaration. *State v. Buckley*, 22 Pac. 838, 840, 18 Or. 228.

#### CORROBORATING EVIDENCE.

"The term 'corroborating evidence,' as found in the books, is used in two distinct senses—the one general, the other special or technical. In the general sense it is used when we say that in any case, and as to any evidence, it was or was not corroborated. In this sense the evidence has no other function than to aid other evidence of a like or different character in giving it additional weight. Such other evidence, so aided, may or may not be sufficient of itself; that is a question

solely for the jury. General corroborating evidence may corroborate any material evidence already in, whether that evidence goes directly to the issue or necessary legal elements in the case, or to giving solidity to a link merely in the chain of proof. In the special or technical sense of corroborating evidence, on the other hand, we are dealing with a substantive quantum of evidence without which the case of the party who is compelled to produce it must inevitably fail. Its materiality goes to the very core of the case. We find special or technical corroborating evidence necessarily present in at least three distinct classes of cases: First, in criminal cases, where it is sought to convict an accused upon the testimony of an accomplice alone; second, in civil cases, where the testimony is given by a witness as to some transaction of the party, dead at the time the evidence is required; third, classes of cases in which technical corroborating evidence is required in proving wills, and in some jurisdictions in proving the signature to deeds." As used in Comp. Laws, § 2082, providing that, in a suit by or against heirs, executors, administrators, or assigns of a deceased party, an opposite or interested party to the suit shall not obtain a verdict, judgment, or decision on his own evidence in respect to any matter occurring before the death of the deceased person, unless such evidence is corroborative of some other material evidence, means "such evidence as tends in some degree, of its own strength and independently, to support some essential allegation of issue raised by the pleadings testified to by the deceased as evidence sought to be corroborative, which allegation or issue, if unsupported, would be fatal to the case; and such corroborating evidence must of itself, without the aid of other evidence, exhibit its corroborative character by pointing with reasonable certainty to the allegation or issue which it supports. And such evidence will not be material unless the evidence sought to be corroborated itself supports the allegation or point in issue." *Gildersleeve v. Atkinson*, 27 Pac. 477, 478, 6 N. M. 250.

The word "corroborating" is a word apt and fitting, and generally adopted by judges and law writers to indicate evidence confirmatory of that already given, and, under the rule that proof of seduction must be made by some corroborating evidence which does not emanate from the mouth of the seduced female, it must not rest wholly upon her credibility, but must be such evidence as adds to, strengthens, confirms, and corroborates her testimony. The change in the statement of the rule in an instruction that there must be independent evidence of such facts to that of corroborating evidence was proper. *Mills v. Commonwealth*, 22 S. E. 863, 93 Va. 815.

Corroborating evidence must be such as tends to connect the accused with the offense committed, and is not sufficient if it merely

shows the commission of the crime, and the corroborating evidence may be either direct or circumstantial. *Hozier v. State*, 6 Tex. App. 501, 503.

"Corroborative evidence" is additional evidence of a different character to the same point. Code Civ. Proc. Cal. 1903, § 1839; Ann. Codes & St. Or. 1901, § 692.

Act March 12, 1870, § 2 (Stat. 1869-70, p. 291), provides that no divorce shall be granted on the testimony of either husband or wife, "unless corroborated by other evidence." The statute does not define to what extent the corroboration must go. In the very nature of the case, it would be impossible to lay down any general rule as to the degree of corroboration which will be requisite. Hence the statute only requires that there shall be some corroborating evidence. *Evans v. Evans*, 41 Cal. 103, 108.

The corroborating evidence required by Gen. St. 1878, providing that a conviction cannot be had on the testimony of an accomplice unless he is corroborated by such other evidence as tends to convict the defendant of the offense, the circumstances thereof must, independently of the testimony of the accomplice, tend in some degree to establish the guilt of the accused, but need not be sufficiently weighty or full, as standing alone, to justify a conviction. *State v. Lawlor*, 25 Minn. 216, 223, 9 N. W. 608, 702.

The expression "corroborated strongly," as used in Code Cr. Proc. art. 746, providing that in trials for perjury no persons shall be convicted except upon the testimony of two credible witnesses, or of one credible witness strongly corroborated by other evidence as to the falsity of the defendant's statement under oath, means that the corroborating evidence must relate to a material matter—that is, must tend to show the falsity of defendant's oath—and, taken altogether, it must be, in the opinion of both the court and the jury, strong—that is, cogent, powerful—and calculated to make a deep or effectual impression upon the mind. This character of corroborating evidence may be produced by the proof of independent facts or circumstances which, when considered separately, would not be sufficient, but when considered in the concrete would be strong. In other words, the corroboration may be by circumstantial evidence, consisting of proof of independent facts which together tend to establish the main fact—that is, the falsity of the oath—and which together strongly corroborate the truth of the testimony of a single witness who has testified to such falsity. *Hernandez v. State*, 18 Tex. App. 134, 149, 51 Am. Rep. 295.

## CORRUGATED.

The word "corrugated" is an English word well known, meaning "wrinkled," and

as used in the term "shirred or corrugated goods" means "wrinkled." The word "corrugated" is used to explain, what otherwise might be unintelligible to the uninitiated, the word "shirred." *Day v. Stelman* (U. S.) 7 Fed. Cas. 262, 265.

"Corrugated" or "shirred" India-rubber goods is a name given to India-rubber goods, manufactured under a Goodyear patent, "by the stretching of strips or threads of India-rubber to such an extent as may be desired, and covering the strips or threads on opposite sides with laminae of cloth, leather, or other suitable material, which laminae are united to each other and to the strips or threads by means of India-rubber cement, which will by the contraction of the strips or thread of India-rubber become corrugated so as to form distinct plaits between them, and present a corded appearance." *Goodyear v. Cary* (U. S.) 10 Fed. Cas. 649, 652.

## CORRUPT.

The term "corrupt" imports a wrongful desire to acquire or cause some pecuniary or other advantage to or by the person guilty of the act or admission referred to, or some other person. *Gen. St. Minn. 1894, § 6842, subd. 2; Pen. Code N. Y. 1903, § 718.*

The word "corrupt," as used in the definition of a crime, such as conspiracy, means doing of an unlawful or prohibited act. *United States v. Johnson* (U. S.) 26 Fed. 682, 683; *United States v. Frisbie* (U. S.) 28 Fed. 808, 809.

A statute defining "usury" as the taking of more than legal interest with a "corrupt" intent means merely the intent to get more for the use of the money than the law allows. The word "corrupt" indicates, as there used, merely the commission of an unlawful act; and hence proof that the lender charged usury, or is responsible for it, sufficiently shows the corrupt intent. *New England Mortg. Sec. Co. v. Gay* (U. S.) 83 Fed. 636.

"Corrupt" is variously defined. *Anderson*, in his Dictionary, defines it as meaning to do an act for unlawful gain; and the same author defines the word "corruption" to be an act done with intent to gain advantages not consistent with official duty and the rights of others. "Corrupt" is also defined to be dishonest, without integrity, guilty of dishonesty, involving bribery, or a disposition to bribe or to be bribed. Where the chief of police ordered two unoffending citizens to be arrested, and while under arrest used towards them the most profane and insulting language, his acts, though willful and malicious, would not be corrupt unless prompted by some dishonest or knavish motives, as, for example, bribery, or unlawful gain, or some dishonest benefit to

the officer or to some one in favor with him. *State v. Ragsdale*, 59 Mo. App. 590, 603.

"Corrupt," as used in *St. 2 Geo. II, c. 24, § 7*, punishing any person who shall "corrupt or procure any person or persons to give his or their vote or votes," is the agreement for the corrupt act to be done, and it is not essential that the vote should actually be given. It is the act of the party giving the bribe. *Henslow v. Fawcett*, 3 Adol. & E. 51.

## CORRUPT FORBEARANCE.

A corrupt forbearance of money then due is as much within the statute against usury as an original loan, and within the meaning of the statute it is a loan. *Gibson v. Fristoe* (Va.) 1 Call, 62, 73, 1 Am. Dec. 502.

## CORRUPT OLD TORY.

The words "corrupt old Tory," used in reference to a member of the Legislature mean no more than that such person was a Tory of an obnoxious description. The words do not impute that kind of Toryism which distinguish one of the political parties in England, or that which was applicable to one portion of the American community during our revolutionary struggle and for some time afterwards. The words of themselves do not mean that the person referred to was a traitor of some kind, or an enemy to his country. They merely impute to him the advocacy of a particular candidate for the presidency. If anything more than general scurrility was meant, the words impute some political creed or heresy which the person spoken of considered obnoxious. The qualities imputed by the adjective "corrupt" merely represented the person as one possessing a heart of general depravity. The joint application of the epithets "corrupt" and "Tory" has a tendency rather to qualify and limit, than to extend, the former, by confining it to political feelings or sentiments. *Hogg v. Dorrah* (Ala.) 2 Port. 212, 217.

## CORRUPTION.

"Corruption," as applied to public officers, is a hard word, not always accurately understood, covering a multitude of delinquencies, great and little. But it is strictly accurate to apply it to any color of influence, of mere relation of any kind, on the administration of justice. *Wight v. Rindskopf*, 43 Wis. 844, 351.

*Bouvier*, in his Law Dictionary, defines "corruption" as being "something against law," and illustrates its application by the case of a contract for usurious interest, wherein it was "corruptly agreed," etc. *Chicago City Ry. Co. v. Olla*, 94 Ill. App. 823, 824.



**CORRUPTION OF BLOOD.**

"Corruption of blood" was an incident on an attainder for treason or felony. The doctrine of corruption of blood was of feudal origin, introduced after the Norman Conquest. The blood of the attainted person was deemed to be corrupt, so that neither could he transmit his estate to his heirs, nor could they take by descent from the ancestor. The crime of the attainted felon was deemed a breach of the implied condition in the donation of the feud "*dum bene segeserit*," and, the descent to his heirs being interrupted by the corruption of blood, his lands escheated to the lord. But this escheat was subordinate to the prior and superior law of forfeiture. *Avery v. Everett*, 18 N. E. 148, 150, 110 N. Y. 317, 1 L. R. A. 264, 6 Am. St. Rep. 368.

The expression "corruption of blood," as used in the Constitution, declaring that no attainer of treason shall work corruption of blood or forfeiture except during the life of the person attainted, when applied to a specific piece of property, is but another form of the expression "or forfeiture during the life of the offender." *Heirs of Szymanski v. Zuntz* (U. S.) 20 Fed. 361, 362.

**CORRUPTLY.**

The word "corruptly" imports a wrongful design to acquire or cause some pecuniary or other advantage to the person guilty of the act or omission referred to, or to some other person. Pen. Code Ariz. 1901, par. 7, subd. 3; Gen. St. Minn. 1894, § 6842, subd. 2; Pen. Code Mont. 1895, § 7, subd. 4; Rev. St. Utah 1898, § 4053; Rev. St. Okl. 1903, § 2688; Ann. Codes & St. Or. 1901, § 2178; Rev. Codes N. D. 1899, § 7715; Pen. Code S. D. 1903, § 810; Pen. Code N. Y. 1903, § 718; Pen. Code Idaho 1901, § 4544, subd. 3; Pen. Code Cal. 1903, § 7, subd. 3.

The terms "willfully and corruptly," in Code, § 1090, providing that it shall be criminal for any officer who is required to take an oath of office to willfully and corruptly do anything contrary to the true intent and meaning thereof, import that there must be a corrupt motive; and therefore the act of county commissioners in accounting for and receiving a greater amount of mileage than is due them is not a violation of the statute, where the money is not taken with any fraudulent motive. *State v. Norris*, 16 S. E. 2, 111 N. C. 652.

The court, instructing the jury in a perjury case, used the following words, "has intentionally, corruptly, willfully," etc. In such connection "corruptly" refers to the motive of the witness rather than the means by which his testimony is obtained, and the word could not be construed so as to imply that the witness had been bribed. In *Overtoom v. Chicago & E. I. R. Co.*, 54 N. E. 898,

181 Ill. 323, it is said: "It is the corrupt motive, or the giving of false testimony knowing it to be false, that authorizes a jury to disregard the testimony of a witness." And in 1 Bouv. Law Dict. it is said: "An act may be corruptly done, though the advantage to be derived from it be not offered by another." "It would seem that a witness who should testify 'willfully, and for the purpose of concealing the truth,' would bring himself within the meaning of 'corruptly testifying.'" *Chicago City Ry. Co. v. Ols*, 61 N. E. 459, 192 Ill. 514; *Id.*, 94 Ill. App. 323, 324.

In law, "corruptly" means more than mere illegal conduct, and implies moral turpitude and intentional fraud. It is synonymous with "actual and intentional wrongdoing" or "willful and corrupt dealing." *Worsham v. Murchison*, 66 Ga. 715, 719.

**As knowingly.**

The word "corruptly" is not as broad in its meaning as "willfully," but signifies the doing of an act for unlawful gain; viciously; crookedly. An allegation, in an indictment for perjury, that the defendant's testimony was "willfully and corruptly" false, was equivalent to alleging that it was "knowingly" false. *State v. Stein*, 51 N. W. 474, 475, 48 Minn. 466.

The description of an oath sworn to by defendant in a prosecution for perjury, whereby it is charged that the person has sworn "falsely, knowingly, and maliciously," necessarily involves "corruptly," which is the language used by the statute, as an oath could not have been taken willfully, knowingly, maliciously, and falsely without being corruptly done. *State v. Bixler*, 62 Md. 354, 356.

An indictment charging that defendant "willfully and corruptly" testified to what was averred to be untrue implies that the testimony was false to his knowledge. *State v. Smith*, 22 Atl. 604, 607, 63 Vt. 201.

**As willfully.**

"Corruptly" means viciously or wickedly, and, as used in an indictment that defendant corruptly and falsely testified, is not equivalent to "willfully" in the statute making perjury the act of willfully, corruptly, and falsely testifying. *Williams v. People*, 57 Pac. 701, 26 Colo. 272.

The word "corruptly," as used in an indictment for perjury, is not synonymous with "willfully," since "corruptly" means viciously, wickedly, while "willfully" means with design or with some degree of deliberation. Thus, to say that testimony was "corrupt" is to say that it is wicked or vicious, whereas to say that it was "willful" is to aver that it was given with some degree of deliberation; that it was not due to

surprise, inadvertence, or mistake, but to design. *United States v. Edwards* (U. S.) 43 Fed. 67.

## CORVEE.

"Corvée" is a French word, meaning the duty imposed upon labor alone of working the highways, which was a grievance contributing to the Revolution, since which time the roads have been worked by taxation. *State v. Covington*, 84 S. E. 272, 125 N. C. 641.

## COSAS COMUNES.

In Febrero, Novisimo, "cosas comunes" are defined as those "qui sirven a los hombres y demas vivientes, como el aire, el agua llovediza, el mar y sus riberas." Title 1, lib. 2, tit. 1. Both writers cite chapter 3, tit. 28, pt. 3. In Hall's version of the law referred to, there are included in the things belonging as to property to none, and as to use to all living creatures, "air, rain, water, the sea, and its shores." Hall, Mex. Law, 447. This is probably a mistake of the printer. The words of the law are, "el ayre, e el mar, las aguas de la lluvia." Lord Denman remarks that Fleta, enumerating "res communes," omits "aqua profuens." *Mason v. Hill*, 5 Barn. & Adol. 1, 23. By the Mexican law the property in rivers pertained to the nation; the use, to the inhabitants. *Lux v. Haggin*, 69 Cal. 255, 816, 10 Pac. 674, 707.

## CO-SERVANT.

See "Fellow Servant."

## COST.

See "Actual Cost"; "Estimated Cost"; "First Cost"; "Invoice Cost"; "Original Cost"; "Prime Cost"; "Real Cost"; "Whole Cost."

The term "cost" is certainly of an equivocal meaning. Thus the actual "cost" of a bale of goods purchased at Liverpool is composed of the price paid for it, or, in other words, the prime cost and charges, including commissions on the purchase; the packages, if any; and, if the goods were purchased at the manufactory, then it includes not only the prime cost and all charges attending them to the place of exportation, but also the charges before mentioned, and perhaps many others. *Goodwin v. United States* (U. S.) 10 Fed. Cas. 625, 627. So, where it was claimed that a contract for the sale of boilers was to be made "at cost," and the agent of the seller computed what he said the cost was, and inserted it in the contract, the parties will be bound by the figures thus given, it being impossible to determine all the ele-

ments which would enter into the cost of it. Thus it is said that we are all familiar with the seemingly insuperable difficulty of ascertaining the cost, for example, of producing a pound of cotton or of making a yard of cloth; and perhaps no two persons engaged on the problem would agree on the prime elements of the calculation. Even in the simpler application to mere bargain and sale of a thing already in existence and not to be manufactured, the term is ambiguous, and so much so that it is not impossible that often it will be found to avoid the contract for incurable uncertainty. *Hazelton Tripod Boiler Co. v. Citizens' St. Ry. Co.* (U. S.) 72 Fed. 317, 321.

"The word 'cost' is of limited significance, much narrower than 'damages,' for instance, which, in the case of laying out one railroad over and across another, has been held not to include compensation for the interruption and inconvenience to the business of the latter occasioned thereby. *Massachusetts Cent. R. Co. v. Boston, C. & F. R. Co.*, 125 Mass. 124. In *Lexington & W. C. R. Co. v. Fitchburg R. Co.*, 75 Mass. (9 Gray) 226, the actual 'cost' of running trains was held not to include interest on cars, and to mean money actually paid out. And in *Alphonso v. United States*, 1 Fed. Cas. 395, under the revenue act of 1799, c. 128, § 66, it has been held that the words 'actual cost' mean the actual price paid by the bona fide purchasers, and not the market value, thus excluding any idea of profit or return. 'Actual cost' means real cost, as distinguished, among other things, from estimated costs, or other market price, which may include matters which do not enter into the real cost." Thus the term as used in St. 1890, c. 428, providing for the abolition of grade crossings, and providing for the payment of the "total costs" of the alterations, does not include the cost of the new station, but only the cost of altering the old one and making it conform to the new tracks and new approaches, and does not authorize the allowance of a reasonable advance on the actual cost of doing the work, so as to give a proper return on the portion of the road used outside of the limits of the improvement in carrying material excavated, and his compensation for interference with other traffic. In *re City of Newton*, 51 N. E. 163, 185, 172 Mass. 5.

A city charter provided that the cost of construction of sidewalks should be defrayed by the owners of the land fronting thereon, and that the cost might be collected by sale of the lot, etc. Held, that where the sidewalks were paid for by bonds, and the city's credit was such as to cause her a loss in so doing, the loss did not constitute a part of the legitimate cost of the work chargeable on the lot, but that the cash value of the bonds when paid out represented the actual cost of the work. *City of Galveston v. Heard*, 54 Tex. 420, 449.

"Cost," within the provision of the act of May 5, 1892, permitting a Chinese laborer arrested without a certificate of residence to show that he was entitled to such certificate, but was prevented by accident, sickness, or other unavoidable cause from procuring it, and declaring that upon proper proof a certificate shall be granted to him upon his paying the "costs," does not mean the cost of his arrest and trial, but merely the cost of the certificate. *United States v. Tye* (U. S.) 70 Fed. 318, 319.

#### Of books.

A contract between publishers, by which one agrees to take any volumes of a certain book which the other may ship within a certain time "at the cost thereof," will mean all the cost thereof, including an allowance to the author, in the absence of evidence showing that the parties adopted a different construction of such language. *Gray v. Harper* (U. S.) 10 Fed. Cas. 1010, 1014.

#### Of commitment.

In Act July 20, 1790, relating to the arrest of a seaman absenting himself from his vessel, and providing that the master shall pay the cost of the commitment, to be deducted out of the seaman's wages, the word "cost" has the large and full sense of charge, expense, loss, and detriment, so as to cover the expense of a person necessarily employed in the place of a seaman who has voluntarily absented himself. *Brower v. The Maiden* (U. S.) 4 Fed. Cas. 821, 822.

#### Of distribution of ballots.

Act June 19, 1891, § 13, imposing on a borough auditor the duty of printing and distributing ballots for the election of borough officers, and certifying the "cost of distribution" to the county commissioners for payment as part of the county election expenses, necessarily implies payment for the time expended by the auditor. Giving the words such meaning is not an enlargement of their scope; to say they meant less would be a restriction on their obvious intent. *Corr v. Lackawanna County*, 29 Atl. 745, 746, 163 Pa. 57.

#### Of erection.

A contract for the sale of a lot obligating the vendor to erect a house on the premises, to be completed by a specified day, and making it the purchaser's duty to pay any "increased costs in the erection of the house" caused by alterations made at her direction, cannot be construed to include taxes and interest on a mortgage which the vendor was compelled to pay, after the date fixed for completion of the house and the delivery of a deed, owing to a delay caused by alterations directed by the purchaser, since the mortgage existed as an incumbrance against the land for the erection of the house, and

the taxes would have become a lien against the land before the date originally fixed for the delivery of the deed if the public officials had not accidentally delayed the performance of their statutory duties. *Woolley v. Friedlander*, 22 N. Y. Supp. 213, 67 Hun. 321.

#### Of insurance.

An agreement between the United States and another whereby such other party agreed to furnish all the labor, tools, and materials necessary to cut, dress, and box all the granite necessary for a government building, and the United States agreed to pay the full cost of labor, etc., and "cost of insurance" on the same, was not an agreement to obtain insurance or to become insurers, but the term meant merely that they would pay the "reasonable premiums of insurance" paid by the other party. *Tillson v. United States*, 9 Sup. Ct. 255, 256, 129 U. S. 101, 32 L. Ed. 636.

The "cost of insurance" for one year is the actual sum which will reimburse the insurer for its outlay, including death claims and operating expenses. *Nielsen v. Provident Sav. Life Assur. Soc.*, 73 Pac. 168, 170, 139 Cal. 332, 96 Am. St. Rep. 148.

#### Of seizure.

Under Act July 13, 1866, providing that the cost of seizure made before process issues shall be taxable by the court, it is held that the phrase "cost of seizure" may be properly construed to cover any necessary expenses of watching the property seized by the collector for such time as shall necessarily elapse between the seizure by the collector and the seizure by the marshal under process; but where a collector of internal revenue seized property as forfeited, and did not turn it over to the district attorney to have proceedings commenced for 37 days, and the property being forfeited, the collector presented the bill for watching the property while in his custody, at \$5 per day, as being cost of seizure, it was held that such a charge could not be regarded, under the circumstances, as cost of seizure. *Fifteen Empty Barrels* (U. S.) 9 Fed. Cas. 42.

#### Of tuition.

Act 1886, c. 24, § 45, authorizing the admission to the schools of certain districts of pupils residing outside the district on the payment of the "actual pro rata cost of tuition" for all such children, means the tuition in the separate school districts, and not in the county at large. *State v. Hamilton*, 10 South. 57, 69 Miss. 116.

#### COST PRICE.

Value synonymous, see "Value."

"Cost" is a relative term, and differs in its meaning according to the circumstances.

under which it is used. Thus the "cost price" to an importer is one thing, to a jobber or middleman another, to a retailer another, and to a purchaser from the retailer still another. In determining what the contracting parties mean by such a term, reference must be had to the situation and the circumstances. Ordinarily it would refer to the sum which the seller had himself paid for the article, but it may refer to the sum paid to its original producer, or to some one of the numerous holders through whose hands it has passed between the original producer and the immediate seller. *Herst v. De Comeau*, 31 N. Y. Super. Ct. (1 Sweeny) 590, 605.

A storekeeper agreed to pay a debt in merchandise out of his store, said merchandise to be sold and delivered at not over 25 per cent. of the cost price. Held, that the phrase "cost price" obviously meant the price paid for the goods by the defendant, and could not be construed to mean what they should have cost at fair market rates. *Buck v. Burk*, 18 N. Y. 337, 340.

"Cost price" means the amount paid for goods, or engaged to be paid; and where a discount is offered for payment within certain dates, but the payment is not made, the discount should not be deducted in determining the cost price. *McCoy v. Hastings & Bradley Co.*, 61 N. W. 205, 92 Iowa, 585.

## COSTS.

See "Accrued Costs"; "Attorney's Costs"; "Bill of Costs"; "Double Costs"; "Final Costs"; "Full Costs"; "Interlocutory Costs"; "Legal Costs"; "Reasonable Costs"; "Security for Costs"; "Taxable Costs"; "Trebble Costs"; "With Costs."

All costs, see "All."

Other costs, see "Other."

Sums allowed to the prevailing party by way of indemnity for his expenses in the action are termed "costs." Gen. St. Minn. 1894, § 5497.

"Costs" are an allowance to a party for the expenses incurred in prosecuting or defending a suit, and are an incident to the judgment. *Tillman v. Wood*, 58 Ala. 578; *Stewart v. Corbus*, 13 Pac. 647, 648, 15 Or. 68; *Stanton Co. v. Madison Co.*, 4 N. W. 1055, 1058, 10 Neb. 304; *City Bank of Leadville v. Tucker*, 3 Pac. 217, 218, 7 Colo. 220; *Cary v. Ducker*, 12 S. W. 204, 205, 52 Ark. 103 (citing *Town of Norwich v. Hyde*, 7 Conn. 529, 533); *Musser v. Good* (Pa.) 11 Serg. & R. 247; *Howard Building & Loan Ass'n v. Philadelphia & R. R. Co.*, 102 Pa. 220, 222; *Johnson v. Chicago, M. & St. P. Ry. Co.*, 13 N. W. 673, 674, 29 Minn. 425; *State v. Dyches*, 28 Tex. 535, 542.

"Costs" are but an incident to the judgment, and do not add to its force or effect *Hoover v. King*, 72 Pac. 880, 882, 48 Or. 281.

"Costs" are a pecuniary allowance made by law to the successful party in a suit, or a distinct proceeding within a suit in consideration of and to reimburse his probable expenses. The word "costs" is a word of well-known legal signification. It signifies, when used in relation to the expense of legal proceedings, the sums prescribed by law as charged for the services enumerated in the fee bill. *Apperson v. Mutual Ben. Life Ins. Co.*, 38 N. J. Law (9 Vroom) 388, 390; *Neher v. Crawford*, 65 Pac. 156, 157, 10 N. M. 725; *City of St. Louis v. Menitz*, 18 S. W. 30, 31, 107 Mo. 611; *Alexander v. Harrison*, 28 N. E. 119, 2 Ind. App. 47; *Price v. Garland*, 4 N. M. 865, 307, 20 Pac. 182 (citing *Apperson v. Mutual Ben. Life Ins. Co.*, 38 N. J. Law [9 Vroom] 272).

"Costs" are certain allowances authorized by statute to reimburse the successful party for expenses occurred in prosecuting or defending an action or special proceeding. They are in the nature of incidental damages allowed to indemnify a party against the expense of successfully asserting his rights in court. The party to blame pays the costs to the party without fault, and they are never allowed to both parties for the same services in the same court. *Stevens v. Central Nat. Bank*, 61 N. E. 904, 906, 168 N. Y. 590.

Costs which are incurred in prosecuting an action are usually adjudged against the losing party, in addition to the principal sum which may be adjudged against him. *State v. Dyches*, 28 Tex. 535, 542.

At common law no costs were allowed eo nomine, but in actions where the plaintiff recovered damages the jury were allowed to include his expenses, though the defendant, in case he prevailed, had no indemnity for his. *Johnson v. Chicago, M. & St. P. Ry. Co.*, 13 N. W. 673, 674, 29 Minn. 425.

"Costs" are the statutory allowance to a party to an action for his expenses in conducting such action. They have reference only to the parties, and the amounts paid or presumed to have been paid by the parties seeking to recover such expenses. Costs are unknown at common law, and are only given by statutory direction." *Bennett v. Korth*, 15 Pac. 221, 222, 37 Kan. 235, 1 Am. St. Rep. 248.

"Costs are only recoverable by force of a statute, and the allowance of them in any case will depend on the terms of the statute." In taxing costs, the only charges which can be allowed are those specifically provided for in the fee bill, and are not to be increased or diminished at the discretion of the court. *Apperson v. Mutual Ben. Life Ins. Co.*, 38 N. J. Law (9 Vroom) 388, 390.

Any charge for services not enumerated in the statute is not, nor is there any pretense for calling it, "costs." Neither a justice of the peace, nor the circuit court, ever taxes and allows the items of costs on the trial of the case. He only renders judgment in that regard that the party recovers costs, and they are known by the entire profession to be the expenses of a suit which may be recovered by law from the losing party. *Chase v. De Wolf*, 69 Ill. 47, 49.

Code, §§ 303, 304, abolishing all laws giving fees to attorneys, solicitors, and counselors, and giving to the prevailing party instead thereof a certain sum by way of indemnity, or his expenses in the action, and declaring that this allowance shall be termed "costs," intended only to alter or abolish one portion of the law regulating costs, and give the prevailing party the same thing in a different form. The term "costs," as used in section 304, prescribing in what actions costs shall be allowed of course to the plaintiff, comprehended all the costs of a suit, as previously. *Wheeler v. Westgate* (N. Y.) 4 How. Prac. 269, 270.

"Costs" are expenses necessarily incurred in a suit in a court of justice. At common law costs were unknown. Costs are altogether the creature of statute. Speaking of the statute of Gloucester (6 Edw. I) Sir Edward Coke says: "Before this statute at the common law, no man recovered any costs of suit, either in plea real, personal, or mixt. By this time it may be collected that justice was good and cheap of ancient times, for in King Alfred's time there were no writs of grace, but all writs remedialls granted freely." 2 Inst. 288. In the United States, therefore, costs are all regulated exclusively by statute. As a rule costs are given to the prevailing party in civil actions, and the statutes giving them might include the state, when it sues or permits itself to be sued in civil actions. But there is a broad distinction between the status of a state instituting a prosecution in its sovereign capacity, to assert its sovereign rights, to enforce its public laws, or to protect its citizens, and the status of a state suing to enforce mere rights of property, as a person might do in a like case. There is no known statute giving costs against the Crown, nor is the state liable for costs in criminal prosecutions. *Noyes v. State*, 1 N. W. 1, 2, 46 Wis. 250, 32 Am. Rep. 710.

"Costs" are expenses which are incurred either in the prosecution or defense of an action, or of any process at law or equity, consisting of the fees of attorneys, solicitors, or other officers of court; and such disbursements are allowed by law. *Appeal of Jane*, 87 Pa. 428, 430.

Within the provisions of 1 Mills' Ann. St. 1891, § 677, providing that a successful plaintiff may recover against the defendant

his costs to be taxed, the language "his costs to be taxed" cannot mean less than all his costs in the action to be taxed. For, the moment an attempt is made to limit these words to a part of his costs, we are met by the unanswerable question, what part? That which was before clear and certain becomes a matter of doubt and conjecture. *Shreve v. Cheesman* (U. S.) 69 Fed. 785, 789, 18 C. C. A. 413.

#### As all the costs.

Acts 1886-87, pp. 186, 187, amendatory of a former statute, which provides that, whenever a person is convicted and sentenced to the penitentiary, a certified copy of the bill of "costs" in the case shall be delivered to the contractor to whom said convict is assigned, and said contractor shall pay over to the clerk of the court in which the conviction is had the full amount of the "costs of the case," is to be construed as including all the costs in a case in which the convict was jointly tried with certain other defendants. *Dawson v. Sayre*, 80 Ala. 444, 445, 2 South. 479.

The "costs of suit" to which a plaintiff is entitled when he succeeds in a civil action includes all the costs belonging to the action, whether prior or subsequent to the rendition of judgment, and, if new costs accrue, the judgment opens to receive them. *Kitchen v. Woodfin* (U. S.) 14 Fed. Cas. 693, 694.

An award for slander of \$1 damages, and that defendant pay the "costs," entitles the plaintiff to judgment for full costs. The bare finding of costs, without saying more, must be intended to mean such costs as the act, operating on the subject-matter, will allow. *Moon v. Long*, 12 Pa. (2 Jones) 207, 208.

#### Attorney's fees.

The term "costs," when used in the statute, means legal or taxable costs, and does not include attorney's fees. *Brown v. Corey*, 134 Mass. 249, 250; *Guild v. Guild*, 43 Mass. (2 Metc.) 229, 233; *City of St. Louis v. McIntz*, 18 S. W. 80, 31, 107 Mo. 611.

"Costs" include certain sums allowed by Code to a party for the purpose of reimbursing him for amounts paid to his attorney, and also disbursements specified in section 3256 of the Code; and a judgment to the effect that trustees shall not have any "costs" on an appeal is also to the effect that they are not entitled to be reimbursed for the sums paid to their attorneys on the appeal. *In re McEchron*, 67 N. Y. Supp. 18, 20, 55 App. Div. 147.

In its legal sense, the term "costs" denotes not only the expenses incurred by reason of being a party to legal proceedings, but also the charges which an attorney is entitled to recover for his professional services. *Rap & L. Law Dict.* A stipulation in a note to

pay "all costs for collecting the above, not less than ten per cent.," includes an attorney's fee for bringing suit. *Williams v. Flowers*, 90 Ala. 136, 137, 7 South. 439, 24 Am. St. Rep. 772.

Under Comp. Laws, § 6065, permitting a justice on such terms as he may see fit, and on payment of costs, to set aside the default judgment, the term "costs" includes an attorney's fee specified in section 6143. *Erepnabach v. Chicago, M. & St. P. R. Co.*, 8 S. D. 575, 579, 67 N. W. 606.

The word "costs," when applied to legal proceedings, does not include counsel fees. A contract settling a suit, and requiring defendant to pay the plaintiff's claim and "costs," was construed not to require defendant to pay the fees of plaintiff's attorney. *Mutual Life Ins. Co. v. Kroehle*, 61 N. Y. Supp. 944, 945, 29 Misc. Rep. 481. See, also, *McDonald v. Page* (Ohio) *Wright*, 121.

"Costs and expenses," as used in 8 & 9 Vict. c. 18, § 128, relating to contests as to the compensation to be made by a waterworks company for land taken by it, and enacting that in addition to the purchase money, and before the promoters of the undertaking shall become absolutely entitled to the estate, or to have the same merged or extinguished for their benefit, they shall, when the right of any such estate shall have been disputed by the company and determined in favor of the party claiming the same, pay the full costs and expenses of any proceedings for the determination or recovery of the same to the parties with whom any such litigation shall have taken place, meant costs as between attorney and client, and not as between party and party. *Hyde v. Borough of Manchester*, 12 C. B. 474, 478.

The term "costs," as used in Code, tit. 1, § 7, providing that when full costs are allowed the sum fixed as an indemnity for the expense of employing legal aid should be as follows, is not used in its ordinary comprehensive sense, defined by Webster to be the sum fixed by law or allowed by the court for charges of a suit awarded against a party losing, in favor of the party prevailing, but is limited generally to the allowance for attorney's, solicitor's, and counsel fees. *Belding v. Conklin* (N. Y.) 2 Code Rep. 112, 113.

"Costs," as used in Code Civ. Proc. § 640, providing that the undertaking given in an attachment proceeding shall obligate the sureties, in case the defendant recovers judgment or the warrant is vacated, to pay all costs which may be awarded to the defendant, cannot be construed as meaning counsel fees incurred and expended by defendant in the litigation, but only means the numerous items designated in the suit as "costs," together with fees of officers and witnesses, which may be recovered under its settled and well-defined provisions as a part of the

judgment in favor of the successful party. "Counsel fees are separate and distinguishable items from those entering into the signification of the word 'costs.'" *Northampton Nat. Bank v. Wylie*, 4 N. Y. Supp. 907, 908, 52 Hun, 146.

Rev. St. 1881, § 1208, declares that in partition suits all costs and necessary expenses shall be awarded and enforced in favor of those entitled thereto against the partitioners. Held, that the words "costs and necessary expenses," as there used, did not include attorney's fees. *Hutts v. Martin*, 38 N. E. 676, 678, 134 Ind. 587.

An order that costs and expenses of a certain suit brought to enjoin creditors' proceedings against an estate shall be paid out of a fund in court does not include fees of counsel for the trustee who brought the suit. *Ball v. Vason*, 56 Ga. 264.

Pub. St. c. 230, § 22, providing for "costs of partition," means counsel fees, ordinary costs of suit, and other expenses of making the partition. *Redecker v. Bowen*, 23 Atl. 62, 63, 15 R. I. 52.

The term "costs," as used in Comp. St. c. 82, § 16, allowing an attorney a lien upon a judgment to the extent of the costs, etc., refers to the sums allowed the party to indemnify him from employing an attorney, and does not include disbursements or charges, such charges being provided for by another statute. *Forbush v. Leonard*, 8 Minn. 303, 308 (Gil. 267, 270).

"Costs," as used in Civ. Code Or. § 144, providing that the plaintiff in an action, before procuring a writ of attachment to issue, shall give an undertaking with one or more sureties, to the effect that he will pay all costs if the attachment be wrongful and without sufficient cause, not exceeding the sum specified in the undertaking, only includes an allowance for attorney's fees. *Bing Gee v. Ah Jim* (U. S.) 7 Fed. 811, 813.

Under Code Civ. Proc. § 3047, requiring appellant, when he serves his notice of appeal from a justice's judgment, to pay the costs of the action included in the judgment, the attorney's fee, being included in the judgment by the act relating to actions in the city court of Albany, is a part of the costs. *Schwemmer v. Stratton*, 22 N. Y. Supp. 523, 66 Hun, 629.

Under Rev. St. § 2918, providing that in all equitable actions costs may be allowed any party, in the discretion of the court, the term "costs" includes attorneys' fees stipulated for in the mortgage sought to be foreclosed. *Spengler v. Hahn*, 70 N. W. 466, 467, 95 Wis. 472.

#### As costs accruing at trial.

Wag. St. p. 349, § 4, providing that "costs shall be paid by the state" in cases of ac-

quittal in a criminal prosecution, means only costs that have accrued at the trial, and does not include costs which have previously been adjudged against the party. *State v. Brigham*, 63 Mo. 258.

#### **Costs of appeal and new trial.**

As used in Code, c. 13, § 2182, which provides that an undertaking for stay of proceedings on appeal to the circuit court from a justice's court must be in such an amount as may be deemed sufficient to compensate plaintiff for the use or profits of the claim during the pendency of the appeal, and for costs and disbursements of the action, the words "costs and disbursements of the action" must be construed to mean that the undertaking includes all costs and disbursements that may be awarded against the appellant on the appeal, and is not limited to include only the costs and disbursements of the trial in the justice's court. "Costs and disbursements of the action" must certainly mean the costs and disbursements which will accrue in the trial of the action, as well as those which have already accrued. *Bilyeu v. Smith*, 22 Pac. 1073, 1074, 18 Or. 335.

The words "with costs," in an order of reversal or affirmance in the Court of Appeals in a case where the allowance of costs is discretionary, means costs in the Court of Appeals only, and the Supreme Court has no power to allow costs after such a disposition of the case. In *re Hood's Estate*, 1 N. Y. Supp. 833, 49 Hun, 608 (citing *In re Commissioners*, 10 N. E. 545, 104 N. Y. 677).

Where a judgment in the Supreme Court provides that "appellants recover of appellee all costs in this behalf expended," such phrase means the recovery of costs of appeals in both the supreme and district courts. *Bonner v. Wiggins*, 54 Tex. 149, 150.

#### **As costs on behalf of the state.**

The word "cost," for which a person may be sentenced to hard labor, has been judicially declared. It includes all costs, including officer's fees incurred in behalf of the state. It does not include fees due witnesses summoned on behalf of defendant, or costs incurred by him in making his defense. *Bowen v. State*, 12 South. 808, 98 Ala. 83; *Bradley v. State*, 69 Ala. 318, 321. Such is its meaning in the statute authorizing the clerk of the criminal court to be paid the costs out of the fine and forfeiture fund when the defendant is acquitted (*Burgin v. Hawkins*, 14 South. 771, 772, 101 Ala. 326), and as used in Code, §§ 4502, 4504, which permits one accused of a misdemeanor to confess judgment with good and sufficient sureties for the fine and costs (*Bowen v. State*, 12 South. 808, 98 Ala. 83).

#### **As costs of prosecution.**

The term "costs," in *Mills' Ann. St. § 699*, providing that costs in criminal cases shall

be paid by the county when the defendant is convicted and is unable to pay them, and when defendant is acquitted, unless the prosecuting witness be adjudged to pay them, refers only to the costs of the prosecution, and not to those of defendant. *Board of Com'rs v. Wilson*, 84 Pac. 265, 268, 8 Colo. App. 492. See, also, *Williams v. Northumberland County*, 20 Atl. 405, 110 Pa. 48; *Hutt v. Winnebago County Sup'rs*, 19 Wis. 116, 128.

#### **Damages.**

An indemnity bond, after reciting that an obligee had levied on certain property by virtue of an execution as belonging to the judgment creditor, and that the property had been replevied by D., contained the condition that if the sheriff should defend the replevin suit the obligor would indemnify and save him from all costs, charges, and expenses that he should incur in defending the suit. Held, that the term "all costs, charges, and expenses in defending the suit" meant expenses of the defense strictly, and hence did not include the damages and costs recovered by D. by reason of the wrongful levy. *Scott v. Tyler* (N. Y.) 14 Barb. 202, 205.

Costs are in the nature of damages, and, as damages and interest, are considered in some sense as the same. *Douglass v. McCoy*, 24 W. Va. 722, 727 (citing *McRea v. Brown* [Va.] 2 Munf. 46, 48).

Although costs were never given at the common law by the name of "costs," yet in reality they were also included in the quantum of damages in actions where damages were given, and in such cases were assessed by the jury. *Aller v. Shurts*, 17 N. J. Law (2 Har.) 188.

A statute providing that on the trial of the traverse of an indictment for a forcible entry and detainer, if the traverse be taken and tried against the person indicted, the person convicted shall pay such "costs and damages" to the party complaining as shall be assessed by the justices or justice before whom the same is tried, does not permit of the construction that the justice who awards the restitution may impose on the party the payment of a gross sum in "damages" as contradistinguished from "costs." The word "damages" is considered in law in two several significations, the one properly and generally, the other relatively; properly, when damages are founded on the statutes where costs are included within the word "damages," and taken as damages; relatively, when the injury declared on existed before the writ brought, and is the foundation of the suit—in such case damages do not mean "costs." *Fitch v. People* (N. Y.) 16 Johns. 141, 142.

The statute of Gloucester, 6 Edw. I. c. 1 (A. D. 1279), has usually been considered as creating the right to recover costs, and hence

the maxim that "costs are recoverable only by statute." That the right to costs is a creature of the statute is generally, but not exclusively, correct. Even before the statute of Gloucester, in cases where damages were recovered, a compensation equivalent to costs was assessed by the jury and included in the quantum of damages. *Eft v. Reeve*, 31 N. J. Law (2 Vroom) 139, 140.

#### As debt.

As debt contracted, see "Debt."

As debt founded on contract, see "Debt Founded on Contract."

In judgment for as debt, see "Debt."

#### Disbursements distinguished.

"There seems to be no little confusion, even in the books, in the use of the terms 'costs' and 'disbursements,' one sometimes being used for the other; and we must look to the sense in which those terms are intended to be used, more than to their strict, technical signification. The theory seems to have been that the fees of the several officers of court, as well as the witnesses, would be paid by the party at the time he called their services into requisition, and, when that is done, the amounts thus paid would properly constitute disbursements; but, unless this is done, we do not see how such fees would be properly classed as disbursements, when nothing has been disbursed; and, in such case, which very frequently occurs, we do not see why such fees may not properly be taxed as costs due to the several officers of court. Indeed, we suppose that a good deal of the confusion in the use of the terms 'costs' and 'disbursements' has arisen from the conflict between the theory and the practice; the theory being that the fees of the several officers of court and the witnesses are paid by the plaintiff or defendant, as the case may be, at the time the services are rendered, in which case they would very properly be termed 'disbursements,' and taxed as such, in order to reimburse the party for the outlay he has been required to make, while the practice in many cases is that such fees are not paid at the time, but, remaining due to the several officers at the termination of the action, are taxed as costs due to such officers." *Dauntless Mfg. Co. v. Davis*, 24 S. C. 536, 541.

In general use, the term "costs," when employed with reference to litigation, embraces both disbursements and specific sums allowed by statute as indemnity to the prevailing party for his expenses. In a narrower sense, the term "costs" excludes disbursements. Giving the term its most liberal signification, it could embrace only the taxable costs and disbursements in an action. *Hegar v. De Groat*, 8 N. D. 354, 358, 56 N. W. 150.

#### Expenses.

Acts 1889, p. 120, § 1, provides that, within 30 days after the termination of any cause in any circuit court that was tried on change of venue from another county, the clerk of such court shall make out an itemized list of all the expenses incurred by his county in the trial of the cause, and present it to the county court of the county where the cause originated. Section 2 provides that the county court to whom any such bill of costs is presented, properly authenticated, shall allow the same, as though the cause had terminated in his own county. Held, that the word "costs," in section 2, should be construed to mean "expenses," and that the county in which the action was begun was liable on change of venue for all "expenses" incurred by the trial court by reason of the change, including current expenses of the court, as well as those for which it was already liable—the costs of the cause. *Hempstead County v. Royston*, 23 S. W. 650, 651, 58 Ark. 113.

Rev. St. § 1852, which entitles the plaintiff to the costs and expenses of prosecuting condemnation proceedings when the company, by its neglect or omission, has compelled the plaintiff to institute the same, includes all necessary expenditures in that behalf, and is not limited to what would be taxable costs in an action. *Taylor v. Chicago, M. & St. P. Ry.*, 53 N. W. 853, 855, 83 Wis. 645.

The word "costs" imports the expenses of the suit, which may be recovered by law from the losing party. *Schlesinger v. Arline*, 31 Fed. 648, 651 (citing *Bouv. Law Dict.*).

The word "costs," as used in Civ. Code, § 2778, subds. 3, 4, relating to costs of the litigation, is used in an extended sense, and includes all things which are necessary in order to make the litigation effectual. *Showers v. Wadsworth*, 22 Pac. 603, 605, 81 Cal. 270.

Gen. St. § 969, provides that sureties on the recognizance of a person charged with a criminal offense may, at any time before judgment is rendered against them, seize and surrender such person to the sheriff of the county in which the recognizance was taken, and that the sheriff shall take such person into custody, and acknowledge in writing his surrender, and that the sureties shall thereupon be discharged on payment of all costs. Held, that the word "costs" includes not only the costs taxable by the clerk, and the fees which the sheriff is entitled to receive for the service and return of the papers, but also all expenses the law officers might legitimately pay out, or have a right to charge in connection with the capture and return of the criminal for trial. *Ayres v. People*, 82 Pac. 77, 78, 3 Colo. App. 117.



Pub. St. c. 227, § 7, relating to the release of poor tort debtors upon petition to any justice of the Supreme Court, the last provision of which is as follows, "provided, however, that any person who shall have been imprisoned as aforesaid upon a writ issued out of the justice court or upon execution wherein the debt of damages and costs shall not exceed one hundred dollars," etc., means the costs specified in the execution itself, and does not include the prisoner's board in jail. In re Millard, 13 R. I. 178, 179.

The term "costs," as used in the provisions of the Code requiring the state and county to pay, in certain criminal proceedings, all costs accruing under existing laws on behalf of the state or county, as the case may be, for the faithful prosecution and safekeeping of the defendant, includes the cost of boarding juries and that of the jailer. Shannon's Code Tenn. 1896, § 7622.

The word "costs," used in sections 5, 7, St. 1834, relating to the impounding of beasts running at large, is not used in reference to any claim that may be made by the impounder, but refers to those undefined expenses which may arise during the after-proceedings required by the statute. Palmer v. Spaulding, 17 Me. (5 Shep.) 239, 243.

The word "costs," as used in an assignment of a policy to secure notes, which provided that if the policy matured before payment, and the assignee would pay to the beneficiary the balance of the policy, less "costs of collecting the same," does not refer to the court costs, but to the expenses which the assignee might incur in collecting the policy. Ballinger v. Connecticut Mut. Life Ins. Co., 91 N. W. 767, 768, 118 Iowa, 23.

#### **Expense of reference.**

The term "costs," as applied to a reference to hear, try, and determine, made on a stipulation in an action in the Supreme Court, with a provision that costs of the reference shall be taxed, has no defined legal meaning. We think the import of these words is the ordinary expenses incident to reference, namely, disbursements, referee's fees, witness' fees, and other proper charges, as upon the trial of a case. Nichols v. Moloughney, 82 N. Y. Supp. 949, 950, 85 App. Div. 1.

The word "costs" as used in an award of arbitrators, allowing a certain sum in full of all damages and costs, means legal costs to be recovered in a suit, and not the expenses of a reference. Buckley v. Ellmaker (Pa.) 13 Serg. & R. 71, 79.

#### **Extra allowance.**

The term "costs" does not include an extra allowance, and therefore a direction by an appellate court, on the remand of a cause, to allow costs to a party, does not authorize

an extra allowance by the trial court. Hascall v. King, 66 N. Y. Supp. 1112, 1114, 54 App. Div. 441.

#### **Fees distinguished.**

"Costs and fees" are altogether different in their nature generally. The one is an allowance to a party of expenses incurred in the successful transaction or defense of a suit. The other is compensation to an officer for services rendered in the progress of the cause. Bradley v. State, 69 Ala. 318, 321; Howard Building & Loan Ass'n v. Philadelphia & R. R. Co., 102 Pa. 220, 222; Musser v. Good (Pa.) 11 Serg. & R. 247; Crawford v. Bradford, 2 South. 782, 783, 23 Fla. 404.

Costs are an allowance to a party for the expenses incurred in prosecuting or defending a suit, and incident to the judgment. There is a manifest difference between costs and fees. Fees are compensation to public officers for services rendered individuals, not in the course of litigation. Tillman v. Wood, 58 Ala. 578, 579.

The word "costs" is a word of known legal signification. It signifies, when used in relation to the existence of legal proceedings, the sums prescribed by law as charges for the services enumerated in the fee bill. The terms "fees and costs" are often used interchangeably, as having the same application; but, accurately speaking, the term "fees" is applicable to the items chargeable by law as between the officers or witnesses, and the party whom he serves, while the term "costs" has reference to the expenses of litigation as between litigants. Alexander v. Harrison, 28 N. E. 119, 120, 2 Ind. App. 47.

#### **As part of fine or judgment.**

See "Fine"; "Judgment."

#### **Master's costs.**

The term "costs," as used in Rev. St. 1893, § 2548, as amended by the act of 1897 providing that, when the property sought to be partitioned does not exceed \$1,000 in value, the costs shall be one-half of the costs allowed when the value exceeds that sum, and declaring that this provision shall apply to all costs in the cause, includes fees allowed the officers, including the commission allowed to the master for making the sale, for, as the act stood before the amendment in 1897, there was an exception of clerk's and sheriff's costs, and the term manifestly was intended to include clerk's and sheriff's fees, and thus indicates an intention to include all officers' fees. Bryan v. Ream, 37 S. E. 921, 59 S. C. 340.

The compensation of a master, as respects the party who has it to pay, is costs, and not a fee. As an item of expense in an equity case, the master's fee is included in the general costs of the suit. Bradley v. West Chester St. Ry. Co., 28 Atl. 500, 160 Pa. 72.

### Payment of judgment.

An employer's liability insurance policy providing that, if any legal proceedings are taken against the assured to enforce a claim for damages on account of an accident, the insurer will defend the same, "at its own cost," in the name and on behalf of the assured, cannot be interpreted to mean not only that the insurer should assume all the expense of defending the suit, but would also pay any judgment that might be recovered. *Rumford Falls Paper Co. v. Fidelity & Casualty Co.*, 43 Atl. 503, 505, 92 Me. 574.

### Receiver's and trustee's costs.

The costs of a receiver in an action where goods are attached are to be included in the term "costs" taxable against the person against whom judgment is rendered, though not as technical costs taxed by law under statutory fee bills. *Hetterman v. Young* (Tenn.) 61 S. W. 1085, 1087.

Upon the final determination of the case, in which a receiver has been appointed, the amount of the receiver's compensation is generally held to be a part of the costs in the cause and fall within the meaning of the term "cost," which are awarded to the prevailing party. *McAnrow v. Martin*, 56 N. E. 168, 170, 183 Ill. 467 (citing *City of St. Louis v. St. Louis Gaslight Co.*, 11 Mo. App. 241, Id. 87 Mo. 223).

An order that costs and expenses of a certain suit, brought to enjoin creditors' proceedings against an estate, shall be paid out of the fund in court, includes the necessary funds for carrying on a planting interest on the estate intrusted to the receiver, the hire of laborers, the commissions of the receiver, and the disbursements incident to the discharge of his duties. *Ball v. Vason*, 56 Ga. 264.

Within the provisions of a decree foreclosing a mortgage on railroad property, and directing an application of the funds, first, to the payment of expenses attendant on the sale; second, to the payment of the costs of this suit, etc.; third, to the payment of all interventions or other claims allowed by this court—the expense of managing the road by the receiver are not strictly costs of suit; yet they are expenses incurred in the litigation, and by order of the court, and may properly be included within the meaning of the words "costs of suit," if, when property is attached or seized by the officers under process of law, the expenses of preserving the property and the litigation are charged as costs of the suit, so that certificates issued for such expenses come within class 2. *Farmers' Loan & Trust Co. v. Stuttgart & A. R. R. Co.* (U. S.) 106 Fed. 565, 570.

### As taxable costs.

Under a statute providing that the defendant may tender the debt and costs be-

fore the return day of the writ, and that such tender shall be a bar to any further proceedings in the case (Gen. St. c. 272, § 5; Id. c. 208, § 1), the costs the defendant must tender in order to avail himself of the advantages of the statute are such costs as the law has prescribed—the costs taxable in court. These are the only involuntary costs known to the law, which is to be interpreted as having provided that, if the party will settle the suit against him before entry in court, he shall be required to pay to the plaintiff's attorney just as much, and no more, for all the costs that are chargeable, before or after the action, as if he paid the same costs after entry. *Woodward v. Roberts*, 51 N. H. 552, 555.

The term "costs," as used in Rev. St. c. 45, § 35, giving the defeated party in an action the right to a new trial on payment of all costs, means the costs as taxed by the clerk and entered in the feebook. *Cook County v. Calumet & C. Canal & Dock Co.* (Ill.) 19 N. E. 46, 47.

"Costs," as used in Code, tit. 10, § 810, directing the clerk to add the interest on a verdict for money to the costs of the party entitled thereto, refer to the bill of costs, and not to the gross allowance. *Belding v. Conklin* (N. Y.) 2 Code Rep. 112, 113.

The term "costs," as used in Act July 20, 1892, c. 209, 27 Stat. 232 [U. S. Comp. St. 1901, p. 706], allowing any citizen to prosecute any suit or action in the federal courts without prepaying fees or costs, means taxable costs to be recovered by the adverse party. *Columb v. Webster Mfg. Co.* (U. S.) 76 Fed. 198, 200.

### Taxes.

The tax imposed by Acts 1889, c. 130, entitled "An act to provide revenue for the state," on the unsuccessful party in civil suits, and on each indictment or presentment, is not costs, within the meaning of the law permitting imprisonment for costs, though by the statute such taxes are required to be taxed in the bill of costs, and are thereby declared part of the costs in the case. By such declaration the Legislature has not changed its nature. It is still a tax, and as such may be put in the bill of costs and collected with the costs, so far as judgment and execution may be efficacious for that purpose; but, so long as it remains in the revenue bill, as a specific tax, it cannot, by a mere declaration in such bill that it is costs, become costs in fact, so as to justify imprisonment for its payment. Costs and fees, though unknown to the common law, have in modern times a fixed and well-defined signification. Costs are the expenses incident to the conduct of a suit, either in the prosecution or defense, and such disbursements as are allowed by law as fees to witnesses and officers of court.

*Ex parte Griffin*, 13 S. W. 75, 76, 88 Tenn. (4 Pickle) 547 (citing 1 Bouv. Law Dict. 376).

#### **Witnesses' and officers' fees.**

The term "costs," as applied to proceedings in a court of justice, has, in the acceptance of the profession, and by the practice of all courts in Georgia, a well-understood meaning. It includes all charges fixed by statute as compensation for services rendered by officers of the court in the progress of the cause. *Davis v. State*, 33 Ga. 531, 533; *Markham v. Ross*, 73 Ga. 105.

"Costs," as used in Pub. St. c. 256, § 5, providing that, on conviction and sentence in any prosecution for a crime or offense, costs shall be taxed as in civil cases, unless otherwise provided, means the expenses and fees which the law authorizes the winning party to recover of his adversary in an action, and includes the expense of procuring the attendance of witnesses. *State v. A. B. C.*, 40 Atl. 1065, 68 N. H. 441.

"Costs of the proceedings," as used in St. Louis City Charter, art. 6, § 8, with respect to proceedings for the condemnation of land for city purposes, which provides that the costs of the proceedings shall be paid by the city, means the costs so authorized to be taxed, and does not include the allowance of charges for expert witnesses, and other similar expenses incurred by a landowner in developing the character and extent of deposits of clay claimed to exist on the lands appropriated by the city. *City of St. Louis v. Meintz*, 18 S. W. 30, 81, 107 Mo. 611.

"Costs in civil actions," as defined by Gen. St. 1894, c. 67, § 5497, is a fixed amount to be recovered by the prevailing party. As used in section 7314, "provided that, on change of venue, the costs accruing from the change shall be paid by the county in which the offense was committed," the word "costs" includes both costs and disbursements as defined by section 5500, as expenses necessarily paid or incurred by the prevailing party, but does not include the expenses incident to the running of the court during the trial, such as jurors' and court officers' fees. *Board of Com'rs of Hennepin County v. Wright County Com'rs*, 87 N. W. 846, 847, 84 Minn. 267.

The term "costs," as used in Code, tit. 10, § 303, providing that there might be allowed to the prevailing party on the judgment certain sums by way of indemnity, which allowances are in this act termed "costs," was meant to indemnify the party for his expenses, which consist quite as much of the fees of witnesses and officers as of lawyers, and does not give a new definition of the word "costs." Webster defines the word "costs" to be the sum fixed by law or allowed by the court for charges of a suit, awarded against the party in favor of the party prevailing. *Belding v. Conklin* (N. Y.)

4 How. Prac. 196, 197; *Belding v. Conklin* (N. Y.) 2 Code Rep. 112, 113.

An order setting aside a default, conditioned that the defendants pay the plaintiff's "costs for the term," included only the travel and attendance of the party, the clerk's fees, and the witnesses' fees. *Thurston v. Roger Williams Min. Co.*, 1 R. I. 288.

A sheriff's expenditures, such as rent bills, keeper's fees, and such other disbursements as are often necessarily made in levying attachment writs, are the officer's legal costs, which need not be included in the party's verified memorandum, under Code Civ. Proc. §§ 507, 508, requiring the party in whose favor judgment is rendered to deliver to the clerk of the court within two days a verified memorandum of costs and necessary disbursements, and providing that such memorandum need not include the legal fees or costs of any officer of the court, etc. necessarily incurred in levying attachment writs. *First Nat. Bank v. Boyce*, 15 Mont. 162, 163, 38 Pac. 829, 832.

#### **COSTS AND EXPENSES OF REDEMPTION.**

The phrase "costs and expenses of redemption," as used in Pol. Code, § 3817, as amended, providing for redemption from tax sale to the state by paying the taxes due with interest and penalty, and costs and expenses of redemption, means the amount due, as computed according to the statute. *San Diego Inv. Co. v. Shaffer*, 70 Pac. 179, 180, 137 Cal. 323.

#### **COSTS DE INCREMENTO.**

The distinction between costs taxable between party and party, and those taxable or allowable between attorney and client, is referred to in every text-book on English practice. The former are called "de incremento," or costs of increase, and had their origin in the statute of Gloucester (6 Edw. I), while the office of attorney did not come into legal existence until a later date, under the statute of Westminster II (13 Edw. I). *Strong v. Mundy*, 31 Atl. 611, 612, 52 N. J. Eq. (7 Dick.) 833.

#### **COSTS OF ADMINISTRATION.**

The administration of an estate of a bankrupt includes the proceedings from the petition until the estate is reduced to money, and the dividends paid and the estate closed, so that under the bankrupt act, providing for the allowance of such attorney's fees only as are a part of the costs of administration, no allowances can be made from the estate to an attorney for services rendered in the matter of the bankrupt's application for discharge. *In re Brundin* (U. S.) 112 Fed. 306, 307.

**COSTS OF COLLECTION.**

The expression or clause in notes, "and costs of collection," is surplusage, and not destructive of the negotiability of the notes, for the reason that no costs of collection can accrue if the notes are paid when due. The great weight of authority is that notes that waive benefit of valuation, appraisal, and exemption laws, and provide for the payment of attorney's fees, do not destroy the negotiability by rendering the amount to be paid uncertain. *Nicely v. Winnebago Nat. Bank*, 47 N. E. 476, 477, 18 Ind. App. 30 (citing *Nicely v. Bank*, 15 Ind. App. 563, 44 N. E. 572, 57 Am. St. Rep. 243).

**COSTS OF MOTION.**

A direction of a court not contained in a judgment is an order. An application for an order is a motion. An order of the General Term upon appeal from an order comes within these definitions, and therefore falls within section 779, Code, which stays all proceedings when "costs of a motion" are given, until payment thereof. The rule as to costs upon a motion is applied by the Code to interlocutory costs upon an issue of law, the same as if they were costs on a motion. *Phipps v. Carman* (N. Y.) 26 Hun, 518, 519.

The phrase "costs of a motion," as used in Code Civ. Proc. § 779, providing that where costs of a motion, or any other sum of money, directed by an order to be paid, are not paid within the time fixed for the purpose, all proceedings on the part of the party required to pay them, except to review or vacate the order, are stayed, cannot be construed to include the costs of an appeal from an order granting a new trial on the merits. *Eisenlord v. Clum*, 5 N. Y. Supp. 512, 52 Hun, 461.

**COSTS OF PROSECUTION.**

Rev. Laws, § 713, authorizing the chancery court to require of either party sufficient security for the costs of the prosecution of an action, will be construed to apply to the defendant as well as the plaintiff, when the former is prosecuting an affirmative counterclaim. *Badger v. Taft*, 3 Atl. 535, 537, 58 Vt. 585.

The expression "costs of prosecution," as used in a statute providing that one tried and convicted might be adjudged to pay the costs of prosecution, meant such only as were incurred in the conduct of the prosecution, and making it effectual in a verdict, and not those which the defendant incurred in resisting the prosecution and defending himself from the criminal charge. *State v. Wallin*, 89 N. C. 578, 580.

**COSTS OF SUIT.**

The terms "costs of suit" and "costs of prosecution" have a well-known technical

meaning, as well understood by lawyers as the term "suit" or "prosecution." The expression does not mean all the expenses incurred, but it means the expenses pending the suit, as allowed or taxed by the court. Lord Coke says "costs are expensæ litis, and shall be allowed for expenses pending the suit. Even the officer's fees on execution or warrant are not included in the costs, properly so called." *Town of Norwich v. Hyde*, 7 Conn. 529, 534.

**COSTS TO ABIDE EVENT.**

As to what constitutes "event," see "Event."

A remittitur on reversal of a judgment by the Court of Appeals, with "costs to abide the event," should be construed to include the costs and disbursements of the first trial, and of the party's appeal to both the General Term and the Court of Appeals on the rendition of a judgment in his favor on a second trial. *Powers v. Manhattan R. Co.*, 14 N. Y. Supp. 180, 131, 20 Civ. Proc. R. 78.

Where an order is made by an appellate court reversing a judgment, with "costs to abide the event," the costs intended by the order include those of the appeal, so that, if the appellee is finally successful, he is entitled to tax the costs of the appeal. *First Nat. Bank v. Fourth Nat. Bank*, 84 N. Y. 469, 470.

A decision of an appellate court reversing a judgment, and ordering a new trial with "costs to abide the event," means only that the party finally prevailing is entitled to his costs in that court, and not that he must recover for all proceedings in the cause. *Thomas v. Evans*, 3 N. Y. Supp. 297, 298, 50 Hun, 441.

"Costs to abide the event" means all costs of the action, up to and including the decision in the Court of Appeals. *Smith v. Lehigh Valley R. Co.*, 82 N. Y. Supp. 674, 675 (citing *Franev v. Smith*, 126 N. Y. 658, 27 N. E. 559).

**COTTAGE.**

A cottage is a small dwelling house. Any number of cottages may, therefore, satisfy the allegation of a number of dwelling houses; and there is not any repugnance in common speech between calling a dwelling house a "messuage" in one instrument, and a "cottage" in another. *Young v. Sotheron*, 2 Barn. & Adol. 628, 634.

In Johnson's and other English dictionaries, a cottage is said to be a small house, and a house is said to be a dwelling place, so that any small dwelling place may, without impropriety of language, be described as a cottage. A large dwelling house or cot-

tage may be divided into two or more distinct dwelling houses or cottages, and each part may be so described. *Hubbard v. Hubbard*, 15 Adol. & E. (N. S.) 227, 240.

#### **Curtilage included.**

"A cottage is a little house without land. Co. Litt. 218. The grant of a cottage will pass a little dwelling house which has no land belonging to it." *Gibson v. Brockway*, 8 N. H. 465, 470, 31 Am. Dec. 200.

There is no difference between a cottage and a messuage. As to the matter of taking cattle damage feasant, it will be supposed that a cottage has at least a court to it. A cottage contains a curtilage, and so there may be a levancy and couchancy on a cottage. *Emerton v. Selby*, 2 Ld. Raym. 1015; *Scholes v. Hargreaves*, 5 Term R. 46, 48.

### **COTTOLEO.**

The use of the word "cottoleo" on tubs containing a compound of cottonseed oil and the product of beef fat is an infringement of the trade-mark "cottolene," previously registered for the sale of the same substance, and used in marking tubs containing it. *N. K. Fairbank Co. v. Central Lard Co.* (U. S.) 64 Fed. 133, 135.

### **COTTON.**

"Cotton in the seed" is not the marketable condition of cotton. The laws of trade and commerce require that it should be manipulated and converted into what is commonly known as "lint cotton." *Mangan v. State*, 76 Ala. 60, 66.

#### **COTTON BRAID.**

Braids composed of 95 per cent. of cotton and 5 per cent. of other materials, commercially known as belonging to the class of "cotton braids," though bought and sold under the specific names of "cotton hat braids," "cotton fancy braids," "cotton straw braids," etc., and used in the manufacture of hats, are dutiable under paragraph 354, Act Oct. 1, 1890, and not under section 4, as a nonenumerated manufactured article, nor under paragraph 355 as a manufacture of cotton not specially provided for; nor under paragraph 354, as "cotton gimps, galloons, webbing, goreing and braces." *Zimmerman v. United States* (U. S.) 61 Fed. 938, 939.

The distinction between cotton braids and other manufactures of cotton not otherwise provided for, and hat braids, has been established and recognized by Congress by Acts March 2, 1861, 12 Stat. 178, and July 14, 1862, 12 Stat. 543, and Rev. St. § 2504. *Arthur v. Zimmerman*, 96 U. S. 124, 125, 24 L. Ed. 770.

#### **COTTON CLOTH.**

Act Aug. 23, 1894, par. 257, reads: "The term cotton cloth, or cloth, wherever used in the foregoing paragraph of this schedule, shall be held to include all woven fabrics of cotton in the piece, whether figured, fancy, or plain, not specially provided for in this act, the warp and filling threads of which can be counted by unravelling or other practicable means." This section does not apply to embroidered cotton cloth, which is not embroidered in the loom. *United States v. Einstein* (U. S.) 78 Fed. 797, 798, 24 C. C. A. 346.

#### **COTTON GIN.**

A "cotton gin" is not a fixture, but in all cases is a personal chattel, which does not ordinarily pass by a conveyance of the ground on which it stands. *Hancock v. Jordan*, 7 Ala. 448, 450, 42 Am. Dec. 600.

#### **COTTON HOUSE.**

The term "cotton house," in a statute making the burning of a cotton house arson, includes a gin, as a ginhouse is a house in which cotton is usually stored. *Waters v. Jones* (Ala.) 3 Port. 442, 447, 29 Am. Dec. 261.

#### **COTTON LACES.**

Act of 1846, providing a duty on cotton laces and insertings, means laces and insertings composed wholly of cotton, and does not include those composed of linen and cotton combined. *Steegman v. Maxwell* (U. S.) 22 Fed. Cas. 1198.

By Revenue Act July 30, 1846 (9 Stat. 46) Schedule D, a duty of 25 per cent. ad valorem was imposed on "cotton laces, cotton insertings and manufactures wholly composed of cotton, not otherwise provided for." By section 1 of the act of March 3, 1857, the duties of the articles enumerated in Schedules C and D of the act of 1846 were fixed at 25 and 19 per cent., respectively, with such exceptions as were thereafter made. By section 2 of the act of 1857, all manufactures composed wholly of cotton, which were bleached, printed, painted, or dyed, and delaines, were transferred to Schedule C. Held, that the designations which were qualified by the word "cotton" in the act of 1846 were designations of articles by special description, as contradistinguished from designations of a commercial name or a name of trade, and were therefore designations of quality and material, and hence laces and insertings composed wholly of cotton, and bleached or dyed, were dutiable at 24 per cent., under the act of 1857. *Cochran v. Schell*, 2 Sup. Ct. 301, 107 U. S. 617, 27 L. Ed. 490.

**COTTON NOTES.**

Cotton notes are receipts given for each cotton bale received on storage by a public warehouse. *Fourth Nat. Bank v. St. Louis Cotton Compress Co.*, 11 Mo. App. 333, 337.

**COTTON PILE FABRICS**

Trimmings cut out of cotton velvet in various open and scroll work designs and colors are dutiable as cotton pile fabrics, under *Tariff Act July 24, 1897*, c. 11, § 1, Schedule I, par. 315, 30 Stat. 178 [U. S. Comp. St. 1901, p. 1659]. *Horstmann, Von Hein & Co. v. United States* (U. S.) 121 Fed. 147.

**COTTON WASTE.**

An application for insurance, representing that there was no cotton or woolen waste or rags kept in or near the property to be insured, means only such waste or rags as are, from their nature or condition, easily inflammable; and clean, white rags, though in the most literal sense included in the term, are not within its spirit or meaning, and should not be regarded as a breach of the representation. *Elliott v. Hamilton Mut. Ins. Co.*, 79 Mass. (13 Gray) 139, 145.

**COTTON WEARING APPAREL.**

"Cotton wearing apparel," as used in *Tariff Act Oct. 1, 1890*, par. 349, does not include so-called fascinators made of cotton chenille. *Oppenheimer v. United States* (U. S.) 66 Fed. 740.

**COTTON WEBBING.**

Cotton elastic webbing is made of rubber and cotton, as distinguished from wool elastic webbing, made of rubber, wool, and cotton, and from union elastic webbing, made of rubber, silk, and cotton. *Beard v. Nichols*, 7 Sup. Ct. 548, 120 U. S. 260, 30 L. Ed. 652.

Webbing made of cotton, silk, and India rubber, the cotton predominating in quantity, and the rubber in value, cannot, in the absence of any finding as to its commercial or common designation, be classified as "cotton webbing," under *Tariff Act 1890*, par. 354, Schedule I, but should be placed under paragraph 460, as a manufacture of which India rubber is the component material of chief value. *United States v. Shattuck* (U. S.) 59 Fed. 454, 455, 8 C. C. A. 176.

**COULD.**

In a charter party for a voyage from Sundswall to Southampton, stipulating that the owner should receive the highest freight "which he could prove" to have been paid for ships on the same voyage when the ves-

sel passed Elsinore, the words "could prove" were satisfied by the capacity to prove, coupled with knowledge on the part of the defendant of the capacity to prove, and of existence of the facts, and did not mean strictly legal proof. *Gether v. Capper*, 15 C. B. 696.

**COUNCIL**

See "City Council"; "Common Council"; "Town Council."  
Other council, see "Other."

The word "council," in cities which have a board of aldermen, includes common council. *Bates' Ann. St. Ohio 1904*, § 1536-907.

The word "council," as used in an act relating to reformatory institutions established by counties and cities, shall be taken and held to mean the corporate authorities of any city or town, by whatever name or style the same may be designated. *Shannon's Code Tenn. 1896*, § 4416.

The word "councilman" may include trustees of town. *Rev. St. Utah 1898*, § 2498.

The word "council" shall include any body or bodies authorized to make ordinances for the government of a city or town. *Code Va. 1887*, § 5.

The word "council" shall include any body or board, whether composed of one or more branches, who are authorized to make ordinances for the government of a city, town, or village. *Code W. Va. 1899*, p. 134, c. 13, § 17.

The word "council," as used in *Rev. St. § 1880*, relating to the change of boundaries of a municipal corporation, includes the board of trustees of a hamlet. In re *Town of Newburgh*, 8 O. C. D. 24, 25, 15 Ohio Cir. Ct. R. 78.

**COUNCILMEN.**

Commonly and colloquially, when we speak of a councilman or alderman, we do not refer to a mayor. Hence, under a statute providing that the councilmen and aldermen of towns and cities shall be ineligible during their term of office to any other municipal office in said towns and cities, a mayor is not therefore rendered ineligible. *Akerman v. Ford*, 42 S. E. 777, 116 Ga. 473.

In an ordinance regulating municipal elections, and providing for the election of a certain number of councilmen, under a statute authorizing the city to elect a certain number of aldermen, to be known as the "city council," the term "councilmen" has the same meaning as the term "aldermen," as used in the statute. *State v. Anderson*, 8 South. 1, 4, 26 Fla. 240.

## COUNSEL

See "Of Counsel"; "State's Counsel."

The words "counsel," "advise," or "assist" may be, and frequently are, used to describe the offense of a person who, not actually doing the felonious act, by his will contributed to, or procured it done. *True v. Commonwealth*, 14 S. W. 684, 685, 90 Ky. 651; *Omer v. Commonwealth (Tex.)* 25 S. W. 994, 998.

### As an attorney.

The term "counsel," as used in Rev. Laws, 437, requiring that the interrogatories annexed to a commission for depositions be signed by the party or his counsel in the cause, was not intended to be employed in that peculiar and restricted sense in which it is used at Westminster Hall, in distinction from "attorney." In our courts a man's attorney is usually his counsel, even though he is not a counselor of this court. *Ludlam v. Broderick*, 15 N. J. Law (3 J. S. Green) 269, 271.

Within Sanb. & B. Ann. St. § 752a, providing that circuit judges are authorized to appoint counsel to assist the district attorney in the prosecution of persons charged with crime, the term "counsel" means one who has been admitted as an attorney at law in this state, and who is associated in the management of a particular cause, or who acts as legal adviser in reference to any matter requiring legal knowledge and judgment. *State v. Russell*, 53 N. W. 441, 442, 83 Wis. 330.

Rev. St. 70, § 10, providing that no justice shall take cognizance of any cause or do any judicial act where he shall have been a counsel in the case, means concerned in the case or having charge of it as attorney, and there is no distinction between being "of counsel" and "attorney" in the case. *Ingraham v. Leland*, 19 Vt. 304, 307.

An attorney is a person authorized to appear for and represent a party in the written proceedings in any action, suit, or proceeding, in any stage thereof. An attorney, other than the one who represents the party in the written proceedings, may also appear for and represent a party in court, before a judicial officer; and then he is known in the particular action, suit, or proceeding, as counsel only, and his authority is limited to the matters that transpire in the court or before such officer at the time. Ann. Codes & St. Or. 1901, § 1049; *Ballinger's Ann. Codes & St. Wash.* 1897, § 4758.

### COUNSEL IN THE CAUSE.

The term "counsel in the cause," as used in the statute excepting counsel in the

cause from the right to witness fees, does not include attorneys in attendance on the court on business other than that of the action in which they were witnesses. *Abbott v. Johnson*, 2 N. W. 832, 835, 47 Wis. 229.

## COUNSELOR.

Attorney at law distinguished, see "Attorney at Law."

## COUNT.

See "Common Counts"; "Counting upon a Statute"; "General Count"; "Omnibus Count"; "Special Count."

"A count is sometimes considered as synonymous with a declaration, and this was its original signification in the law French, but it is now most generally considered as a part of a declaration wherein the plaintiff sets forth a distinct cause of action. *Cheetham v. Tillotson (N. Y.)* 5 Johns. 430, 434.

The term "counts" is used to designate the several different forms in which plaintiff states his cause of action in his declaration. *Buckingham v. Murray's Ex'r*, 30 Atl. 779, 780, 7 Houst. 176.

The word "count," in Gen. St. § 229, prohibiting any candidate being put in charge of any box in which votes are cast for the office, or to take part in the count thereof, must be given not its narrowest and most technical meaning, but that wider meaning, reasonably applied, which embraces all those acts of the counter which are within the natural and proper scope of his duties, and which bring to him any opportunity to perpetrate a fraud. Under this section, the action of a candidate for office in merely cutting off the sides of a few envelopes containing ballots, with a machine used for that purpose, to illustrate the operation of the machine, at the request of the election counters, is not taking part in the count. *Grelle v. Pinney*, 62 Conn. 478, 483, 26 Atl. 1106, 1108.

### In indictment.

"The word 'count' is used when in one finding by the grand jury the essential parts of two or more separate indictments for crimes apparently distinct are combined, the allegations for each being termed a 'count,' and the whole an 'indictment'; and an indictment in several counts, therefore, is a collection of several bills against the same defendant for offenses which on their face appear distinct, under one caption, and found and indorsed collectively as true by the grand jury. The object is what it appears to be, namely, in fact, to charge the defendant with the distinct offenses, under the idea that the court may, as often as it

will, allow them to be tried together, thus averting from both parties the burden of two or more trials, or, in another class of cases, to vary what is meant to be the one accusation so as at the trial to avoid an acquittance by any unforeseen lack of harmony between allegations and proofs, or a legal doubt as to what form of charge the court will approve. On the face of the indictment, every separate count should charge the defendant as if he had committed a distinct offense, because it is on the principle of joinder of offenses that the joinder of counts is admitted." *Boren v. State*, 4 S. W. 463, 464, 23 Tex. App. 28.

#### As paragraph.

A "count," as used in common-law pleading, and the term "paragraph," as used in code pleading, are equivalent, and mean an entire or integral statement of a cause of action. *Balley v. Mosher* (U. S.) 63 Fed. 488, 490, 11 C. C. A. 304.

In an answer alleging that defendant admits that she is the owner, by purchase contract, of the premises described in the complaint, and admits the sixth, seventh, and eighth counts in the complaint, the term "counts" evidently means paragraphs, as the complaint contains but one cause of action, divided into paragraphs. *Southard v. Smith*, 66 N. W. 816, 317, 8 S. D. 230.

### COUNTENANCE.

"To countenance" an act means something more than to witness it. Webster defines the word: "To encourage by a favoring aspect; to sanction; to favor; to approve; to aid; to support; to abet." Mere approval of a trespass after it is committed, by one for whose benefit it was committed, will not make him liable. One may rejoice over a murder after its commission, without for that being criminally liable; and so may one approve and applaud an assault and battery committed by one upon another, without subjecting himself to liability to the injured party. "To countenance an assault," means to aid or abet it, and, as jurors are presumed to understand the meaning of ordinary English words, an instruction authorizing a conviction for an assault of one not the assaulting party, if he countenanced it, or if it was committed in his presence and countenanced by him, is not erroneous. *Cooper v. Johnson*, 81 Mo. 483, 487.

### COUNTER.

The word "counter" is defined to be "contrary to; contra-way; in opposition to"; and such is its meaning when used as a part of the compound "counter-claim." *Silliman v. Eddy* (N. Y.) 8 How. Prac. 122, 123.

### COUNTERCLAIM.

The term "counterclaim" means an opposition claim or demand of something due; a demand of something which of right belongs to the defendant, in opposition to the right of the plaintiff. *Silliman v. Eddy* (N. Y.) 8 How. Prac. 122, 123; *Venable v. Dutch*, 15 Pac. 520, 521, 37 Kan. 515, 1 Am. St. Rep. 260. It is the claim of a defendant to recover from a plaintiff by setting up and establishing any cross-demand that may exist in his favor as against plaintiff. *Venable v. Dutch*, 15 Pac. 520, 521, 37 Kan. 515, 1 Am. St. Rep. 260.

"Counterclaim" is the opposite of "claim." The plaintiff makes a claim against the defendant. The defendant, besides his defense, makes a counterclaim against the plaintiff. *Wolf v. H—*, (N. Y.) 13 How. Prac. 84, 85.

A counterclaim proper presents matter upon which an original action might be brought in defendant's favor. *Bardes v. Hutchinson*, 85 N. W. 797, 798, 113 Iowa, 610; *Belleau v. Thompson*, 33 Cal. 495, 497. It is in effect an action in favor of the defendant and against the plaintiff. *Albany Brass & Iron Co. v. Hoffman*, 33 N. Y. Supp. 600, 601, 12 Misc. Rep. 167; *Davidson v. Remington* (N. Y.) 12 How. Prac. 310, 311.

A counterclaim is a cause of action arising out of the transaction set forth in the complaint as the foundation of plaintiff's claim or defendant's defense, or connected with the subject of the action. *Davis v. Frederick*, 12 Pac. 664, 6 Mont. 300; *Hudson v. Snipes*, 40 Ark. 75, 78; *Slone v. Slone*, 59 Ky. (2 Metc.) 339, 340; *Keifer v. Summers*, 35 N. E. 1103, 1105, 137 Ind. 106; *Cohn v. Hussen* (N. Y.) 66 How. Prac. 150, 151. It is allowed in order that the whole controversy between the parties may be determined in one action, and it may be relied on wherever an action could be brought by the defendant for that same cause. *Slone v. Slone*, 59 Ky. (2 Metc.) 339, 340.

"A counterclaim in an action on contract is that which might have arisen out of, or could have had some connection with, the original transaction, in the view of the parties, and which, at the time the contract was made, they could have intended might in some event give only one party a claim against the other for compliance or noncompliance with its provisions." *Conner v. Wenton*, 7 Ind. 523; *White v. Regan*, 32 Ark. 281, 289; *Standley v. Northwestern Mut. Life Ins. Co.*, 95 Ind. 254, 261; *Blue v. Capital Nat. Bank*, 43 N. E. 655, 658, 145 Ind. 518.

The counterclaim must have such a relation to and connection with the subject of the action that it will be just and equitable



that the controversy between the parties as to the matters alleged in the complaint and in the counterclaim should be settled in one action by one litigation, and that the claim of one should be offset against or applied upon the claim of the other. *Romaine v. Brewster*, 27 N. Y. Supp. 138, 139, 6 Misc. Rep. 581 (citing *Carpenter v. Manhattan Life Ins. Co.*, 93 N. Y. 552, 556, 557); *Minneapolis Threshing Mach. Co. v. Darnall*, 83 N. W. 266, 267, 13 S. D. 279.

A counterclaim, to be available to a party, must afford to him protection in some way against the plaintiff's demand for judgment, either in whole or in part. It must therefore consist of a set-off or claim by way of recoupment, or be in some way connected with the subject of the action stated in the complaint. It must present an answer to the plaintiff's demand for relief; must show that he is not entitled, according to law, or under the application of just principles of equity, to judgment in his favor as or to the extent claimed in the complaint. It must therefore contain not only the substance of what is necessary to sustain an action in favor of the defendant against the plaintiff, but it must also operate in some way to defeat, in whole or in part, the plaintiff's right of recovery in the action. An answer which does not meet this requirement is insufficient, whether regarded as a defense or counterclaim. *Mattoon v. Baker* (N. Y.) 24 How. Prac. 329, 332; *Dietrich v. Koch*, 35 Wis. 618, 626.

A counterclaim is a claim on behalf of the defendant, which, if established, will defeat or in some way qualify the judgment to which the plaintiff is otherwise entitled. *Scott v. Town of Menasha*, 54 N. W. 263, 264, 84 Wis. 73; *Dietrich v. Koch*, 35 Wis. 618, 626; *Venable v. Dutch*, 15 Pac. 520, 521, 37 Kan. 515, 1 Am. St. Rep. 260.

A counterclaim must be a cause of action on which defendant can sue plaintiff. A defendant cannot avail himself of a counterclaim which the court before which the action is pending has no jurisdiction to try and determine. *Cragin v. Lovell*, 88 N. Y. 258, 259 (quoted in *Howard Ironworks v. Buffalo Elevating Co.*, 81 N. Y. Supp. 452, 459, 81 App. Div. 386).

The counterclaim must exist in favor of the defendant and against the plaintiff, and a defendant cannot set up a counterclaim existing in favor of any person; the test being whether defendant could have maintained an independent action on the judgment. *Roberts v. Donovan*, 9 Pac. 180, 181, 70 Cal. 108.

A counterclaim is a cause of action arising against the plaintiff, or against him and another, which arises out of the contract or transaction stated in the petition. The defendant who pleads a counterclaim admits

the contract or transaction, and seeks to recover on his counterclaim growing out of it. *Louisville & N. R. Co. v. Whitlow's Adm'r* (Ky.) 48 S. W. 711, 712, 41 L. R. A. 614.

A counterclaim is where the demand is against the plaintiff, and for which a judgment might be recovered against the defendant. *Tyler v. Willis* (N. Y.) 33 Barb. 327, 333.

A counterclaim setting up a cause of action against the plaintiff must state facts sufficient to constitute a cause of action in favor of the defendant against the plaintiff. *Campbell v. Routt*, 42 Ind. 410. It must also show that the facts stated as constituting a cause of action arise out of, or were connected with, the cause of action stated in the complaint. *Lane v. Whitehouse*, 46 Ind. 389, 390.

Where the facts stated in an answer constitute a cause of action in favor of the defendant for the recovery of damages against the plaintiff, and are connected with the subject of the action, it is sufficient to warrant their being pleaded as a counterclaim. *Cincinnati Daily Tribune Co. v. Bruck*, 56 N. E. 198, 199, 61 Ohio St. 489, 76 Am. St. Rep. 433.

In an action to recover possession of certain chattels claimed under a mortgage executed to plaintiff by defendant, where the answer demanded judgment for the value or return of certain goods not covered by the mortgage, and alleged to have been wrongfully taken by plaintiff and converted to her use, such claim is a counterclaim, under Code, § 3226, providing that, in actions for the recovery of specific personal property, no counterclaim shall be allowed. *Chapin v. Garretson*, 52 N. W. 104, 85 Iowa, 377.

A breach of warranty may be the subject of counterclaim in an action for the purchase price of property sold with warranty. *Aultman & Co. v. Torrey*, 57 N. W. 211, 55 Minn. 492.

The Code declares that, in order to obtain an attachment, plaintiff must show that he is entitled to recover the sum stated to be due him, over and above all counterclaim. Held, that the word "counterclaim" is broader and includes more than "discounts and set-offs," and hence an affidavit stating that plaintiff is entitled to the sum due, over and above all discounts and set-offs, is insufficient. *Lampkin v. Douglass* (N. Y.) 10 Abb. N. C. 342, 343; *Valentine v. Central Nat. Bank*, Id. 188, 191.

#### Statutory definitions.

A counterclaim may consist of (1) a cause of action arising out of the transaction set forth in the complaint as a foundation of the plaintiff's claim, or connected with the subject of the action; (2) in an action arising upon contract, any other cause of action also

arising upon contract, and existing at the commencement of the action. Code Civ. Proc. § 438. *Wigmore v. Buell*, 47 Pac. 927, 928, 116 Cal. 94; *Ainsworth v. Bank of California*, 51 Pac. 952, 119 Cal. 470, 89 L. R. A. 686, 63 Am. St. Rep. 135; *Lyon v. Petty*, 4 Pac. 103, 104, 65 Cal. 322; *Roberts v. Donovan*, 9 Pac. 180, 181, 70 Cal. 108; *St. Louis Nat. Bank v. Gay*, 101 Cal. 286, 289, 85 Pac. 876, 877; *Freeman v. Seltz*, 58 Pac. 690, 126 Cal. 291. A like definition is given in the New Mexico Code. *Agua Pura Co. v. City of Las Vegas*, 60 Pac. 208, 212, 10 N. M. 6.

Practice Act, § 47, defines the counterclaim which, in section 46, defendant is authorized to set up as constituting a defense, as follows: "The counterclaim mentioned in the last section shall be one existing in favor of defendant or plaintiff, and against a plaintiff or defendant between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of the transaction set forth in the complaint or answer as the foundation of the plaintiff's claim, or defendant's defense, or connected with the subject of the action; (2) when an action arises upon contract, any other causes of action arising also upon contract, and existing at the commencement of the action." In an action for damages for an assault and battery, a libel published by the plaintiff of and concerning the defendant does not constitute a counterclaim, within the meaning of Practice Act, § 47. *Macdougall v. Maguire*, 85 Cal. 274, 280, 95 Am. Dec. 98.

By section 57, Mills' Ann. Code, a "counterclaim" is defined as being a claim in favor of a party plaintiff or defendant against the adverse party, between whom a several judgment might be had in the action, and arising out of the transaction set forth as the foundation of the plaintiff's claim or the defendant's defense, or, in an action arising upon contract, any other cause of action also upon contract. *Long v. McGowan* (Colo.) 66 Pac. 1076, 1077; *Hyman v. Jockey Club Wine, Liquor & Cigar Co.*, 48 Pac. 671, 672, 9 Colo. App. 299.

A "counterclaim" is defined by Code, § 2659, as follows: "(1) When the action is founded on contract, a cause of action also arising on contract, or ascertained by the decision of a court; or (2) a cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contracts or transactions set forth in the petition, or connected with the subject of the action; or (3) any new matter constituting a cause of action in favor of the defendant, or all of the defendants if more than one, against the plaintiff, or all of the plaintiffs if more than one, and which the defendant or defendants might have brought when the suit was commenced, or which was then held, either matured or not, when so

pleaded." *Palmer v. Palmer*, 57 N. W. 645, 647, 90 Iowa, 17. The three subdivisions of this section are the same as sections 2886, 2889, and 2891 of the revision of 1860. The only difference is that the first subdivision above set out is called a "set-off," the second a "counterclaim," and the third a "cross-demand." *Sherman v. Hale*, 41 N. W. 48, 76 Iowa, 383.

The statutory definition is that a "counterclaim is any matter arising out of or connected with the cause of action," etc. Rev. St. 1894, § 353 (Rev. St. 1881, § 350). Again, it is referred to in the statute as "a counterclaim arising out of a contract or transaction set forth in the complaint as the ground of plaintiff's claims" (Rev. St. 1894, § 354; Rev. St. 1881, § 351). *Blue v. Capital Nat. Bank*, 48 N. E. 655, 658, 145 Ind. 518.

A counterclaim, under the Code, is any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant, or tend to reduce the plaintiff's claim for damages. Rev. St. 1894, § 353 (Rev. St. 1881, § 350). *Shipman Coal Min. & Mfg. Co. v. Pfeiffer*, 39 N. E. 291, 292, 11 Ind. App. 445; *Wright v. Anderson*, 117 Ind. 349, 353, 354, 20 N. E. 247; *Lane v. Whitehouse*, 46 Ind. 389, 390 (quoting definition in 2 *Gavin & H. St.* 91, § 59); *Douthitt v. Smith*, 69 Ind. 463, 465; *Standley v. Northwestern Mut. Life Ins. Co.*, 95 Ind. 254, 261-263.

The counterclaim which a defendant may file must be one existing in favor of a defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claims, or connected with the subject of the action (Gen. St. par. 4178). *Atchison, T. & S. F. R. Co. v. Phelps*, 46 Pac. 183, 184, 4 Kan. App. 139; *Richardson v. Penny*, 61 Pac. 584, 586, 10 Okl. 32; *Deford v. Hutchison*, 25 Pac. 641, 643, 45 Kan. 318, 11 L. R. A. 257.

A counterclaim must tend in some way to diminish or defeat the plaintiff's recovery, and must be one of the following causes of action against the plaintiff, or, in a proper case, against the person whom he represents, and in favor of the defendant, or of one or more defendants, between whom and the plaintiff a separate judgment may be had in the action: (1) A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; (2) in an action on contract, any other cause of action on contract existing at the commencement of the action. Code Civ. Proc. N. Y. 1899, § 501. See, also, *Putnam v. De Forest* (N. Y.) 8 How. Prac. 146, 147; *Williams v. Upton* (N. Y.) 8 How. Prac. 205; *Drake v. Cockroft* (N. Y.) 4 E. D. Smith, 34, 39; *Hall v. Werney*, 46 N. Y. Supp. 33, 34,

18 App. Div. 565; *Howard Ironworks v. Buffalo Elevating Co.*, 81 N. Y. Supp. 452, 459, 81 App. Div. 386.

The counterclaim mentioned in a provision requiring the answer of a defendant to contain a statement of any new matter constituting a defense or counterclaim must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action: (1) A cause of action arising out of a contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action; (2) in an action arising on contract, any other cause of action arising also on contract, and existing at the commencement of the action. *Clark's Code N. C. 1900*, § 244; *Ballinger's Ann. Codes & St. Wash. 1897*, § 4913; *Jacobson v. Aberdeen Packing Co.*, 68 Pac. 419, 421, 26 Wash. 175; *Hurst v. Everett*, 91 N. C. 399, 402; *Code S. C.* § 173; *Ex parte Carolina Nat. Bank*, 18 S. C. 289, 297.

A counterclaim is a cause of action existing in favor of a defendant, and against a plaintiff or another defendant, or both, between whom a several judgment might be had in the action, and arising out of the contract or transaction set forth in the petition as the foundation of the plaintiff's claim, or connected with the subject of the action. *Bates' Ann. St. Ohio 1904*, § 5039.

By Rev. St. § 2656, a defendant is allowed to plead as a counterclaim a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of the action. *Gilbert v. Loberg*, 57 N. W. 982, 983, 86 Wis. 661; *Racine County Bank v. Keep*, 13 Wis. 209, 214; *Computing Scale Co. v. Churchill*, 85 N. W. 337, 338, 109 Wis. 303. A like definition is given in *Code*, § 96, *Renaker v. Smith*, 60 S. W. 407, 109 Ky. 643; *Whitlock v. Ledford*, 6 Ky. Law Rep. 387, 388, 82 Ky. 390; *Forbes v. Cooper*, 11 S. W. 24, 88 Ky. 285; *Grimes v. Grimes*, 10 Ky. Law Rep. 658, 659, 88 Ky. 20, 23, 9 S. W. 840; *Rennebaum v. Atkinson*, 20 Ky. Law Rep. 254, 256, 45 S. W. 874, 876, 103 Ky. 555; and in *Civ. Code*, § 126, *Wells v. Boyd*, 62 Ky. (Duv.) 366, 367; *Nolle v. Thompson*, 60 Ky. (3 Metc.) 121, 123; and in *Comp. Laws S. D.* § 3915, *Minneapolis Threshing Mach. Co. v. Darnall*, 83 N. W. 266, 267, 13 S. D. 279. Under the Kentucky statutory definition it has been held that a cause of action for the specific performance of a contract for the purchase of real property cannot be pleaded as a counterclaim to a suit for the recovery of the possession of specific personal property, though the real property and the personal property were sold by defendant to plaintiff by the same contract, *Rennebaum v. Atkinson*, 20 Ky. Law Rep. 254, 256, 45 S. W. 874, 876, 103 Ky. 555; that a defendant cannot

recover, by way of counterclaim, against a person not a plaintiff, on a claim which does not affect the plaintiff, nor the subject-matter of his action, *Wells v. Boyd*, 62 Ky. (1 Duv.) 366, 367; that, in an action to recover damages for trespass to land, defendant may bring in, as a counterclaim, his sworn title, and have judgment for the land, *Whitlock v. Ledford*, 6 Ky. Law Rep. 387, 388, 82 Ky. 390.

#### **Answer distinguished.**

Answer distinguished, see "Answer."

#### **As complaint.**

See "Complaint."

#### **As cross-action.**

A counterclaim is substantially a cross-action by the defendant against the plaintiff, growing out of or connected with the subject-matter of the action. *Renaker v. Smith*, 60 S. W. 407, 109 Ky. 643.

A counterclaim is allowed in order that the whole controversy between the parties may be determined in one action, and it may be relied upon wherever an action could be brought by the defendant for the same cause. In an action for assault and battery, the defendant may be the party most aggrieved, and the one who is actually entitled to relief. If so, he could maintain an action against the plaintiff, and, having been sued by him, has the right to seek redress against him by his cross-action in the form of a counterclaim. *Slone v. Slone*, 59 Ky. (2 Metc.) 339, 340.

A "counterclaim" is a cross-action, and it must contain all the elements of a cause of action, and must be governed and judged by the same rules which apply to the complaint, and the claim must be due. *Union Bank v. Heyward*, 15 S. C. 296, 303.

A counterclaim is, in effect, a cross-action, and, when well pleaded, the defendant becomes an actor, and there are two simultaneous actions depending in the same proceeding between the same parties, and each has the right to have all matters put in issue by the pleadings adjudicated, and neither has the right to go out of court before a complete determination of all the matters in controversy, without the consent of the other. *Whedbee v. Leggett*, 92 N. C. 469, 470.

#### **As cross-complaint.**

See "Cross-Complaint."

#### **Cross-complaint distinguished.**

In a counterclaim the defendant's cause of action is against the plaintiff, while in a cross-complaint it is against a codefendant or one not a party to the action. *White v. Regan*, 82 Ark. 281, 290.

**Cross-bill in equity included.**

A counterclaim is declared to be any matter arising out of or connected with the cause of action which might be the subject of an action in favor of the defendant, or which would tend to reduce the plaintiff's claim or demand for damages. This definition of "counterclaim" comprehends the recoupment of the common law and the cross-bill of the chancery practice. *Kirkpatrick Const. Co. v. Jewett Car Co.* (U. S.) 107 Fed. 622, 625; *Shipman Coal Min. & Mfg. Co. v. Pfeiffer*, 39 N. E. 291, 292, 11 Ind. App. 445.

A counterclaim, as the term is now used, is comprehensive of both recoupment and set-off at common law, and is also broader. In actions at law, or in suits in equity, it imports a claim opposed, or which qualifies, or at least in some degree affects, the plaintiff's cause of action or suit. As applicable to suits in equity, a counterclaim need only be a claim on which a suit might be maintained against the plaintiff by the defendant. Civ. Code, § 389. The Code, in thus authorizing counterclaims in equity, seems to have adopted substantially the rule in regard to filing cross-bills. *Burrage v. Bonanza G. & Q. M. Co.*, 6 Pac. 766, 768, 12 Or. 169.

**As cross-demand.**

See "Cross-Demand."

**As cross-petition.**

See "Cross-Petition."

**Defense distinguished.**

A counterclaim is not a defense, as the word is used in reference to pleadings. Thus in section 500, Code Civ. Proc., it is provided that an answer may contain a statement of new matter constituting a defense or counterclaim, thus making a clear distinction between the two, and the definition of "counterclaim" as given in section 501 shows that it is not included in the term "defense." Hence a counterclaim cannot be stricken off as sham under a provision allowing a sham answer or a sham defense to be stricken off on motion. *Baum's Castorine Co. v. Thomas*, 37 N. Y. Supp. 913, 92 Hun, 1.

A clear distinction between a defense and a counterclaim was that, when a defense is intended as a counterclaim, it should be explicitly so stated in the answer, and, when the defendant defines his answer as a defense, and it is uncertain whether a counterclaim is intended, the answer should be construed and considered as his defense. *Lafond v. Lassere*, 56 N. Y. Supp. 459, 26 Misc. Rep. 77.

A counterclaim cannot be stricken out as an irrelevant defense. It is not a defense. It is an affirmation of a cause of action against the plaintiff in the nature of a cross-action, upon which the defendant may have

an affirmative judgment against the plaintiff. *Fettretch v. McKay*, 47 N. Y. 426, 427.

The purpose of the answer is to defeat the action and bar the recovery, and a counterclaim or set-off, on the contrary, is a pleading by which the defendant states a cause of action in his own behalf and against the plaintiff. Accordingly, where the commencement of a paragraph of the pleading filed by the defendants was in the words, "For the third and further defense, said defendants say," etc., and it concluded thus, "Wherefore the defendants say that \* \* \* neither of said defendants are indebted to the plaintiffs, and they ask judgment," the paragraph cannot be made the foundation of a judgment for damages or other affirmative relief in favor of the defendants against the plaintiffs. *Bird v. St. John's Episcopal Church*, 56 N. E. 129, 133, 154 Ind. 138.

A counterclaim cannot be regarded as a defense, and hence is not subject to be stricken out. An irrelevant defense and counterclaim is an affirmation of a cause of action against the plaintiff in the nature of a cross-action upon which the defendants may have an affirmative defense against the plaintiff, and it cannot be stricken out on motion. *Fettretch v. McKay* (N. Y.) 11 Abb. Prac. (N. S.) 453, 454.

A counterclaim does not deny the cause of action, or plaintiff's right to recover thereon. A counterclaim will not prevent plaintiff from obtaining full credit for the amount due him, yet, if established, it affects his right of judgment. A defense denies the right to recover, and shows that plaintiff never had a cause of action, or that it had been discharged as by payment. *Yarger v. Chicago, M. & St. P. Ry. Co.*, 43 N. W. 469, 78 Iowa, 650.

**Denial.**

A counterclaim is defined by Code, § 500, as a cause of action in favor of the defendant against the plaintiff, whether independent of the plaintiff's claim or connected with it. Denials are no part of a counterclaim. *Foley v. Mercantile National Bank*, 33 N. Y. Supp. 414, 24 Civ. Proc. R. 249.

**Recoupment and set-off.**

"Counterclaim" is a term introduced into codes of civil proceedings, and includes any defense which at common law would have been set up by the way of recoupment or set-off. *Hay v. Short*, 49 Mo. 139, 142.

A counterclaim, under the Code, is like a recoupment at common law. *Hudson v. Snipes*, 40 Ark. 75, 78.

The counterclaim of the Code is a new invention. Its precise force and meaning is to be fixed by judicial decision, and obviously includes recoupment and set-off, as between the parties to the record. It is the

set-off of the Revised Statutes, together with the set-off of the courts of equity, and yet something more. It embraces all sorts of claims which a defendant may have against a plaintiff in the nature of cross-action or demand, or for which a cross or separate action would lie, within the limitations or restrictions contained in Code, § 150. *Wolf v. H—* (N. Y.) 13 How. Prac. 84, 85.

"Counterclaim," as used in the Code, includes both recoupment and set-off, and is, strictly speaking, a pleading by which the matters arising out of the recoupment or set-off are averred. *Freeman v. Seitz*, 58 Pac. 690, 126 Cal. 291; *St. Louis Nat. Bank v. Gay*, 101 Cal. 286, 289, 35 Pac. 876, 877.

Counterclaim embraces both set-off and recoupment. *Windecker v. Mutual Life Ins. Co.*, 43 N. Y. Supp. 858, 862, 12 App. Div. 73; *Wilder v. Boynton* (N. Y.) 63 Barb. 547, 549; and is more comprehensive than either, *O'Connor v. Roark*, 41 Pac. 465, 467, 108 Cal. 173.

A counterclaim is more comprehensive than a defense, set-off, or recoupment, and secures to a defendant sued the full relief which a separate action at law would have secured to him on the same facts. *Cohn v. Hussen* (N. Y.) 66 How. Prac. 150, 151.

The term "counterclaim" embraces both recoupment at common law and the cross-bill in equity. *Shipman Coal Min. & Mfg. Co. v. Pfeiffer*, 39 N. E. 291, 292, 11 Ind. App. 445; *Kirkpatrick Const. Co. v. Jewett Car Co.* (U. S.) 107 Fed. 622, 625.

The term "counterclaim," as used in the statutes, embraces all matters which might have been set off, and all claims which, under the adjudications of the court, might have been imposed as a defense by way of recoupment, as well as other claims and demands which theretofore could not have been enforced by separate action. The design was to enable the parties to settle all disputes, as far as practicable, in one action. *Gage v. Angell* (N. Y.) 8 How. Prac. 335, 336.

## COUNTERFEIT.

"In common parlance, a counterfeit is a likeness or resemblance intended to deceive, and to be taken for that which is original and genuine. and, when applied to persons, is seldom used in an innocent sense." *Thrman v. Matthews* (Ala.) 1 Stew. 384, 386.

The word "counterfeit" means to make in imitation of something else, with a view to defraud by passing the false copy for genuine or original. *State v. McKenzle*, 42 Me. 392, 394 (citing *Webst. Dict.*).

A counterfeit is an instrument falsely made in similitude of a genuine instrument. *United States v. Barrett* (U. S.) 111 Fed. 369, 372.

"Counterfeit," in a statute making it criminal to falsely make, forge, or counterfeit the coin of the United States, means to make something in the resemblance or similitude of such coin. *United States v. Otey* (U. S.) 81 Fed. 68, 69.

Pen. Code, div. 6, § 49, prescribes the punishment to be inflicted on a person who shall feloniously and fraudulently make, sign, or print any counterfeit note or bill of a bank; and section 52 declares that any person who shall feloniously and fraudulently pass up, etc., any false, forged, counterfeit, or altered note as aforesaid, shall be punished, etc. It was held that the term "counterfeit" was sufficient, without the addition of the words "in imitation of or purporting to be," and therefore an indictment following the identical language of the statute was sufficient. As defined by orthodox and classical expounders of our language, and in common acceptance, the word "counterfeit" imported an imitation, likeness, resemblance. In this acceptance it was understood and taken by all mankind. In reference to standard compilers of the words forming our language, the word "counterfeit" imports nothing more. The word "counterfeit" conveyed every idea without the addition of the explanatory expression, "imitation of or purporting to be." *State v. Calvin* (Ga.) R. M. Charit. 151, 159.

An indictment under the forty-third section of the act concerning crimes and misdemeanors, which punishes counterfeiting coin current in the state, must charge the offense to have been committed with an intent to defraud, as the word "counterfeit" is not a technical term legally meaning that the act is done to defraud. *Mattison v. State*, 3 Mo. 421.

## COUNTERFEIT BILL.

A counterfeit bill is one printed from a false plate, and not a bill printed legitimately or illegitimately from a genuine plate. *Kirby v. State*, 1 Ohio St. 185, 187.

V. S. p. 264, c. 31, § 34, directed against counterfeiting, and making it punishable for any one to have in his possession, with intent to utter, any counterfeited bill, must be construed as meaning counterfeit, and referring to bills made in imitation of money, and not as referring to a valid bill which had been copied or imitated. *State v. Randall* (Vt.) 2 Aik. 89, 103.

## COUNTERFEIT COIN.

A counterfeit coin is one made in imitation of some genuine coin. It is not necessary that the resemblance should be exact in all respects. The resemblance is sufficient if the coins are so far alike that the counterfeit coin is calculated to deceive a person exercising ordinary caution and observation

in the usual transactions of business, though it would not deceive a person who was an expert or who has had particular experience in such matters. *United States v. Hopkins* (U. S.) 26 Fed. 443.

Both the coin made and that in imitation of which it is made are said to be counterfeited, the one in an active and the other in a passive sense. In the one case the action is effective, and in the other not. In the one case the protectiveness of the action centers in the object; in the other, it is reflected from it. And an allegation in an indictment that respondent ten pieces of forged and counterfeit coin unlawfully and feloniously did forge, make, and counterfeit, is sufficient. *State v. Griffin*, 18 Vt. 198, 202.

A counterfeit coin, within Act June 8, 1864, entitled "An act to punish and prevent the counterfeiting of coin in the United States," is a piece of metal stamped and made legally current as money issued from the mints of the United States and those of foreign countries current here. It is a coin in imitation of some genuine coin. The resemblance of the counterfeit to the genuine must be such that it might deceive a person using ordinary caution, and a conviction for counterfeiting cannot be had for the uttering of pieces of metal which are not in the likeness or similitude of some genuine coin; and hence a person who passes pieces of metal apparently gold, octagon in form, on one side of which is the device of an Indian, and on the other the inscription "¼ dollar," is not guilty under Rev. St. § 5461 [U. S. Comp. St. 1901, p. 3685], punishing the counterfeiting of coin. *United States v. Bogart* (U. S.) 24 Fed. Cas. 1185.

#### COUNTERFEIT TRADE-MARK.

The phrases "forged trade-mark" and "counterfeited trade-mark," or their equivalents, as used in provisions in the Penal Code punishing the forging and counterfeiting of trade-marks, include every alteration or imitation of any trade-mark so resembling the original as to be likely to deceive. Rev. St. Utah 1898, § 4484.

#### COUNTERFEITER.

In legal parlance, a counterfeiter is one who unlawfully makes base coin in imitation of the true metal, or forges false currency, or any instrument of writing bearing likeness and similitude to that which is lawful and genuine, with an intention of deceiving and imposing on mankind. *Thirman v. Matthews* (Ala.) 1 Stew. 384, 386.

#### COUNTERFEITING.

As an infamous crime, see "Infamous Crime."

As felony, see "Felony."

### COUNTERPART.

Where each part of a statement is executed by one party only, as often occurs in cases of leases, the two instruments are called "counterparts." *Roosevelt v. Smith*, 40 N. Y. Supp. 381, 382, 17 Misc. Rep. 823.

#### COUNTERPART WRIT.

A counterpart writ is a copy of the original writ, and is authorized to be issued to another county when the court or justice has jurisdiction of the cause by reason of the fact that some of the defendants are residents of his county, or found therein. *White v. Lea*, 77 Tenn. (9 Lea) 449, 450.

### COUNTERSIGN.

To countersign an instrument is to sign what has already been signed by a superior—to authenticate by an additional signature—and usually has reference to the signature of a subordinate in addition to that of his superior, by way of authentication of the writing to which it is affixed, and it denotes the complete execution of the paper. *Fifth Avenue Bank v. Forty-Second St. & G. St. Ferry R. Co.*, 33 N. E. 378, 380, 137 N. Y. 231, 19 L. R. A. 331 33 Am. St. Rep. 712.

"Countersign" means to sign what has already been signed by a superior; to authenticate by an additional signature; and hence, where the signature of a person appeared on the instrument, it was not open to the objection that it was not signed though the signature was preceded by the word "Countersigned." *Gurnee v. City of Chicago*, 40 Ill. 165, 167.

"Countersigned," as used in a statute directing the issuance of a certificate of state indebtedness signed by the Governor, and countersigned by the Acting Paymaster General, means the signing of what has already been signed by a superior to authenticate a writing. In the making of the paper itself, the part taken by the Acting Paymaster General was subordinate to the previous signature of the Governor and the Quartermaster General. *People v. Brie* (N. Y.) 43 Hun, 317, 327.

### COUNTERVAIL LIVERY.

A release was a form of transfer used at common law only where some right to real estate existed in one person, the actual possession of which was in another. The possession in such case was said to "countervail livery." *Dyer*, 269, pl. 20, in marg. That is, it supplied the place of and rendered unnecessary that open and notorious delivery of the possession which the common law required in cases of transfer of lands. *Miller v. Emans*, 19 N. Y. 384, 387.

## COUNTING HOUSE.

Within an act authorizing a punishment for breaking or entering a counting house, a building called a "machine house," on the premises of a person who had large chemical works, in which goods sent out were weighed, and in which the men's time was taken, and wages paid, is included.—*Regina v. Potter*, 4 Eng. Law & Eq. 575.

## COUNTING UPON A STATUTE.

In *Gould*, Pl. c. 111, § 16, note 3, it is said that "counting upon a statute consists in making express reference to it as by the word 'against the form of a statute' (or 'by the force of statute') in such case made and provided."—*Richardson v. Fletcher*, 52 Atl. 1064, 1066, 74 Vt. 417.

## COUNTRY.

See "Foreign Country"; "Indian Country."

"Countries," as used in 12 Stat. 577, providing that goods which are grown or produced in countries beyond the Cape of Good Hope shall, when imported from a place this side of it, pay a duty of 10 per cent. in addition to the duties imposed on such articles when imported directly from the place of their growth or production, is used in a local and geographical sense, without regard to the subdivision of the territory under different sovereigns or government; and hence Calcutta, in the British East Indies, is to be regarded as a country beyond the Cape of Good Hope. *Campbell v. Barney* (U. S.) 4 Fed. Cas. 1157, 1158.

Under revenue laws providing that no goods, wares, or merchandise should be imported into the United States from any foreign port or place, except in vessels of the United States, or in such foreign vessels as truly and wholly belong to the citizens or subjects of that country of which the goods are the growth, production, or manufacture, or from which they can only be, and most usually are, shipped for transportation, it was held that "country" should be construed as embracing all the possessions of a foreign state, however widely separated, which are subjected to the same executive and legislative authority. The productions and manufactures of a foreign state and of its colonies may be imported into the United States in vessels owned by the citizens or subjects of such state, without regard to their place of residence within its possessions. This, when applied to Great Britain, includes its East India possessions. *United States v. The Recorder* (U. S.) 27 Fed. Cas. 718; *Stairs v. Peaslee*, 59 U. S. (18 How.) 521, 526, 15 L. Ed. 474.

The concluding part of the old system of pleading, by which the answer stated that the pleader, "and of this he puts himself upon the country," meant that the truth of the fact so stated he desired to have tried by the jury. *Bell v. Yates* (N. Y.) 33 Barb. 627, 629.

### As state in United States.

In an article in the convention for extradition between the United States and Switzerland, which provides that the fact of the commission of the crime shall be established according to such proceedings as would be required if the crime had been committed in the country where the person shall be found, the word "country" necessarily means, in carrying out the provisions of the convention under our form of government, the special political jurisdiction that has cognizance of the crime; and, where the proceeding is brought in the state of New York, it must follow the observances which prevail in such state. In *re Farez* (U. S.) 8 Fed. Cas. 1007.

In the statute of limitations providing that limitations shall not run against a person without the country, the word "country" should not be construed to mean the United States, and not the state. The state may certainly with propriety be called a country, and, when the Legislature used the expression "country," it is natural to suppose that they meant the country for which they were legislating. *Mansell's Adm'r v. Israel*, 6 Ky. (3 Bibb) 510, 514.

### In mining as rock surrounding vein.

As the term "country" is used in the mining law, it designates the mass of rock which surrounds a vein or lode. It is used to designate all such surrounding rock, without regard to its character. *Stevens v. Williams* (U. S.) 23 Fed. Cas. 44.

The term "country," in the mining law, is used to designate the rock surrounding or adjoining a lode. *King v. Amy & Silver-Smith Con. Min. Co.*, 24 Pac. 200, 202, 9 Mont. 543.

## COUNTRY DAMAGE.

"Country damage," as used with reference to bales of cotton, is damage which results often from the bad condition of the cotton when it is baled, or from its exposure to bad weather, or from ill usage in its interior transportation, and is not discoverable from an inspection of the bales at the time of shipment. *Bradstreet v. Heran* (U. S.) 3 Fed. Cas. 1183.

The term "country damaged," as applied to a cargo of wheat purchased afloat, means damaged by being wet or from some other cause before shipment. *Alexander v. McNear* (U. S.) 28 Fed. 403.

**COUNTRY ROCK.**

As the term "country rock" is used in the mining law, it designates the mass of rock which surrounds the vein or lode. It is used to designate all such surrounding rock, without regard to its character. *Stevens v. Williams* (U. S.) 23 Fed. Cas. 44.

"Country rock" is the term applied in mining parlance to the rock which forms the boundaries of and incloses a vein, lode, or ledge. *Iron Silver Min. Co. v. Cheesman*, 6 Sup. Ct. 481, 483, 116 U. S. 529, 29 L. Ed. 712.

**COUNTRY WHENCE HE CAME.**

Act Cong. Oct. 1, 1888, c. 1064, 25 Stat. 504 [U. S. Comp. St. 1901, p. 1318], prohibiting any Chinese laborer, etc., from returning to the United States, and providing that, if such person return, he shall be removed to the "country from whence he came," means the country of his last domicile, and is not simply a paraphrase of the words "country of which he is a subject by birth or allegiance." *United States v. Chong Sam*, 47 Fed. 878, 883.

Act Cong. Oct. 1, 1888, c. 1064, 25 Stat. 504 [U. S. Comp. St. 1901, p. 1318], prohibiting any Chinese laborer, etc., from returning to the United States, and providing that, if such person return, he shall be removed to the "country from whence he came," includes the country from which he came by a direct journey, though he may have come through another country. In *re Mah Wong Gee* (U. S.) 47 Fed. 433, 434.

**As country of residence.**

Act Cong. Oct. 1, 1888, c. 1064, 25 Stat. 504 [U. S. Comp. St. 1901, p. 1318], prohibiting any Chinese laborer, etc., from returning to the United States, and providing that, if such person return, he shall be removed to the "country from whence he came," means a country in which he has established relations of a permanent character, and acquired a right under the law of that country to freely return thereto. *United States v. Ah Toy* (U. S.) 47 Fed. 305, 306.

Act Cong. Oct. 1, 1888, c. 1064, 25 Stat. 504 [U. S. Comp. St. 1901, p. 1318], prohibiting any Chinese laborer, etc., from returning to the United States, and providing that, if such person return, he shall be removed to the "country from whence he came," means any country of which such person was a resident at the time he entered the United States. In *re Leo Hem Bow* (U. S.) 47 Fed. 302, 303.

**COUNTY.**

See "Another County"; "Established County"; "New County"; "Organized County"; "Proper County"; "Unorganized County"; "Body of County"; "Co."

Any county, see "Any."

The term "county," as defined by Blackstone (1 Bl. Comm. 113, 116), is a civil division of a state or kingdom for political and judicial purposes, formerly governed in England by an earl or count, from whom it derived its name. Kent defines a county (2 Kent, Comm. 275) as a public corporation created by the government for political purposes, and invested with subordinate legislative powers, to be exercised for local purposes connected with the public good; and such powers are, in general, subject to the control of the Legislature of the state. *Patterson v. Temple*, 27 Ark. 202, 207.

The word "county" signifies the same as "shire"; "county," being derived from the French, and "shire" from the Saxon. Both of these words signify a circuit or portion of the realm into which the whole land is divided for the better government thereof, and the more easy administration of justice. *State v. Dickenson* (Fla.) 33 South. 514, 515, 60 L. R. A. 539 (citing *Stockton v. Powell*, 29 Fla. 1, 10 South. 688, 15 L. R. A. 42).

Counties "are corporations of a purely political character, constituting the machinery and essential agencies by which the free governments derived from and modeled upon the representative and popular features of the English Constitution are upheld, and through which, for the most part, their powers are exercised. The idea of a government by means of counties comes down from the remotest period of Anglo-Saxon history. It was imported to the American colonies with the common law, and entered naturally and of course into the frame of all their colonial governments, from whence it passed, by easy transition and necessary consequence, into the governments of the states. Our Constitutions do not expressly provide for the organization of the territory into counties. This division is taken for granted. The idea of counties underlies all American Constitutions. They presuppose both the existence and necessity of counties, and, starting from that foundation, proceed to base thereon frames of government in which the counties act all efficient parts. The political power is composed of representatives from counties. Through them justice is administered, the revenue collected, and the local police rendered effective. Having this character, so intimately connected with the public interests, so foreign to any considerations of private convenience in opposition to the common good, it logically follows that the power of the Legislature to mold and direct these political subdivisions to effect their objects, and cause them to subserve their highest purposes, must be very great. They are the vitals of the state; their inefficiency, her paralysis. The health of the body politic requires that the Legislature should have a power over them analogous to that of the individual over his own limbs." *Eagle v. Beard*, 33 Ark. 497, 501.



Counties are but agencies of the state for governmental purposes. *Consolidated Ice Co. v. City of New York*, 59 N. E. 713, 716, 166 N. Y. 92.

Counties are involuntary political or civil divisions of the state, created by general laws to aid in the administration of the state government. *City of New Albany v. Conger*, 47 N. E. 852, 854, 18 Ind. App. 230; *Jasper County Com'rs v. Allman*, 42 N. E. 206, 207, 142 Ind. 573, 39 L. R. A. 58; *Cones v. Benton County Com'rs*, 37 N. E. 272, 273, 137 Ind. 404; *State v. King*, 57 N. E. 535, 537, 154 Ind. 621; *Jay County Com'rs v. Fertich*, 46 N. E. 699, 700, 18 Ind. App. 1; *Cole v. White County*, 32 Ark. 45, 52; *State v. Blackburn*, 33 S. W. 529, 530, 61 Ark. 407. The people residing therein are virtually the corporators. *State v. King*, 57 N. E. 535, 537, 154 Ind. 621.

"A county is a public corporation which exists only for public purposes connected with the administration of the state government, and it and its revenues are alike, where no express restriction is found to the contrary, subject to legislative control." *Raymond v. Hartford Fire Ins. Co.*, 63 N. E. 745, 749, 196 Ill. 329; *Swartz v. Lake County Com'rs*, 63 N. E. 31, 35, 158 Ind. 141; *Sangamon County Sup'rs v. City of Springfield*, 63 Ill. 66, 71; *Marion County v. Lear*, 108 Ill. 343; *Harris v. Whiteside County Sup'rs*, 105 Ill. 445, 451, 44 Am. Rep. 808; *City of Chicago v. Manhattan Cement Co.*, 53 N. E. 68, 70, 178 Ill. 372, 45 L. R. A. 848, 69 Am. St. Rep. 321; *Armstrong v. Dearborn County Com'rs* (Ind.) 4 Blackf. 208, 213.

Counties are, at most, but local organizations which for the purpose of civil administration are invested with a few functions characteristic of corporate existence. They are local subdivisions of the state, created by the sovereign power of the state of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. *Frederick v. Douglas County*, 71 N. W. 798, 799, 96 Wis. 411 (citing 1 Dill. Mun. Corp. §§ 23, 25); *Grant County v. Lake County*, 21 Pac. 447, 448, 17 Or. 453; *Hamilton County Com'rs v. Mighels*, 7 Ohio St. 109, 115; *Fischer Land & Improvement Co. v. Bordelon*, 27 South. 59, 62, 52 La. Ann. 429; *Kahn v. Sutro*, 46 Pac. 87, 88, 114 Cal. 316, 33 L. R. A. 620.

Counties are subdivisions of the state in which some of the powers of state government are exercised by legal functionaries for legal purposes. They are nothing more than certain portions of territory in which the state is divided for the more convenient exercise of the powers of government. They form together one political body, in which the sovereignty resides. *Wooster v. Plymouth*, 62 N. H. 193, 208.

A county is a corporation, with commissioners, treasurer, coroner, sheriff, consta-

bles, justices of the peace, judges of the courts, etc. It is struck off from the state at large, and becomes a distinct and independent body, though in some cases it may be within the bounds of an old county. *Respublica v. McClean* (Pa.) 4 Yeates, 399, 409.

A county is a political subdivision of the state, acting as a corporation with certain specified powers, and acting through its officers in a certain prescribed way, pointed out by law. *Shawnee County Com'rs v. Carter*, 2 Kan. 115, 128.

Counties are subdivisions of the state for governmental purposes, and the General Assembly has power to create, alter, abolish, and regulate them as expediency may demand, so that no vested rights are interfered with. *State v. Missouri Pac. Ry. Co.*, 27 S. W. 867, 868, 123 Mo. 72.

Counties of a state are involuntary subdivisions of the state, and corporations for governmental purposes. The board of county commissioners is the legal representative of the county, but the inhabitants, not the board, constitute the county. *Zuelly v. Casper*, 67 N. E. 108, 104, 160 Ind. 455, 63 L. R. A. 133.

Counties are separate organizations established for public, political purposes, for the administration of government—chiefly for purposes strictly local in character and interest. *Shriver v. Hering*, 54 Atl. 651, 653, 97 Md. 19.

A county is a subdivision of the state created by the sovereign power of the state for governmental purposes. Such subdivisions are instrumentalities of government, and exercise the powers delegated by the state. *Miami County Com'rs v. Mowbray*, 66 N. E. 46, 47, 160 Ind. 10 (citing *Fulton County Com'rs v. Rickel*, 106 Ind. 501, 7 N. E. 220; *Vigo County Com'rs v. Daily*, 132 Ind. 73, 31 N. E. 531).

A county is a political division endowed with specific powers, and provided with appropriate officers to manage its affairs. *Floyd v. Perrin*, 8 S. E. 14, 21, 30 S. C. 1, 20, 2 L. R. A. 242.

Counties, cities, etc., are political subdivisions of the state, and are included in the term "state," which is the concrete whole. *State v. Levy Court* (Del.) 43 Atl. 522, 524, 1 Pennewill, 597.

A county is a body politic whose powers are exercised by a board of supervisors. *Sierra County v. Butler*, 69 Pac. 418, 419, 136 Cal. 547.

A county is a political subdivision of the state. *People v. Scannell*, 75 N. Y. Supp. 500, 508, 37 Misc. Rep. 345.

A county is a legal subdivision of the state. *State ex rel. Beach v. Finn*, 4 Mo. App. 347, 350.

A county is the largest political division of the state having corporate powers. Pol. Code Cal. 1903, § 3901; Pol. Code Ment. 1895, § 4100.

The word "county" includes a parish, or any other equivalent subdivision of a state or territory of the United States. U. S. Comp. St. 1901, p. 4.

The word "county" may mean the county in which the subject-matter referred to is situate, belongs, or is cognizable. V. S. 1894, 25; Pub. St. N. H. 1901, p. 64, c. 2, § 27.

Whenever the term "county," "subdivision," or "judicial subdivision" is employed in the Code of Criminal Procedure, in defining or describing the territorial or local jurisdiction of any magistrate or court, or in restraining, enlarging, or otherwise conferring authority upon any court, officer, or person of this state, the words are deemed to be employed in the same sense and interchangeably, except when a different sense plainly appears; as, for example: (1) The term "county," when so employed, includes an organized county, or an organized county and such unorganized counties or other territory or parts of this state as now are, or as may be hereafter, by law, attached to such organized county for judicial purposes; (2) the term "subdivision," when so employed, includes an organized county, or an organized county and such unorganized county or counties or other territory or parts of this state as now are, or as may be hereafter, by law, attached to such organized county for judicial purposes; (3) the term "judicial subdivision," when so employed, includes an organized county, or an organized county and such unorganized county or counties or other territory or parts of this state as now are, or as may be hereafter, by law, attached to such organized county for judicial purposes. Rev. Codes N. D. 1899, § 8511.

#### City as.

The word "county" includes city and county. Code Civ. Proc. Cal. 1903, § 17; Civ. Code Cal. 1903, § 14.

The word "county" shall be construed to include the city of Baltimore, unless such construction would be unreasonable. Pub. Gen. Laws Md. 1888, p. 3, art. 1, § 11.

Under a statute prohibiting counties from subscribing for stock in any incorporated company unless the same be paid for at the time of such subscription, it is held that cities, though an integral part of the county, are not intended to be included in the prohibition. *Thompson v. City of Peru*, 29 Ind. 305, 307; *City of Aurora v. West*, 9 Ind. 74, 77.

The words "counties and townships," in Const. art. 13, § 12, providing that the Legislature shall provide for the establishment

of a library in each township, and that all the fines collected in the several counties and townships for any breach of the penal laws shall be exclusively applied to the support of such libraries, include all the municipal divisions of the state, and hence fines collected in the city of Detroit must be shared with the country towns of the county. *Wayne County v. City of Detroit*, 17 Mich. 390, 401.

#### Contiguous territory implied.

Within Gen. St. 1894, § 621, providing that new counties may be created out of territory to be detached from one or more of the counties already organized, but no existing county shall by the creation of any new counties be reduced in area to less than 400 square miles, or contain a population of less than 2,000 inhabitants, the word "county" is used in its usual and accepted meaning, and with reference to declared public policy of the state from its beginning—that all counties shall be composed of contiguous territory, unless separated by navigable rivers; so that a statute does not authorize the founding of a new county, where by so doing the old county is left in two or more completely separated parts. *Duckstad v. Polk County Com'rs*, 71 N. W. 933, 934, 69 Minn. 202.

#### As district.

Rev. St. 1898, § 8, declares that counties on the shores of Green Bay shall have jurisdiction in common of all offenses committed on that part of the bay lying within the limits of the state. Const. art. 1, § 7, provided that, in all prosecutions by indictment or information, the case shall have a speedy trial by a jury of the county or district wherein the offense shall have been committed, which county or district shall have previously been ascertained by law. It was held that where one was informed against for taking fish with nets in the waters bordering on Door county, and the offense was committed 40 miles from Brown county, and 5 miles, at least, from the nearest point of any other county than Door, the circuit court of Brown county had jurisdiction; the word "district," in the Constitution, not being used synonymously with "county." *State v. McDonald*, 85 N. W. 502, 505, 109 Wis. 506.

As used in Code Civ. Proc. Or. § 54, amended in Sess. Laws 1876, p. 37, providing that, in case of an action against a private corporation, the summons shall be served on certain officers, or, in case none of them reside or have an office in the county where the cause of action arose, then on any clerk within such county, the word "county" must, in the federal court, be understood to mean the district or territorial limit of the court's jurisdiction. *Lung Chung v. Northern Pac. R. Co.* (U. S.) 19 Fed. 254, 257.

**As a municipal corporation.**

A county is a municipal corporation comprising the inhabitants within its boundaries, and formed for the purpose of exercising the powers and discharging the duties of local government, and the administration of public affairs conferred upon it by law. *Laws 1892, c. 686; Markey v. Queens County, 49 N. E. 71, 72, 154 N. Y. 675, 39 L. R. A. 46; Kennedy v. Queens County, 62 N. Y. Supp. 276, 279, 47 App. Div. 250.*

A county is a municipal corporation created by law for public and political purposes, and constitutes a part of the government of the state. Its powers are expressly defined by law, and, where they are not fixed by the Constitution, they may be acknowledged or modified by the Legislature. *Gooch v. Gregory, 65 N. C. 142, 143.*

Municipal corporations proper are called into existence either at the direct solicitation or by the free consent of the people who compose them. Counties are local subdivisions of the state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent, or concurrent action of the people who inhabit them. The former organization is asked for, or at least assented to, by the people it embraces. A municipal corporation proper is created mainly for the interest and convenience of the locality and its people. A county organization is created almost exclusively with a view to the policy of the state at large. *Overholser v. National Home for Disabled Volunteer Soldiers, 67 N. E. 487, 489, 68 Ohio St. 236.*

A municipal corporation is a government possessing powers of legislation, and is charged with a general care for the welfare of the people, while a county organization is merely the involuntary agent of the state, charged with the interests of the state in the particular county, and clothed with certain administrative functions, limited in extent, and clearly defined by law. *City of Williamsport v. Commonwealth, 84 Pa. 487, 499, 24 Am. Rep. 208.*

A county is a municipality, within the meaning of an act authorizing municipal corporations to fund indebtedness; a county being defined by St. 1893, c. 22, art. 1, § 1, as follows: "That each organized county within this territory shall be a body corporate and politic." *Territory v. Hopkins, 59 Pac. 976, 980, 9 Okl. 133.*

A county is not, in a strict sense, a municipal corporation. In the sense, however, that its board of commissioners has no power other than is derivable expressly or by necessary implication from the provisions of the statute defining their powers, it comes within the rules and principles of law applicable to such corporations. *State v. Coad, 57 Pac. 1092, 1095, 23 Mont. 131.*

A county is not a municipal corporation in the full sense of the term. It is only a quasi corporation, and possesses such powers and is subjected to such liabilities only as are specially provided for by law. *Schweiss v. First Judicial District Court, 45 Pac. 289, 23 Nev. 226, 34 L. R. A. 602.*

Counties are not municipal corporations proper, and, even when invested with corporate capacity and the power of taxation, are but quasi corporations, with limited powers and liabilities. They exist only for the purpose of the general political government of the state. They are the agents and instrumentalities the state uses to perform its functions. All the powers with which they are intrusted are the powers of the state, and the duties imposed upon them are the duties of the state. *Madden v. Lancaster County (U. S.) 65 Fed. 188, 191, 12 C. C. A. 566.*

The city and county of San Francisco is recognized as having the attributes of both a city and county. Geographically it is one of the legal subdivisions of the state, and, in that respect, is recognized by the Constitution as one of the counties of the state. Politically it is regarded in that instrument as a municipal corporation. A county is not a corporation for municipal purposes, within the meaning of the Constitution. *Kahn v. Sutro, 46 Pac. 87, 88, 114 Cal. 316, 33 L. R. A. 620.*

A county is one of the public territorial divisions of the state, created and organized for public, political purposes connected with the administration of the state government, and especially charged with the superintendence and administration of local affairs of the community; being in its nature and objects a municipal corporation. The Legislature, unless restrained by the Constitution, may exercise control over the county agencies, and require such public duties and functions to be performed by them as fall within the general scope and object of the municipal organization. *Talbot County Com'rs v. Queen Anne's County Com'rs, 50 Md. 245.*

**As person.**

See "Person."

**Powers and liabilities.**

Counties are quasi municipal corporations, and it is elementary that they can exercise only such powers as are expressly granted them by the Legislature, or such as are fairly implied as necessary to the exercise of the powers granted. *Grannis v. Blue Earth County Com'rs, 83 N. W. 485, 496, 81 Minn. 55; Scates v. King, 110 Ill. 456, 466.*

Counties exist only for the purpose of a general politic government of the state. All the powers with which they are intrusted

are the powers of the state, and all the duties with which they are charged are duties of the state. *Travelers' Ins. Co. v. Township of Oswego* (U. S.) 59 Fed. 58, 64, 7 C. C. A. 869.

A county is one of the political divisions of the state, signifying a community clothed with such extensive authority and political power as may be deemed necessary by the superior controlling power of the state for the proper government of its people residing within its borders, and for a proper administration of its local affairs. *Emery County v. Buresen*, 47 Pac. 91, 14 Utah, 328, 37 L. R. A. 732, 60 Am. St. Rep. 898.

A county organization is created almost exclusively with a view to the policy of the state at large, for purposes of political organization and civil administration in matters of finance, of education, of provision for the poor, of military organization, and especially in the general administration of justice. *State v. Downs*, 57 Pac. 962, 963, 60 Kan. 788; *People v. Van Gaskin*, 6 Pac. 30, 40, 5 Mont. 352.

Counties are involuntary political or civil divisions of the state, created by general laws to aid in the administration of the government. Their powers are not uniform in all the states, but these generally relate to the administration of justice, the support of the poor, and the establishment and repair of highways, all of which are matters of state, as distinguished from municipal, concern. They are purely auxiliaries of the state, and to the general statutes of the state they owe their creation, and the statutes confer on them all the powers they possess, prescribe all the duties they owe, and impose all the liabilities to which they are subject. *Cummings v. Kendall County*, 26 S. W. 439, 440, 7 Tex. Civ. App. 164; *Shipley v. Hachenev*, 55 Pac. 971, 972, 34 Or. 303; *Harris v. Whiteside County Sup'rs*, 105 Ill. 445, 451, 44 Am. Rep. 808. A county is thus merely a part of the state government. *Hoexter v. Judson*, 59 Pac. 498, 499, 21 Wash. 646.

A county has been defined as an involuntary political or civil division of a state, created by statute to aid in the administration of the government. It is in its very nature and purpose a governing agency, rather than a corporation. Whatever of power it possesses, or whatever of duty it is required to perform, originates in the statutes creating it, or in the statutes declaring its power and duty. *Southern Ry. Co. v. St. Clair County*, 27 South. 23-25, 124 Ala. 491; *Askew v. Hale County*, 54 Ala. 639, 641, 25 Am. Rep. 730. It is created mainly for the interest, advantage, and convenience of the people residing within its territorial boundaries, and the better to enable the government to extend to them the protection to which they are entitled, and the more ben-

eficially to exercise over them its powers. All the powers with which the county is intrusted are the powers of the state, and all the duties with which they are charged are the duties of the state. If these were not committed to the county, they must be conferred on some other governmental agency. *Askew v. Hale County*, 54 Ala. 641; *People v. Martin*, 53 N. E. 309, 312, 178 Ill. 611.

Counties are mere subdivisions of the state for governmental purposes—capable, however, of holding title in fee to such land as may be donated to them for their own use. *Abernathy v. Dennis*, 49 Mo. 468. Hence a county can take land under a will. *Fulbright v. Perry County*, 46 S. W. 955, 958, 145 Mo. 432.

A county is not a municipal corporation. It has no police powers. It is not a corporation in the strict sense of the term, but is what is denominated a "quasi corporation"—an organization in the nature of a corporation exercising special and limited powers. Those powers pertain strictly to local concerns—the performance of local public duties in which no other part of the state is directly concerned. The apprehension and trial of persons accused of crime is a matter not of local, but of general, concern—one in which the whole state, in theory, is equally interested. Hence the services of the sheriff in the arrest of offenders against the criminal laws of the state are performed for the state, and not for the county of which he is sheriff. *Northern Trust Co. v. Snyder*, 89 N. W. 460, 466, 113 Wis. 516.

A county is not a corporation, but it is a mere political organization of certain of the territory within the state, particularly defined by geographical limits, for the more convenient administration of the laws and police power of the state, and for the convenience of the inhabitants. Such organization is vested with certain powers delegated to it by the state for the purpose of civil administration, and for the same purpose it is clothed with many characteristics of a body corporate. *Hunter v. Mercer County Com'rs*, 10 Ohio St. 515, 520.

A county is a corporation, so far as to be capable of suing and being sued; but its inhabitants cannot, like the inhabitants of towns and parishes, assemble, and by vote declare their will on any subject. The inhabitants of counties, as such, are not represented in either branch of the Legislature, and so cannot, like towns, which may be represented in both branches, or plantations, which may be represented in the Senate, be presumed to have assented to taxes imposed by the Legislature. The only representative body in the county whose acts and admissions are binding on its inhabitants is the court of sessions, which has been immemorially considered as the agent and representative of the county, touching its finances and general prudential concerns. In-

habitants of Hampshire County v. Inhabitants of Franklin County, 16 Mass. 76, 87.

Counties are but subdivisions of the territory created for governmental purposes, and their inhabitants derive their authority to hold elections and elect officers from the Legislature; and where the law makes no provision for an election, or gives no authority to elect an officer, such right or authority cannot be legally exercised. *Stone v. Reynolds*, 54 Pac. 555, 558, 7 Okl. 397.

A county is often said to be a mere agency of state government—a function through which the state administers its affairs—and it frequently has but little, if any, option in the creation of debts and liabilities against it. *Robertson v. Blaine County* (U. S.) 90 Fed. 63, 69, 32 C. C. A. 512, 47 L. R. A. 459.

A county is an organized political subdivision of a state. It has such powers—and such only—to contract loans and incur other indebtedness as are expedient, or by fair implication granted to it by the Legislature of the state. *Dudley v. Lake County Com'rs*, 80 Fed. 672, 675, 26 C. C. A. 82.

In the absence of a statute imposing special duties, with corresponding liabilities, a county is not liable for the tortious acts of negligence of its officers or agents. *Jasper County Com'rs v. Allman*, 42 N. E. 206, 207, 142 Ind. 573, 39 L. R. A. 58; *Cones v. Benton County Com'rs*, 37 N. E. 272, 273, 137 Ind. 404.

Laws 1887, p. 237, making a county liable for property destroyed within it by a mob, without reference to its ability or exercise of diligence to prevent the destruction, is within the police power of the state. *City of Chicago v. Manhattan Cement Co.*, 53 N. E. 68, 70, 178 Ill. 372, 45 L. R. A. 848, 69 Am. St. Rep. 321.

#### As quasi corporations.

Counties are quasi corporations. *Price v. Sacramento County*, 6 Cal. 254, 255.

Counties are quasi corporations organized as a part and parcel of the state government to subserve the public interest, and to this end, and in order to accomplish this effect, certain corporate powers are conferred upon them. *Wells v. Cole*, 27 Ark. 603, 605.

A county is a political division, and denominated a "quasi corporation." It assumes on itself some of the duties of the state, in a partial or detached form, and is to be considered in the light of an auxiliary of the government, and as a trustee of the people. *Barton County v. Walser*, 47 Mo. 189, 202 (citing *Hannibal & St. J. R. Co. v. Marion County*, 36 Mo. 294, 308); *Reardon v. St. Louis County*, 36 Mo. 555, 560 (citing *McKim v. Odom*, 3 Bland, 407, 417).

A county is a political division, and denominated a "quasi corporation," and is in-

vested with corporate power to do things. *Hannibal & St. J. R. Co. v. Marion County*, 36 Mo. 294, 303.

A county is a body politic having a corporate capacity only for particular specified ends and purposes, and is termed by legal writers a "quasi corporation"; that is, having corporate attributes sub modo. *Williams v. Lash*, 8 Minn. 496, 504 (Gil. 441, 446).

The term "county" has a well-defined meaning. By act the state has been divided into a certain number of territorial boundaries called "counties." Each county is a body politic and corporate for certain purposes, among which are to purchase and hold for the use of the county lands and personalty within the limits thereof, and to make all contracts and to do all acts in relation to the property and concerns of the county. *Carolina, C., G. & C. Ry. Co. v. Tribble*, 25 S. C. 260, 264.

A county is a corporation created by law. Like most corporations, its powers are necessarily specific and limited, and such powers as it may exercise it owes to legislative grant; and the Legislature may make such grant as broad as it sees fit, unless there is a constitutional provision which confines such grant to a specified limit. The people of the county are the incorporators. 2 Kent, Comm. 274. And when it acts, as all corporations must when no other mode is prescribed, it must perform its functions through the action of a majority of its citizens entitled to speak in its elections. *Ang. & A. Corp. §§ 84, 499*; 1 Kyd, Corp. 422; 2 Kent, Comm. 236. As in other corporations, the minority must act with the majority, unless there is some rule to excuse them. If an obligation is contracted by a majority in a manner authorized by law, it must be discharged in a manner authorized by law. It cannot be repudiated because the minority complain, nor because the majority may subsequently change its views. *Ex parte Selma & G. R. Co.*, 45 Ala. 696, 727, 6 Am. Rep. 722.

Counties are not corporations, but civil and political divisions of the state. For some purposes they are merely civil divisions, but for others they certainly are corporations. They are therefore called "quasi corporations." They are political, aggregate corporations, capable of exercising such powers as they may be vested with by the Legislature. Any body of persons capable of acting as one man, and in a single name, fixed by law, having succession, is in some sense a corporation. Without going into all the ramifications of this subject to be found in the books, it is sufficient to say that the counties in each state are clothed with the powers of attributes of corporations to a sufficient extent to be able to act and contract, and to become debtor and creditor, so as to subject all the persons and property within their limits

to taxation in any mode that may be prescribed by the Legislature. *Louisville & N. R. Co. v. Davidson County Court*, 33 Tenn. (1 Sneed) 637, 687, 62 Am. Dec. 424.

Counties, though possessing some corporate functions and attributes, are primarily political subdivisions—agencies in the administration of civil government—and their corporate functions are granted to enable them to perform their public duties. They are denominated in the books and known to the law as quasi corporations, rather than corporations proper. *Beach v. Leahy*, 11 Kan. 23, 29 (cited in *Knowles v. Board of Education*, 7 Pac. 561, 33 Kan. 692).

Counties are commonly designated as "quasi corporations," for the reason that, being but political subdivisions of the state, and organized purely for the purposes of government, they differ essentially not only from private corporations, but also such public corporations as towns and cities, which are voluntary, and are established largely for the private interest of their inhabitants; and hence, in the absence of statutory authority, a county cannot be subject to garnishment proceedings. *City of Sherman v. Shobe*, 58 S. W. 949, 94 Tex. 126, 86 Am. St. Rep. 825.

The designation of counties as "quasi corporations" distinguishes them, on the one hand, from private corporations aggregate, and, on the other, from municipal corporations proper, such as cities or towns acting under charters or incorporating statutes, and which are invested with more powers, and endowed with special functions relating to the political or local interests of a municipality, and to this end are granted a larger measure of corporate life. *Shipley v. Hacheney*, 55 Pac. 971, 972, 34 Or. 303 (citing *Dill. Mun. Corp.* [4th Ed.] § 25).

Counties, in a very important sense, occupy a double relation. In one relation, a county is a municipal corporation charged with corporate functions and duties, and invested with corporate powers. These are exercised for the benefit of the municipality, and in respect to these the county is responsible. A county is also a territorial and political division of the state, established as an instrumentality of government and municipal regulation. Some of the duties of county boards, as well as other county officers, relate to and are exercised in the discharge of their functions as governmental agencies. Of this character are the duties of the county treasurer and auditor, so far as they are connected with the revenue system of the state. In exercising these duties the officers exert a power delegated immediately to them by the state for the benefit of all the citizens who are affected by the sovereign power which pertains to the levying and collecting of taxes. The county, as a municipality, is not specially interested in the exercise of

these powers, except so far as they relate to its own municipal affairs. It is, hence, not liable for derelictions of officers in respect to their conduct as mere agents of the government. Of course, in respect to such duties as are directly and absolutely imposed on a municipal corporation by law, or which concern interests specially committed to its charge, and for the performance of which certain agents or officers may have been designated, the delinquency or default of the agent may nevertheless render the municipality answerable. Liability in such cases grows out of the fact that the municipality failed to discharge some corporate duty which the law expressly and primarily laid upon it, and not on the officer or agent. *Vigo Tp. v. Knox County Com'rs*, 12 N. E. 305, 306, 111 Ind. 170.

A county may not improperly be called a quasi corporation, for it is in many respects like a corporation; but a county can neither sue nor be sued, except by express power conferred by statute, and in the manner so expressed; nor can any of the officers of a county, by virtue of such office, sue or be sued, except as provided by statute. *Hunter v. Mercer County Com'rs*, 10 Ohio St. 515, 520.

Considered with respect to their corporate powers, counties rank low down in the scale of corporate existences, and hence have been termed "quasi corporations." *Frederick v. Douglas County*, 71 N. W. 798, 799, 96 Wis. 411 (citing 1 *Dill. Mun. Corp.* §§ 23, 25). See, also, *Nelson v. Hamilton County*, 71 N. W. 206, 207, 102 Iowa, 229; *Shipley v. Hacheney*, 55 Pac. 971, 972, 34 Or. 303; *Burnett v. Maloney*, 87 S. W. 689, 693, 97 Tenn. (13 Pickle) 697, 34 L. R. A. 541; *Scates v. King*, 110 Ill. 456, 466; *Kennedy v. Queens County*, 62 N. Y. Supp. 276, 279, 47 App. Div. 250.

Comp. Laws, § 332, provides: "Each organized county in this territory shall be a body corporate and politic, and as such shall be empowered to make all contracts and to do all things in reference to the property \* \* \* necessary to the exercise of its corporate or administrative powers." *Coler v. Santa Fé County Com'rs*, 27 Pac. 619, 622, 6 N. M. 88.

#### As tax district.

While a county, like towns and villages, is a political subdivision of the state, it has no board of assessors, as do towns and villages, and therefore does not come within the statutory definition of a "tax district" contained in the tax law as amended in 1901, c. 24. *People v. Schoharie County Sup'rs*, 79 N. Y. Supp. 145, 146, 39 Misc. Rep. 162.

#### As territory.

The word "county," as used in the act of 1895 providing that certain territory "is

hereby set off from the county of Westchester, and annexed to, merged in, and made part of the city and county of New York," etc., is not used to refer to the political division of the state known as the "County of New York," but only in a geographical sense referring to the territory which had long been embraced prior thereto within the limits of the state and county of New York; thus not making the territory described a part of the political division known as the "County of New York." *In re McKeon*, 58 N. Y. Supp. 589, 590, 26 Misc. Rep. 464.

The word "county," in section 11 of the Nebraska Bill of Rights, providing that all persons charged with crime are entitled to a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, is held to be used in a restrictive sense—to limit and control the exercise of both legislative and judicial power in the punishment of criminal offenders. It is intended to designate the precise portion of territory or division of the state over which the court of any particular city may exercise power in criminal matters. *Olive v. State*, 11 Neb. 1, 7 N. W. 444.

Const. 1895, art. 8, § 3, which divides the state into Senate districts by counties, uses the word "county" in the sense of a certain portion of territory, and not of a political organization. This is evident, because, in defining the boundary of the Twenty-First Senate District, metes and bounds are established, and there is added: "All that part of the county of New York not hereinbefore described." *People v. Aldermen of City of New York*, 35 N. Y. Supp. 817, 819, 89 Hun, 460.

It is expressly provided by Ann. St. 1899, § 32, that the word "county," as used in any of the laws of Arkansas which are put in force in the Indian Territory, shall be construed to embrace the territory within the limits of the judicial division in said Indian Territory, and, whenever in the laws of Arkansas the word "county" is used, the words "judicial division" may be substituted therefor in the Indian Territory. *Simon v. United States* (Ind. T.) 76 S. W. 280-282.

### COUNTY AFFAIRS.

County affairs are those relating to the county in its organized and corporate capacity, and included within its governmental or corporate powers. *Hankins v. New York City*, 64 N. Y. 18, 22; *Fragley v. Phelan*, 126 Cal. 383, 388, 58 Pac. 923.

Const. art. 3, § 7, prohibiting the Joint Assembly from passing any local or special law regulating the affairs of counties, means such affairs as affect the people of the county; and hence P. L. 187, regulating the fees of sheriffs in counties having a certain population, is a special act, and unconstitutional.

*Morrison v. Bachert*, 5 Atl. 739, 112 Pa. 322, *In Commonwealth v. Patton*, 88 Pa. 258, and *Appeal of Scowder*, 96 Pa. 422, an act authorizing the holding of special sessions of the courts of a county away from the county seat violated this provision of the Constitution; and in *Frost v. Cherry*, 122 Pa. 417, 15 Atl. 782, an act relating to the repeal of the fence law by the vote of the people was held invalid, as violating the same provision.

### COUNTY AGRICULTURAL SOCIETY.

A county agricultural society, under the statutes of Ohio, is a corporation for a public purpose, with defined and limited powers. It cannot mortgage the fair grounds to secure debts. *Stewart v. Hardin County Agricultural Soc. (Ohio)* 7 Am. Law Rec. 668, 6 Ohio Dec. 751.

### COUNTY ASSESSOR.

Under Acts March 5, 1885 (St. 1885, p. 62), and March 11, 1885, the words "county assessors" do not mean county assessors and ex officio tax receivers. *State v. Boyd*, 19 Nev. 356, 359, 11 Pac. 36, 38.

### COUNTY ATTORNEY.

The words "sheriff," "county attorney," "clerk," or other words used to denote an executive or ministerial officer, may include any deputy or other person performing the duties of such officer either generally or in special cases. *Rev. St. Utah 1896, § 2496*.

### COUNTY AUDITOR.

As judicial officer, see "Judicial Officer."

The words "county auditor," when used in the chapter relating to the assessment and collection of taxes, shall be construed to mean register or recorder, whenever it shall be necessary to use the same to the proper construction of the chapter. *Ballinger's Ann. Codes & St. Wash. 1897, § 1658*.

### COUNTY AUTHORITIES.

The commissioners for the management of a dispensary established under the act of December 16, 1897, are "county authorities," within the meaning of the tax law which imposes a tax on dispensaries operated by county or municipal authorities. *Sheffield v. Commissioners of Dispensary in Blakely*, 36 S. E. 302, 303, 111 Ga. 1.

Within Const. 1868, art. 1, § 28, providing that the General Assembly may grant the power of taxation to the county authorities of municipal corporations, to be exercised within their several territorial limits, a county board of education is included. *Smith v. Bohler*, 72 Ga. 546, 552.

**COUNTY BOARD.**

As court, see "Court."

The phrase "county board," as used in the Constitution, which requires such board to fix the compensation of all county officers, does not embrace any one particular body of persons, but means the body authorized to prosecute county business. It embraces the county court in counties not under township organization, and which in such counties was to be superseded by the board of county commissioners, and which, until so superseded, was the body for the transaction of county business. In counties under a township organization, it refers to the board of supervisors. *Broadwell v. People*, 76 Ill. 554, 556; *Hughes v. People*, 82 Ill. 78, 79.

"County boards," within the meaning of Laws July 1, 1898, § 41, providing that county boards who have heretofore acted as boards of review shall not hereafter have such power, etc., include county commissioners. *People v. Cook County Com'rs*, 52 N. E. 834, 837, 176 Ill. 578.

The term "county board," when used in the revenue act, shall be construed to include the board of supervisors—the board of county commissioners. *Hurd's Rev. St. Ill. 1901*, p. 1493, c. 120, § 292, subd. 5.

In the construction of statutes, the words "county board" shall apply to the board of county commissioners in counties not under township organization, and the board of supervisors in counties under township organization, and to the board of commissioners in Cook county. *Hurd's Rev. St. Ill. 1901*, p. 1719, c. 131, § 1, subd. 7.

The term "county board" includes both county commissioners and supervisors, as the case may be. *Cobbey's Ann. St. Neb. 1903*, § 10,405.

The words "county board" and "town board" import, respectively, the county board of supervisors and the town board of supervisors, unless otherwise clearly indicated. *Rev. St. Wis. 1898*, § 4972.

**COUNTY BRIDGES.**

The term "bridges in the county," in *Rev. St. 1881*, § 2802, requiring the board of commissioners to keep all bridges in the county in repair, includes a bridge 40 feet long, 15 feet wide, and 8 feet above the ground, constructed by a county across a ditch on a free traveled road, which is a public highway of such county. *Boone County Com'rs v. Mutchler*, 36 N. E. 534, 535, 137 Ind. 140.

"The county is not required to maintain every structure which may be denominated a 'bridge.' On the contrary, the bridge must be one erected as a part of the public highway over a river, creek, pond, lake, or stream of water, natural or artificial, flowing in a chan-

nel between banks more or less defined, although such channel may be occasionally dry." A bridge across a natural outlet for surface water from adjoining lands and water from under a railroad near by is not a county bridge, within the rule making counties liable for negligence in failure to retain a county bridge in reasonably safe condition for travel. *Reinhart v. Martin County Com'rs*, 37 N. E. 38, 89, 9 Ind. App. 572.

"County bridges are such only as require for their erection an extraordinary expenditure of money—such bridges as cannot be constructed with the limited means under the control of the respective road districts of the county, or such as have been constructed by the county." *Chandler v. Fremont County*, 42 Iowa, 58, 59.

"County bridges" are only those of the larger class, which require an extraordinary expenditure of money, and do not include a small bridge which was not erected by the county, and which was under the supervision of the officers of the particular road district. *Taylor v. Davis County*, 40 Iowa, 295, 297.

"County bridges" are defined by an Iowa statute as all public bridges, exceeding 40 feet in length, over any stream crossing a state or county highway. *Roby v. Appanoose County*, 18 N. W. 711, 712, 63 Iowa, 118.

**COUNTY CANVASSERS.**

See "Canvassers."

**COUNTY CLERKS.**

Under *Rev. St. 1894*, § 432, providing that depositions may be taken without the state before the clerk of the court of record, a deposition taken before a county clerk of another state is not admissible in the absence of proof that he is the clerk of the county court. *Bolds v. Woods*, 36 N. E. 933, 936, 9 Ind. App. 657.

The acknowledgment of a tax deed executed by a deputy county clerk, which recites that such deputy county clerk appeared before the acknowledging officer and acknowledged the execution of the deed as such county clerk, should be construed to mean as such deputy county clerk. *Ward v. Walters*, 22 N. W. 844, 63 Wis. 39.

A county clerk, in this state, is not merely a clerk, as the name would seem to indicate, but he is also substantially the auditor of the county, and the assessor of the county for all property that may be omitted by the regular assessor; and he may administer oaths and affirmations, and take acknowledgments of deeds, mortgages, etc. *Amrine v. Kansas Pac. Ry. Co.*, 7 Kan. 178, 181.

In the construction of statutes, the words "county clerk" shall be held to include clerk of the county court, and the words "clerk



of the county court" to include county clerk. Hurd's Rev. St. Ill. 1901, p. 1719, c. 131, § 1, subd. 8.

The words "county clerk" may be held to include clerk of the district court. Rev. St. Utah 1898, § 2498.

#### COUNTY COMMISSIONERS.

See "Board of County Commissioners." As county officers, see "County Officer." As court of record, see "Court of Record."

County commissioners are the agents, trustees, and managers of the county and its financial affairs. They are in a fiduciary capacity, and the money of the county is expended on orders drawn by them on the county treasury. They have the custody and control of the property of the county, and conduct all its litigation. They exercise all the corporate powers of the county. *Commonwealth v. Krickbaum*, 49 Atl. 68, 69, 199 Pa. 351.

The words "commissioner of the county court" and "county commissioner" shall be construed to mean and have reference to the commissioners, or one of them, composing the county court or an existing tribunal created in lieu of a county court. Code W. Va. 1899, p. 134, c. 13, § 17.

#### COUNTY CONTINGENT TAX.

A bond with a condition that A. should collect the county contingent tax, and in all things perform his duty as sheriff, should be construed strictly, and hence public taxes could not be recovered on the bond. *Crumpler v. Governor*, 12 N. C. 52, 53.

#### COUNTY CONTRACTS.

"A contract entered into by a board of supervisors for and on behalf of the county, and signed by the chairman of the board, is a contract of the county." *Babcock v. Goodrich*, 47 Cal. 488, 508.

#### COUNTY CONVICTS.

County convicts embrace all those sentenced to hard labor for the county, whether in or out of the county. *Ex parte Gayles*, 19 South. 12, 13, 108 Ala. 514.

A "county convict," as used in a provision for the erection of workhouses and establishment of county farms for the purpose of utilizing the labor of county convicts, is any person who may have been convicted of a misdemeanor or petty offense, and whose punishment has been assessed at imprisonment in the county jail for any term, or who, under a like conviction, has been adjudged to pay a pecuniary fine, and is unable so to do. Rev. St. Tex. 1895, art. 3728.

#### COUNTY COURT.

As an inferior court, see "Inferior Courts."

"As a general rule, when reference is made to a county court, or the action of a county court, it is understood as a court presided over by the county judge alone." As used in the charter of a railroad company, providing that whenever the said railroad company shall request the county court of any county, through or adjacent to which it is proposed to construct said railroad, to subscribe to the capital stock of the said company, the county court may, in their discretion, order an election, etc., it is not so limited, but means the county judge and a majority of the county justices of the peace. *Bowling Green & M. R. Co. v. Warren County Court*, 73 Ky. (10 Bush) 711, 717.

Const. Colo. §§ 22, 23, establishing "county courts," providing for the election of a county judge in each county, who shall be the judge of the county court, declaring them the courts of record, and prescribing their jurisdiction under this distinctive name, title, and designation, distinguish the court so established as the "county courts" of the Constitution, and gives the term a distinct meaning. So the term as used in article 6 of the Constitution (section 29), declaring that the judges of the county courts shall hold office until the next general election, means the county courts as established by the Constitution, and would not include a criminal court, though such court, in a certain sense, is a court of the county. *People v. Rucker*, 5 Colo. 455, 460.

The term "county court" includes the court of general sessions in the city and county of New York, wherever such inclusion does not conflict with other provisions of this Code. *Crim. Code N. Y. 1903*, § 961.

The term "county court," as used in the collateral inheritance and succession tax law, shall be construed to apply to the courts presided over and held by the chairman or county judge, and not to the quarterly county courts. *Shannon's Code Tenn. 1896*, § 754.

The words "county court," as used in the Probate Code, are to be understood as referring only to the exercise of the jurisdiction and powers conferred by the Code. *Rev. Codes N. D. 1899*, § 6163.

The words "county court" shall be construed and held to apply to and include any tribunal heretofore established and now existing in a county for police and fiscal purposes, in lieu of the county court. Code W. Va. 1899, p. 358, c. 43, § 55; Code W. Va. 1899, p. 198, c. 29, § 45; Code W. Va. 1899, p. 134, c. 13, § 17; Code W. Va. 1899, p. 93, c. 4, § 13.

**Probate court.**

"In the United States, county courts are usually of limited jurisdiction, and confined to the fiscal and other local concerns of the county." As used in Act Cong. June 9, 1880, c. 164, 21 Stat. 169 [U. S. Comp. St. 1901, p. 1407], providing that the affidavit in making final proof in pre-emption claims may be made before the clerk of the county court, it does not include the probate court. *United States v. Hall*, 21 Pac. 85, 5 N. M. 178.

Act Ill. Feb. 12, 1849, establishing a county court, and providing that the sheriff in each county shall, by himself or deputy, attend the sittings of the county court, was designed only to apply to the sittings of the county court for the transaction of county business, and would not apply to courts held for the transaction of probate business. *St. Clair County v. Irwin*, 15 Ill. (5 Peck) 54, 56.

"County court," as used in 1 Stat. 88, 89, requiring depositions to be taken before a judge of a county court, includes a judge of the probate court. *Fowler v. Merrill*, 52 U. S. (11 How.) 375, 393, 18 L. Ed. 738.

**COUNTY IMPROVEMENTS.**

The term "county improvements," within the meaning of Gen. St. § 2415, providing that county commissioners shall require a bond for the security of laborers when they contract for work which, if performed for an individual, would give rise to a lien, or make improvements for the county, does not include a local ditch constructed under Gen. St. tit. 21, c. 1; such work being a purely local one, in which all expenses are payable by the district benefited, and in which the commissioners only act as statutory agents of the improvers. *Wallace v. Skagit County*, 36 Pac. 252, 8 Wash. 457.

**COUNTY JAIL.**

The county jail is a place of incarceration for the punishment of minor offenses, and custody of transient prisoners, where the ignominy of confinement is devoid of the infamous character which an imprisonment in the state jail or penitentiary carries with it, and which is regarded as a part of the punishment. *United States v. Greenwald* (U. S.) 64 Fed. 6, 8.

**COUNTY JUDGE.**

As county officer, see "County Officer."

The words "county judge," as used in the Probate Code, are to be understood as referring only to the exercise of the jurisdiction and powers conferred by the Code. *Rev. Codes N. D. 1899*, § 6166.

**COUNTY OFFICER.**

State officers, in a general sense, are officers whose duties and powers are coextensive with the territorial limits of the state. County officers, in the same sense, are those whose general authority and jurisdiction are confined within the limits of the county in which they are appointed, who are appointed in and for a particular county, and whose duties concern more especially the people of that county. Whether an officer unprovided for by the Constitution, but created solely by legislative enactment, is to be regarded as a state or county officer, must depend in a large measure upon the territorial scope of his jurisdiction, and upon the nature and character of his powers and duties. If the jurisdiction for the exercise of his powers and duties is coextensive with the limits of the state, then he is a state officer; if confined, like a sheriff or county judge, within the limits of a county, but coextensive with the limits of such county, then he is a county officer. *State v. Burns*, 21 South. 290, 295, 38 Fla. 367.

A county officer is one whose entire duties apply only to the county in which he is located, and for which he is elected or appointed. *State v. Glenn*, 54 Tenn. (7 Helsk.) 472, 473.

Within the meaning of Const. N. Y. art. 10, § 2, providing that all county officers whose election or appointment is not provided for by the Constitution shall be elected by the electors of the respective counties, or appointed by the boards of supervisors or other county authorities, as the Legislature shall direct, the term "county officer" would comprehend all those who are appointed or elected for a county, and who must reside and perform the duties of their offices within their counties, such as sheriffs, coroners, county clerks, etc. The health officer of the port of New York is not a county officer. *In re Whiting*, 2 Barb. 513, 517, 1 Edm. Sel. Cas. 498, 500. The office of commissioner of loans is a county office. *In re Carpenter*, 7 Barb. 30, 34.

"County officers" as used in Const. 1874, art. 14, § 5, providing that, in all counties containing over 150,000 inhabitants, all county officers shall be paid by salary, means one by whom the county performs its usual political functions. *Philadelphia v. Martin*, 17 Atl. 507, 510, 125 Pa. 583 (citing *Sheboygan County v. Parker*, 70 U. S. [3 Wall.] 93, 18 L. Ed. 33).

Special persons appointed by the Legislature to make a subscription for a county to bonds of a railroad company, and the issue of bonds in behalf of the county therefor, are not county officers, within the Constitution of the state, providing that all county officers shall be elected by the electors of the county. Such persons, in the perform-

ance of their special duty, are in no proper sense county officers. They do not exercise any of the political functions of county officers, such as levying taxes, etc. They do not exercise continuously, and as a part of the regular and permanent administration of government, any important public policies, trusts, or duties. An officer of the county is one by whom the county performs its usual political functions—its functions of government. *Sheboygan County v. Parker*, 70 U. S. (3 Wall.) 93, 96, 18 L. Ed. 33.

The term "county officers," as used in the title relating to elections, shall include Senators in the General Assembly, judges of probate, assistant judges of the county court, state's attorney, sheriff, high bailiff, county commissioner, and justices of the peace. V. S. 1894, 57.

Sheriffs, coroners, county justices, etc., whose functions are confined to their respective counties, are commonly known as "county officers." *State v. Dillon*, 2 S. W. 417, 419, 90 Mo. 229.

#### **As agent.**

See "Agent."

#### **County commissioner.**

Gen. St. c. 13, §§ 1, 2, providing that all county officers, including justices of the peace, may be removed from office for official misdemeanors, and that the board of county commissioners shall have exclusive original jurisdiction thereof, does not include members of the board of county commissioners. *Hutchinson v. Ashburn*, 5 Neb. 402, 404.

#### **Board of education.**

The term "county officers," as used in Const. art. 17, relating to the tenure of county offices, does not seem to be used in any restricted sense; and a board of education elected by the voters of an entire county, whose jurisdiction extends over the whole county, comes within such designation. *State v. Tilford*, 1 Nev. 240, 244.

#### **Constable.**

The term "county and township officers," as used in Act Feb. 13, 1890, providing that the official bonds of county and township officers shall be filed with the county clerk, includes constables. *State v. Yourex*, 71 Pac. 203, 204, 30 Wash. 611.

#### **County attorney.**

The office of county attorney is a county office, and hence a statement of a contest of an election to the office of county attorney is within Code 1873, § 697, requiring the statement of contest in the case of an election to a county office to be filed 20 days after the votes are canvassed. *Clark v. Tracy*, 64 N. W. 290, 291, 95 Iowa, 410.

#### **County collector.**

A county collector is a very important county officer. He collects not only the revenue of the county, but of the state, city, and district schools, and is clearly an officer, under an act approved March 1, 1875, "to provide for the official bonds of county and township officers." *Ex parte McCabe*, 33 Ark. 396, 399.

#### **County or probate judge.**

An act creating the office of county judge provided that he should be elected at the same time as that prescribed "for other county elections," that he should be commissioned as other judges, and that he should have all jurisdiction and authority exercised by the chairman of the county court. The office was established in place of the quorum court and no further authority was given to the county judge than that formerly exercised by the quorum court, or the chairman elected by the justices. Held, that the county judge was a county officer, and that therefore his election at the time when other county officers, rather than at the time when judges and chancellors, were elected, was constitutional. *Saffrons v. Ericson*, 43 Tenn. (3 Cold.) 1, 3. A county judge is a county officer, and therefore a statute directing that he be elected at the same time as other officers is not a violation of the Constitution, directing the election of judges on the same day that other county officers are elected. *Moore v. State*, 37 Tenn. (5 Sneed) 510, 513; *State v. Glenn*, 54 Tenn. (7 Helsk.) 472, 473.

The St. Louis scheme and charter which went into effect in 1876 established the city as a separate territorial division of the state, which is treated as a county. 1 Rev. St. 1899, §§ 41, 60, provides that the word "county," when used in the statutes, shall include such city. Const. 1875, art. 6, § 34, provides that the General Assembly should establish a probate court of record in every county. Act April 9, 1877, §§ 1, 13, established a probate court in every county and in the city of St. Louis, and provided that the judge should recover the fees allowed by law for his services. Held, that the judge of the probate court of the city of St. Louis is a county officer, within the meaning of Const. 1875, art. 9, § 12, declaring that the General Assembly shall, by a law uniform in its operation, provide for and regulate the fees of all county officers, and, for such purpose, may classify the county by population. *Henderson v. Koenig*, 68 S. W. 72, 73, 168 Mo. 356, 57 L. R. A. 659.

A county judge is not a county officer, within Const. 1870, art. 11, § 17, providing that no county office created by the Legislature shall be filled otherwise than by the people or the county court. *State v. Glenn*, 54 Tenn. (7 Helsk.) 472, 473.

**County treasurer.**

A county treasurer is an officer of the county for which he is appointed or elected. *Bradford v. Justices of Inferior Court*, 33 Ga. 332, 336.

**County warden.**

The office of county warden, created by section 409, Rev. St., is a county office, and cannot be filled by appointment. Const. art. 10, § 2. *State v. Halliday*, 55 N. E. 175, 61 Ohio St. 171.

**District judge.**

Pol. Code Cal. § 1312, providing that certificates of nomination for county officers must be filed with the clerks of the respective counties, means that certificates for nomination of officers to be voted for by electors of a single county shall be filed with the clerk of the particular county, and so includes a district judge of a district containing only one county. *State v. Hays*, 70 Pac. 321, 322, 27 Mont. 174.

**Drainage commissioner.**

Rev. St. 1881, § 943, providing that any officer of a county who fraudulently fails or refuses to account for and pay over all moneys, choses in action, or other property which may have come into his hands by virtue of his office, shall be deemed guilty of embezzlement, should be construed to include a drainage commissioner, for he is an officer of the county for which he is appointed. *State v. Wells*, 18 N. E. 722, 723, 112 Ind. 237.

**Guardian of poor.**

The Pennsylvania statute relating to writs of quo warranto against a county or township officer should be construed to include a guardian of the poor, such guardian being substantially the same officer as an overseer and director of the poor. *Commonwealth v. Armstrong* (Pa.) 9 Phila. 479, 480.

**Jury commissioner.**

The term "county officer," within the meaning of Const. art. 10, § 2, prohibiting the appointment of county officers by other than the board of supervisors or other county authorities, include jury commissioners; and therefore Laws 1901, c. 602, authorizing the appointment of such commissioners by justices of the Supreme Court, is invalid. *In re Brenner*, 71 N. Y. Supp. 44, 46, 35 Misc. Rep. 306.

**Justice of the peace.**

As used in Rev. St. p. 355, §§ 100-115, relating to the election of county officers, the words "county officers" are used in the common meaning of such terms in previous legislation, and would include justices of the peace. *State v. Clark*, 15 Atl. 831, 832, 51 N. J. Law (22 Vroom) 97.

The phrase "such other county or township officers provided by law," as used in the North Carolina election law of 1895, c. 159, providing for election ballots, includes a justice of the peace. *Foushee v. Christian*, 25 S. E. 793, 794, 119 N. C. 159.

**Notary public.**

The term "county officer," as used in Const. Ind. art. 6, § 4, declaring that no person shall be elected or appointed as a county officer who shall not be an elector of the county, does not include a notary public. Notaries have nothing to do with the affairs of the county, and they discharge no duties as county officers. *United States v. Bixby* (U. S.) 9 Fed. 78, 79.

**School director.**

Comp. St. 1893, p. 461, c. 28, § 70, confers jurisdiction on district courts to hear election contests between county officers. Held, that the term "county officers," as so used, did not include a school director; such provision evidently referring to the sheriff and clerks of courts—county officers proper, as distinguished from state officers, or officers of the divisions of the county, or municipal officers. *Laird v. Leap*, 60 N. W. 1043, 1044, 42 Neb. 834.

**Sheriff.**

The sheriff, who is *ex officio* collector of taxes, is a county officer, within an act providing for official bonds of county and township officers. *Ex parte McCabe*, 33 Ark. 396, 397.

**Storekeeper.**

Act March 14, 1890, providing for the appointment by the clerk of common pleas of a storekeeper for Hamilton county, and devolving on such storekeeper the duty to purchase and have charge of all blank books, stationery, printing, and office blanks for the offices of that county, and fixing an annual salary, and requiring a bond for the faithful performance of his duties, constitutes the storekeeper a county officer, and is in conflict with Const. art. 10, §§ 1, 2, requiring that all county officers shall be elected. *State v. Brennan*, 49 Ohio St. 33, 37, 29 N. E. 593.

**Superintendent of irrigation district.**

The term "county officer" does not include the superintendent of a portion of a county formed into irrigation districts, as his duties only relate to a portion of the county. *Knox v. Los Angeles County Sup'rs*, 58 Cal. 59, 60.

**Superintendent or member of board of public instruction.**

Though, in a sense, a county superintendent of public instruction is a county officer, and though called a "county superintendent," he is in fact an officer and

agent of the state; the state having assumed the functions of maintaining free public schools for the education of the children throughout its domain; the counties being recognized, with reference to that business, merely as convenient subdivisions of territory, and some of their officers as proper agents for the administration of affairs relating to the public free schools. Such officers, with respect to such affairs, act for the state, and not for the county. This is the case even as to officers who in other respects are county officers in fact as well as in name. *Webb County v. Board of School Trustees of Laredo*, 65 S. W. 878, 881, 95 Tex. 131.

"A county officer is one which is usually provided in the organization of counties and county governments, whose duties pertain and are limited to the territory of the county. Members of the board of public instruction are county agents, whose duties pertain to and are limited to the county." *Gadsden County v. Green*, 22 Fla. 102, 110.

#### COUNTY ORDER.

A county order is, in legal effect, a promissory note of the county. It is assignable and presumed to be based on a sufficient consideration. *Noble School Furniture Co. v. Washington School Tp.*, 29 N. E. 935, 937, 4 Ind. App. 270; *Brownlee v. Madison County Com'rs*, 81 Ind. 186, 187.

#### COUNTY PURPOSE.

The Constitution does not attempt to give a definition of "county purpose," and, to obtain a correct interpretation of that phrase, we must look to the contemporaneous legislation upon that subject, and the uniform action of the county courts under the territorial government. By this reference it will be abundantly demonstrated that, at the time the Constitution was adopted, "county purposes" were taken to embrace principally the erection and repair of courthouses and jails; the opening and maintaining of public thoroughfares within the limits of their respective counties, by opening roads, building bridges, and causeways, and keeping the same in repair; licensing and regulating ferries and tollbridges, etc. It is thus seen that the entire subject of highways was at that time an object peculiarly within the jurisdiction of the county authorities, and we are hence warranted in the assumption that it was so understood by the convention when they used the phrase "county purposes." *Duval County Com'rs v. City of Jacksonville*, 18 South. 339, 343, 36 Fla. 196 (quoting and approving *Cotton v. Leon County Com'rs*, 6 Fla. 610).

Const. Tenn. art. 2, § 28, which confers on the Legislature the power to au-

thorize the several counties of the state to impose taxes for "county purposes," means such enterprises as would not advance the wants and demands of the community independently of public aid. Thus the building of courthouses, jails, poorhouses, and common roads and bridges by which they are made accessible to the people, are "county purposes," while hotels and mercantile, trading, banking, and manufacturing establishments would not be, though they might be highly necessary for the comfort and prosperity of the people at large. *Louisville & N. R. Co. v. Davidson County*, 33 Tenn. (1 Sneed) 637, 663, 62 Am. Dec. 424.

"County purposes," as used in Const. art. 12, § 6, providing that the Legislature shall authorize the several counties and incorporated towns to impose taxes for county and corporation purposes, include the support of their officers; the building of courthouses and jails; the paying of the legitimate indebtedness of the counties; the construction of roads, bridges, and works of public necessity and convenience; and the expense of a county in the management of its affairs, the maintenance of internal police and good order, the public schools, "and such other matters of public concern as may peculiarly affect the people of the county in their property and local interests." *Gadsden County v. Green*, 22 Fla. 102, 110.

#### Armory.

The erection or maintenance of an armory in a county for the benefit of a company of state troops regularly enlisted as a part of the militia of the state is not a county purpose, within the Constitution, authorizing the counties of the state to impose taxes for county purposes. *State v. Dickenson* (Fla.) 33 South. 514, 515, 60 L. R. A. 42.

#### Bounties.

Where by acts of Legislature the real estate in a city, and the personal property of the inhabitants thereof, were exempted from taxation for county purposes, and subsequently the board of supervisors were authorized to make appropriations for bounties to volunteers for the army, to be collected and paid out as other county indebtedness, such tax was a tax for a county purpose, from payment of which the city was exempt. *McDonough County Sup'rs v. Campbell*, 42 Ill. 490.

#### County debt.

In Laws 1861, c. 6, § 2, providing that the maximum tax levied by any county for county purposes shall be three mills on the dollar, the term "county purposes" means the ordinary expenses of the county, and does not embrace the payment of a county debt, or the interest thereon. *McCormick v. Fitch*, 14 Minn. 252, 257 (Gil. 185, 189).

**Drainage.**

"County purposes," as used in an act authorizing the levy of taxes separately for county purposes, and for bridges, roads, etc., each to be kept distinct from any other, and forbidding the disbursement of moneys raised for one purpose in payment of obligations contracted for any other, save, in cases expressly named, does not include labor on a local drain or water course. *State v. Seaman*, 23 Ohio St. 389, 394.

**Education.**

Money received by the county treasurer, and disposed of in the county in payment of expenses incurred for governmental purposes, is money received for county purposes. It is true that "education," within some definitions of that term, is not a county purpose. Certainly it is not a county purpose in the sense of being a system established by the county for public good, but in such sense the county has not purposed and established any system of government in respect to the people of the county; but within Ann. Code, § 2016, allowing a county treasurer a commission on money received by him for county purposes, school funds are subject to the commission. *Adams v. Watt*, 26 South. 364, 365, 76 Miss. 667.

In Rev. St. § 3768, which provides that the county commissioners may levy a tax for the support of common schools, not to exceed 3 mills on the dollar, but that the aggregate tax for territorial and county purposes should in no case exceed 16 mills on the dollar per annum, the taxes for county purposes do not include taxes levied for the support of the common schools of the county. *Powder River Cattle Co. v. Johnson County Com'rs*, 29 Pac. 361, 362, 3 Wyo. 597.

**COUNTY ROAD.**

A county road is one which lies wholly within one county, and is thereby distinguished from a state road, which is a road lying in two or more counties. *State v. Treasurer of Wood County*, 17 Ohio, 184, 186.

The word "highway" may include a county bridge, and shall be equivalent to the words "county way," "county road," and "common road." Rev. Laws Mass. 1902, p. 88, c. 8, § 5, subd. 4.

**COUNTY SEAT.**

In every county of this state there is, and must be, a county seat. At it the county court is required to erect a good and sufficient courthouse and jail. The county, circuit, and other courts held for the county must sit there. There is no other place designated by law for that purpose. The name "county seat" indicates the object of its creation. It is, as defined by the Century Dictionary, "the seat of government of a

county; the town in which the county and other courts are held, and where the county officers perform their functions." *Williams v. Reutzell*, 60 Ark. 153, 158, 29 S. W. 374, 375 (quoting Cent. Dict.).

The term "county seat," in common parlance, applied to a particular town or city, simply designates the town or city where the seat of the county government is for the time being established. In *re Allison*, 22 Pac. 820, 821, 13 Colo. 525, 10 L. R. A. 790, 16 Am. St. Rep. 224.

"County seat," as used in the various territorial acts of Michigan, meant the place designated for doing the county business—a place at which the public buildings were to be erected, where the probate and county courts were to be held and the county offices located, and where the board of supervisors were to hold their sessions. The county seat did not necessarily mean the same thing as "seat of justice," or the place of the holding of the circuit court. *Whallon v. Gridley*, 18 N. W. 876, 880, 51 Mich. 503.

Ordinarily the term "county seat" applies not merely to the lot and buildings used for transacting the public business, but to the territory occupied by such town as may be designated as the "county seat." A county seat is not necessarily coextensive with the town of its location. It is not identical with the municipality, and does not move by force of the latter's expansion. Thus, where an act of the Legislature selects a certain town as a county seat, the board of county commissioners had no authority to move the county courthouse to a portion of the town not embraced within its limits when the act was passed, notwithstanding the act of adding territory to the town was passed after the locating act, and that the actual establishment of the courthouse occurred after the enlargement of the town; such authority being especially wanting in view of Const. § 41, providing that no courthouse or county seat shall be removed, except by a majority vote of qualified electors in said county voting at an election held for such purpose. *Marengo County v. Matkin*, 32 South. 669, 670, 134 Ala. 275.

**COUNTY SITE.**

The terms "courthouse site" and "county site," in their ordinary use, mean the same thing, and are taken and understood to signify the seat of government of the county, and, in this sense, cannot be restricted and confined to the particular lot or the ground, by measurement, upon which the necessary public buildings are erected. *Matkin v. Marengo County*, 34 South. 171, 174, 137 Ala. 155.

**COUNTY SOLICITOR.**

As ministerial officer, see "Ministerial Office, Officer."

**COUNTY SUPPLIES.**

See "Supplies."

**COUNTY TAX.**

The expression "county taxes," as used in a charter of a railroad company (Act Mo. 1847, p. 157, § 4) exempting such company from the payment of county taxes, should be construed to include a special tax known as a "road tax," to provide the necessary funds for opening, repairing, and improving roads, made in the same manner as the county revenue; being levied, collected, and disbursed by the county authorities; its rate being uniform over the whole county, and being a county burden. *State v. Hannibal & St. J. R. Co.*, 13 S. W. 406, 409, 101 Mo. 120.

School taxes which originated after the granting of the charter of a railroad, exempting it from county taxes, are not within the exemption. *Livingston County v. Hannibal & St. J. R. Co.*, 60 Mo. 516, 519.

The term "county" has a well-defined meaning. Each county is a body politic and corporate for certain purposes. County commissioners are provided, who are the officials of the county and represent it; and where one township in a county votes a tax to pay for subscriptions to a railroad, not upon the report of the county commissioners, but by a vote of the people of the township, the tax so paid, though it may be a public benefit, will not be a county tax. *Carolina, C., G. & C. Ry. Co. v. Tribble*, 25 S. C. 260, 264.

A tax levied to pay the bonds of a county, given by it for stock in a railroad company, is a county tax, within the meaning of a clause in the charter of a railroad corporation exempting it from the payment of all county taxes. But a local tax levied only on property within the limits of a particular township, to pay township funding bonds given in a compromise and as payment for bonds issued by the township in aid of certain railroads, is not a county tax, within the meaning of such clause. *State ex rel. Trammel v. Hannibal & St. J. R. Co.*, 13 S. W. 505, 507, 101 Mo. 186; *State v. Hannibal & St. J. R. Co.*, 21 S. W. 14, 15, 113 Mo. 297.

The term "county taxes" includes all taxes due to the county, school district, and other subdivisions of the county, which are levied and collected by the county. *Cobbey's Ann. St. Neb.* 1903, § 10,406.

**COUNTY TOWN.**

The term "county town," as used in Const. art. 6, § 15, providing that two justices of the peace shall be elected in each civil district, except such districts as include county towns, which shall elect three, means the county seat where the courthouse is situated, so that the district including the county town

where the courthouse is located is entitled to the additional justice of the peace. *State v. Cates*, 58 S. W. 649, 650, 105 Tenn. 441.

**COUNTY TREASURER.**

A county treasurer is a ministerial officer, and hence can be compelled to perform his duties in respect to paying claims properly audited. *State ex rel. Wheeler v. Adams*, 61 S. W. 894, 897, 161 Mo. 349.

**COUNTY WARRANT.**

A county warrant is the command of one duly authorized officer to another, whose duty it is to obey, to pay from the county funds a specified sum to a designated person, whose claim therefor has been allowed by the court of county commissioners. *Savage v. Mathews*, 13 South. 328, 98 Ala. 535.

A county warrant or order is an instrument, generally in the form of a bill of exchange, drawn by the proper officer of the county upon the county treasurer, directing him to pay an amount of money specified therein, upon a particular fund, to the person named therein, or to his order, or to bearer. *Crawford v. Noble County Com'rs*, 58 Pac. 616, 618, 8 Okl. 450.

A county warrant is the means by which funds for the payment of claims are reached in the county treasury. It is the mode whereby money is transferred from the treasurer of the county to its creditors, and the payment of its debts effected. The warrant is the authority of the treasurer to pay out the money of the county upon the debt, but its mere delivery to the creditor does not constitute payment. Its purpose is to enable him to secure the money to be applied in payment. *People v. Rio Grande County Com'rs*, 52 Pac. 748, 749, 11 Colo. App. 124.

**As negotiable instrument.**

See "Negotiable Instrument."

**COUNTY WAYS.**

County ways are roads leading from one town to another. Inhabitants of Waterford v. Oxford County Com'rs, 59 Me. 450, 452.

The word "highway" may include a county bridge, and shall be equivalent to the words "county way," "county road," and "common road." *Rev. Laws Mass.* 1902, p. 88, c. 8, § 5, subd. 4.

**COUNTY WITNESSES.**

County and state witnesses, within the meaning of Code, art. 25, § 7, which imposes on the county commissioners the duty of levying all needful taxes to compensate county and state witnesses, must be construed to mean such witnesses as are entitled to be

paid by the public authorities. The section requires the county commissioners to pay all witnesses before justices of the peace summoned on behalf of the state, and all summoned on behalf of defendant when he is discharged, or fined only 15 cents, or acquitted, but not to pay fees due to the prisoner's witnesses when he is convicted. *Schamel v. Washington County Com'rs*, 34 Atl. 839, 83 Md. 128.

## COUPLED WITH AN INTEREST.

See "Agency Coupled with an Interest"; "Power Coupled with an Interest."

## COUPON.

As written instrument, see "Written Instrument."

A coupon is something intended to be cut off from another thing. *Williams v. Moody*, 22 S. E. 30, 32, 95 Ga. 8.

A "coupon" is defined to be "a remnant shred; papier portant interet; dividend in the public fund; an interest certificate, printed at the bottom of transferable bonds (state, railroad, etc.) given for a term of years." There are as many of these certificates as there are payments of interest to be made. At each time of payment one is cut off and presented for payment. Hence the name "coupon." "Coupons," from the French, is a term employed in England and elsewhere to denote the warrants for the payment of the periodical dividends on the public stocks, a number of which, being appended to the bonds, are severally cut off for presentation as the dividends fall due. The practice of appending coupons prevails chiefly in reference to foreign stock. *Myers v. York & C. R. R.*, 43 Me. 232, 239.

The term "coupon" is derived from the French "couper," and is defined by Worcester to signify one of the interest certificates attached to transferable bonds, and of which there are usually as many as there are payments to be made, so called because it is cut off when it is presented for payment. The contract between the payor and the holder is contained in the bond, but the coupons are furnished as convenient instruments to enable the holder to collect interest, without presenting the bond, by separating and presenting the proper coupon. Coupons are substantially a minute repetition of what is contained in some concise terms in the bond. The coupon is not an independent instrument, like a promissory note for a sum of money, but is given for interest thereafter to become due on the bond, which interest is parcel of the bond and partakes of its nature. These coupons are substantially but copies from the body of the bond in respect

to the interest. While such coupons perform new and important functions in commercial transactions, they are in their legal essence no less interest, the product of the use for money borrowed, than if incorporated alone in the body of the bond itself, and constitute "interest," within the meaning of Act March 3, 1887, c. 373, 24 Stat. 552, and Act Aug. 18, 1888, c. 866, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], requiring the matter in dispute to exceed, exclusive of interest and costs, the sum or value of \$2,000, in order to give the United States Circuit Court jurisdiction. *Howard v. Bates County* (U. S.) 43 Fed. 276, 277.

Coupons are written contracts for the payment of a definite sum of money on a given day, and being drawn and executed in a form and mode for the purpose, that they may be separated from the bonds to which they are usually attached, it is held that they are negotiable, and that a suit may be maintained on them without the necessity of producing the bonds. Each matured coupon upon a negotiable bond is a separable promise, distinct from the promises to pay the bonds or the other coupons, and gives rise to a separate cause of action. *Aurora v. West*, 74 U. S. (7 Wall.) 82, 88, 19 L. Ed. 42; *Nesbit v. Independent District of Riverside*, 144 U. S. 610, 12 Sup. Ct. 746, 748, 36 L. Ed. 562 (cited and approved in *Edwards v. Bates County*, 16 Sup. Ct. 967, 968, 163 U. S. 269, 41 L. Ed. 155). See, also, *Butterfield v. Town of Ontario* (U. S.) 44 Fed. 171, 172.

A "coupon," said Mr. Justice Nelson, in *City of Kenosha v. Lanson*, 76 U. S. (9 Wall.) 477, 483, 19 L. Ed. 725, "is not an independent instrument, like a promissory note or a sum of money, but is given for interest thereafter to become due upon the bond, which interest is parcel of the bond and partakes of its nature." *State v. Spartanburg & U. R. Co.*, 8 S. C. (8 Rich.) 129, 163.

## COUPON BOND.

The term "coupon bonds" is used to designate bonds that "are made payable to bearer and are provided with interest warrants, called 'coupons,' for each installment of interest, also payable to bearer, which, when actually detached, are negotiable and payable to bearer. The result is that a security of this class is passed easily from hand to hand, and is convenient for use among bankers and moneyed institutions that desire a security which is easily, readily, and quickly convertible into money by sale, the title to which may be passed from hand to hand without any formality, except the mere tradition of the paper. The collection of the interest is made by simply detaching the coupon and presenting it at the place of payment, either directly or through the usual course of bank exchanges, where it is paid



without inquiry as to the ownership of the bond from which it has been cut." *Benwell v. City of New York*, 36 Atl. 668, 669, 55 N. J. Eq. 260.

The expression "coupon bonds of the state of Tennessee" implies state bonds with coupons for interest attached, in the ordinary form in use, whereby the faith of one of the United States was pledged for their payment. *Tennessee Bond Cases*, 5 Sup. Ct. 974, 985, 114 U. S. 663, 29 L. Ed. 281.

#### COUPON NOTE.

A coupon note is defined to be a promissory note with coupons attached, the coupons being notes for interest written at the bottom of the principal note, and designed to be cut off when the notes are presented for payment or paid, so that, as used in a mortgage stating that it is given to secure a debt evidenced by coupon notes, a purchaser of land subject to the mortgage is put on notice of the matters contained in the coupons. *Williams v. Moody*, 22 S. E. 80, 32, 95 Ga. 8.

#### COURAGE.

In holding that the use of the word "courage," in the phrase "ordinary temper and courage," instead of the words "ordinary temper," was erroneous in a homicide case, in view of Pen. Code 1895, art. 700, defining adequate cause, and article 698, defining manslaughter as voluntary homicide committed under the immediate influence of sudden passion arising from any adequate cause, but neither justified nor excused by law, as that which would commonly produce a degree of anger in a person of ordinary temper sufficient to render the mind incapable of cool reflection, the courts say that courage is not the same thing as temper. Temper means disposition of mind; as inclination to give way to anger, resentment, or the like. Courage means that quality of mind which enables one to encounter dangers and difficulties with firmness, or without fear or depression of spirits; valor, boldness, bravery, etc. A man may be a person of mild and agreeable temper or disposition, capable of patience or forbearance, with coolness under great insults or provocation, and yet he may be a man of great courage, or vice versa. A man of ordinary temper might become excited with passion long before a man of courage would be under similar circumstances; and to lay down a rule going beyond the statute, authorizing the jury to regard the defendant, not only as a man of ordinary temper, but as a man of courage, was charging an additional and different requisite on which to base his defense of manslaughter than is provided by the statute. *Gardner v. State*, 48 S. W. 170, 171, 40 Tex. Cr. R. 19.

#### COURONNES.

"Couronnes," when not made for export, is the tangled slubbing, or wool top, which through accident becomes disarranged in the process of spinning it into yarn. *Standard Varnish Works v. United States (U. S.)* 59 Fed. 456, 457, 8 C. C. A. 178.

#### COURSE.

See "Of Course."

Keep her course, see "Keep."

"Course," as used in a description of the location of a surveyed line in the following words: "Up the said O'Neill's Branch, the general course being south," etc.—means that the line should follow the winding of the stream in a southerly direction. *Wharton v. Brick*, 8 Atl. 529, 530, 49 N. J. Law (2d Vroom) 289.

A line, in surveying and dividing grounds, means *prima facie* a mathematical line, without breadth; yet this theoretic idea of a line may be explained by the facts referred to and connected with the division to mean a wall, a ditch, a cricket fence, or a hedge; a line having breadth. A course given from corner to corner is *prima facie* to be intended a right line; yet this may be explained, by a reference to acts of the surveyor and the marker, to be a curved line. Even the courses expressed must yield and change, so as to be accommodated to the objects and abutments referred to in the certificate of survey, grant, or deed. *Baker v. Talbott*, 22 Ky. (6 T. B. Mon.) 179, 182.

#### COURSE DESIGNATED BY EXISTING LAWS.

A direction in a will that, in case of the death of testator's widow, the land devised to her is "to take the course designated by existing laws," is to be construed as meaning that, in case of the happening of the contingency, the property shall be distributed according to the laws establishing the rules of descent of the real property of an intestate. *McGuire v. Brown*, 41 Iowa, 650, 656.

#### COURSE OF ACTION.

In an act providing that whenever, in the course of any civil action, it appears that the defendant is in the service of the United States in the army, the action shall be suspended, the word "course" means progressive action in a suit or proceeding not yet determined; and hence the enlistment of a defendant in the active militia of the state or of the United States constituted no ground for staying proceedings on a judgment of foreclosure rendered before the time of the enlistment. *Williams v. Ely*, 14 Wis. 236, 237.

**COURSE OF ADMINISTRATION.**

See "Due Course of Administration."

**COURSE OF BUSINESS.**

See "Due Course of Business"; "Ordinary Course of Business"; "Regular Course of Business"; "Usual Course of Business."

In the mercantile law, with reference to the legal character of the transfer of negotiable paper, the expression "in the course of business" is a mere formulary for stating a conclusion of law on certain facts, which in the given case may be shown to exist, to the effect that the transfer was made while the paper was current for a sufficient consideration moving between the parties and bona fide. *Clough v. Patrick*, 37 Vt. 421, 429.

The transfer by indorsement to a creditor of negotiable paper before maturity, merely as security for an antecedent debt, although it was without an express agreement or gratuity, is a transfer in the usual course of business. *Brooklyn City & N. R. Co. v. National Bank of the Republic of New York*, 102 U. S. 14, 28, 26 L. Ed. 61.

A sale of his entire stock to one or more persons by a retail merchant conducting a country store in a small town is not in the usual and ordinary course of business of such merchant, within the meaning of Bankr. Law, § 35, declaring that fraudulent sales not made in the "usual and ordinary course of the business" of a debtor shall be prima facie evidence of fraud, since the usual and ordinary course of such debtor's business was to sell at retail a miscellaneous stock of goods common to country stores in a small town in the interior of a state. *Walbrun v. Babbitt*, 83 U. S. (16 Wall.) 577, 581, 21 L. Ed. 489.

**COURSE OF COMMON LAW.**

See "According to Course of Common Law."

**COURSE OF DEALING.**

Where a person only performed one act for another, that of transferring a loan from one creditor to another, there is no course of dealing between the parties which would amount to a holding out of the right of the person transferring the loan to sign another's name to the notes or other instruments. *Sanders v. Chartrand*, 59 S. W. 95, 97.

**COURSE OF EMPLOYMENT.**

The "course of employment," in the sense in which it is used in regard to the duties imposed by the particular service, is not to be understood as restricted and confined to the prescribed duties set apart for the performance of the servant. Whatever may be

incident to the employment must necessarily belong to it. Where a railroad employee's duties were to attend the ladies' room, this might imply that he was to take charge of it, or at least to see to the seating and comfort of passengers who might enter, and this would further imply the duty of putting out improper or disorderly persons and of preventing entrance by an intruder. If by error of judgment he should forcibly and violently eject a party who had a right to be there, or in like manner prevent admission to one entitled to enter, the defendant would not be excused on the ground that such employé was not acting within the scope of his service. *Redding v. South Carolina R. Co.*, 3 S. C. (3 Rich.) 1, 7, 16 Am. Rep. 681.

**COURSE OF DRAINAGE.**

See "Natural Course of Drainage."

The word "course," in the expression "the principal course of drainage" in a city, means those lines along which the principal drainage does or would flow; the word being defined by Webster as "motion considered with reference to its direction; line of progress; direction." *Bayha v. Taylor*, 86 Mo. App. 427, 442.

**COURSE OF LAW.**

See "Ordinary Course of Law."

**COURSE OF PROCEEDING.**

Under a statute directing courts to proceed and give judgment according as the right of the cause and matter in law shall appear to them, without regarding any imperfections or defects or want of form in the writ, declaration, or other pleading, return, process, judgment, or course of proceeding, it is held that, although verdicts are not specially mentioned, yet the words "or course of proceeding whatever," are broad enough to include them. *Parks v. Turner*, 53 U. S. (12 How.) 39, 46, 13 L. Ed. 883.

**COURSE OF RIVER.**

The course of the river is a line parallel with its banks. It is not synonymous with the current of the river. *Attorney General v. Paterson & H. R. R. Co.*, 9 N. J. Eq. (1 Stockt.) 526, 550.

**COURSE OF STUDY.**

A certificate entitling a party to all the privileges of a course of study at an educational institution does not confine his right to demand instruction to the term at which he was entered, but permits it at any reasonable time thereafter. To confine the term to the privileges belonging to it before it had commenced would not be warranted by the meaning of the word or the spirit of the con-

tract. Course is what is termed in higher institutions of learning "curriculum," and the original meaning of that is "raceground." Surely the permitted times of entry on the race are a part of the privileges of the course. *Iron City Commercial College v. Kerr* (Pa.) 3 Brewst. 196, 200.

### COURSE OF TRADE.

See "Due Course of Trade."

### COURSE OF TRIAL.

The expression "course of the trial," as used in Cr. Prac. Act, § 404, providing that the defendant shall be entitled to a new trial for any substantial error arising during the course of the trial, includes every step taken in the trial, after the issue of fact was joined, up to and including the verdict on the issue. *People v. Turner*, 39 Cal. 370, 371.

### COURSE OF VEIN.

"Course of the vein," as used in mining law, is that which is indicated by the surface outcrop or surface explorations and workings. The law may be imperfect in this respect, as the court said in *Flagstaff Silver Min. Co. v. Tarbet*, 98 U. S. 463, 25 L. Ed. 253, "and perhaps the true course of the vein should correspond with its strike, or the line of a level run through it"; but it added that this question can rarely be ascertained until considerable work has been done and after claims and locations have become fixed. *Iron Silver Min. Co. v. Elgin Mining & Smelting Co.*, 6 Sup. Ct. 1177, 1184, 118 U. S. 196, 30 L. Ed. 98.

### COURSE OF THE YEAR.

A lithographing company contracted to make and furnish in the course of the year designs of certain buildings of a manufacturing company, with sketches of its trademarks; to execute engravings, etc. Held, that the words "in the course of the year" should not be construed as of the essence of the contract, so as to justify a repudiation thereof, because of a delay in delivery of six or eight days after the expiration of the year. The contract was one for work and labor requiring artistic skill, and, there being nothing in the contract to indicate a binding agreement for the delivery of the goods, etc., by the end of the year, the words "in the course of the year" should not be construed as words of limitation of the time in which the contract might be performed. *Beck & Pauli Lithographing Co. v. Colorado Milling & Elevator Co.* (U. S.) 52 Fed. 700, 705, 3 C. O. A. 248.

### COURT.

The term "court" is used in England to designate the portion of the ground sur-

rounding the dwelling and outhouses of all kinds, and inclosed by a fence or stone wall. *People v. Taylor*, 2 Mich. 250, 251.

When used in connection with a piece of land, is synonymous in law with the words "park" and "square." *Conrad v. West End Hotel & Land Co.*, 36 S. E. 282, 283, 126 N. C. 776.

### COURT (Of Justice).

See "Admiralty"; "Appellate Court"; "Attendance on Court"; "Circuit Court"; "City Court"; "Civil Court"; "Clerk of Court"; "Common-Law Court"; "Competent Court"; "Coroner's Court"; "County Court"; "De Facto Court"; "Domestic Courts"; "Ecclesiastical Courts"; "Examining Court"; "Foreign Courts"; "General Court"; "Inferior Courts"; "Inferior Local Courts"; "Instance Court"; "Into Court"; "Justice Court"; "Justice of the Peace"; "Local Court"; "Mayor's Court"; "Municipal Courts"; "Next Court"; "Open Court"; "Ordinary Courts of Law"; "Orphans' Court"; "Police Court"; "Prefects' Court"; "Prerogative Court"; "Prize Court"; "Probate Court"; "Proper Court"; "Superior Court"; "Supreme Court"; "Surrogate Court"; "United States Courts."

All courts, see "All."

Any court, see "Any."

Auditor of, see "Auditor."

Before said court, see "Before."

Business of, see "Business."

Other court, see "Other."

A court is a place where justice is judicially administered. *Central of Georgia Ry. Co. v. Harden*, 38 S. E. 949, 950, 113 Ga. 453, 456; *Commonwealth v. Brower*, 7 Pa. Dist. R. 254, 255; *Lenox v. Pike*, 2 Ark. (2 Pike) 14, 19; *Johnston v. Hunter*, 40 S. E. 448, 450, 50 W. Va. 52; *Loosee v. Dolan*, 74 N. Y. Supp. 685, 688; *United States v. Clark* (U. S.) 25 Fed. Cas. 441, 442; *Fuller v. County of Colfax* (U. S.) 14 Fed. 177, 178.

A court is a tribunal charged, as a substantive duty, with the exercise of judicial power. *Waldo v. Wallace*, 12 Ind. 569, 583.

"A court is a tribunal established for the administration of justice, and is composed of one or more persons assembled under authority of law for the hearing and trial of causes and transaction of judicial business. It is an organized body, with defined powers, meeting at certain times and places for the hearing and decision of causes and other matters brought before it, and aided in this, its proper business, by its proper officers." *State v. Atherton*, 10 Pac. 901, 906, 19 Nev. 332.

In England, from whence our system of courts and the practice governing them are

derived, the tribunal was called "curia" or "court" because it was held by the king himself originally. The judgments of the courts read as the judgments of the king, and when he ceased to hold the court in person, and delegated this function to one of his officers, the character of the judgment was the same. In this country the power vested in the king vests in the body of the people, and the courts sit as their representative. The law, from principle and policy, requires that full confidence should be given to their judgments while in force, and an action for damages for acts done in obedience to a judgment while in force cannot be maintained on the subsequent reversal of such judgment. *Bridges v. McAllister*, 51 S. W. 603, 605, 106 Ky. 791, 45 L. R. A. 800, 90 Am. St. Rep. 267.

A court is an instrumentality of government. It is a creation of the law, and in some respects it is an imaginary thing, that exists only in legal contemplation, very similar to a corporation. A time when, place where, and the persons by whom judicial functions are to be exercised are essential to complete the idea of a court. It is its organized aspect, with all these constituent elements of time, place, and officers, that completes the idea of a court in the general legal acceptance of the term. *White County Com'rs v. Gwin*, 36 N. E. 237, 242, 136 Ind. 562, 22 L. R. A. 402.

Courts are the only agencies of the law by which a cause can be heard and determined. They are the only depositaries of judicial power. Without them it lies dormant and inactive in the sovereignty of the state. Its active and potent existence is inseparable from that of a court. To constitute a court, the judge or judges must be in the discharge of judicial duties at the time and in the place prescribed by law for the sitting of the court. *Works, Courts*, 1. The proceedings of a court at a time and place other than that prescribed by law are void. It is not the act of a court at all. *Johnston v. Hunter*, 50 W. Va. 52, 55, 40 S. E. 448 (citing *Doss v. Waggoner*, 3 Tex. 515; *Baker v. Chisholm*, 3 Tex. 157).

Courts are an integral part of the government, and entirely independent, deriving their powers directly from the Constitution, in so far as such powers are not inherent in the very nature of the judiciary. A court of general jurisdiction, whether named in the Constitution or established in pursuance of the provisions of the Constitution, cannot be directed, controlled, or impeded in its functions by any of the other departments of the government. The security of human rights and the safety of free institutions require the absolute freedom of action and integrity of courts. *Vigo County Com'rs v. Stout*, 35 N. E. 683, 685, 136 Ind. 53, 22 L. R. A. 396.

A court may be particularly described as an organized body with defined powers, meeting at certain times and places for the hearing and decision of causes and other matters brought before it, and aided in this, its proper business, by clerks to record and attest its acts and decisions and ministerial officers to execute its commands and secure due order in its proceedings. *Ex parte Gardner*, 39 Pac. 570, 22 Nev. 280. See, also, *Fitzpatrick v. Simonson Bros. Mfg. Co.*, 90 N. W. 378, 381, 86 Minn. 140.

The office and purpose of a court is to administer exact justice as nearly as may be to all those before it, without favor to any. The debtor is to have his rights administered and protected, but in no larger share than the creditor. *Hinson v. Adrian*, 92 N. C. 121, 127.

Blackstone defines a court as consisting of at least three constituent parts, namely, the actor, or plaintiff, who complains of an injury; the reus, or defendant, who is called upon to make satisfaction for it; and the judex, or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain, and by its officers to apply, the remedy. *People v. Board of Trustees of Village of Saratoga Springs*, 39 N. Y. Supp. 607, 610, 4 App. Div. 399 (citing 3 Bl. Comm.); *People v. Van Allen*, 55 N. Y. 31, 35.

The word "court," as used in Code Iowa, § 2229, providing that, where a divorce is decreed, the court may make such an order in relation to the children, property, parties, and the maintenance of the parties which shall be right and proper, does not confine the jurisdiction to the district court rendering the decree, but the word must be construed in the plural, as "courts." *Shaw v. McHenry*, 2 N. W. 1096, 1099, 52 Iowa, 182.

#### Federal courts included.

The term "court," in Code 1868, c. 130, § 5, authorizing the admission in evidence of an attested copy of any record or paper in the clerk's office of any court in lieu of the original, includes the District Court of the United States held within the state. *Dickinson v. Chesapeake & O. R. Co.*, 7 W. Va. 390, 415.

The word "court," as used in Gen. Laws, 1889, c. 46, § 111, providing that all matters which are pending against a deceased person at the time of his death may, if the cause of action survives, be prosecuted to final judgment, and, if judgment is rendered against an executor or administrator, the court rendering it shall certify the same to the probate court, and the amount thereof shall be paid in the same manner as other claims allowed against the estate, includes a federal court sitting within the territorial limits of the

state. In re Kittson's Estate, 48 N. W. 419, 45 Minn. 197.

#### **Board of arbitrators.**

A board of arbitrators is not a "court" or "judicial tribunal" in any proper sense of those terms. It has none of the powers that appertain to courts to regulate their proceedings or enforce their decisions. An award, when made, is more in the nature of a contract than of a judgment. It is but the consummation of the contract of submission; its appropriate and legitimate result. Hence it is held that the fact that a judgment rendered on Sunday is void does not render an award made on Sunday illegal. *Blood v. Bates*, 31 Vt. 147, 150.

#### **Board of assessors.**

St. 1837, c. 221, § 1, provides that if any person is embarrassed, restrained of his liberty, or held in duress, unless it be in the custody of some public officer of the law by force of a lawful warrant or other process issued by a court of competent jurisdiction, he shall be entitled as of right to a writ of personal replevin, and to be thereby delivered, etc. Held, that the word "court" as used in such section, was not used in its technical meaning as confined to the judiciary established by the state Constitution, but was sufficiently broad to include a board of assessors having authority to issue a warrant for the arrest of a party on whom a tax is assessed, by whose warrant such person is arrested and deprived of his liberty. *Aldrich v. Aldrich*, 49 Mass. (8 Metc.) 102, 103.

#### **Board of village trustees.**

A board of village trustees, sitting to hear charges against a village officer constitutes a court. *People v. Trustees of Saratoga Springs*, 39 N. Y. Supp. 607, 610, 4 App. Div. 618.

#### **City council.**

A court is a tribunal empowered to hear and determine issues between parties, on pleadings either oral or written, and on evidence to be adduced under well-defined and established rules according to settled principles of law; but a city council, though an inferior court under the statute, with a limited jurisdiction, does not act in that capacity in granting a liquor license. *State v. City of Columbia*, 17 S. C. 80, 82.

In those enactments which confer jurisdiction or power, or impose duties, when the words "superior court," or "court," in reference to a superior court, are used, they mean the clerk of the superior court, unless otherwise specially stated, or unless reference is made to a regular term of the court, in which cases the judge of the court alone is meant. *Clark's Code N. C. 1900*, § 132.

#### **Clerk of court.**

While the clerk of a court is a very proper officer to keep regular and fair minutes of all the proceedings of the court, the court can live and move and have its being without him. His office is not necessary to the existence of the court. *Mealing v. Pace*, 14 Ga. 596, 629.

Within the meaning of statutes requiring an oath to be administered by the court or judge would be included an oath administered by the clerk in open court under the direction of the court. *Oaks v. Rodgers*, 48 Cal. 197, 200.

#### **Commissioners of appeal.**

A tribunal known as "commissioners of appeal for the state of Texas," created by an act of the Legislature of that state July 9, 1879, is held not to be a court, because lacking in the following essential elements: It was able to act only by consent of both parties, and even then was without jurisdiction to render or power to enforce a judgment. It had no jurisdiction, on the ground that jurisdiction could not be given by consent. Its opinion settled no law and affected only the particular case referred to it. *Henderson v. Beaton*, 52 Tex. 29, 42.

#### **Commissioners of claims.**

A court, as understood in its full modern signification, consists of at least three constituent parts, the actus, reus, and judex. The actus, or plaintiff, complains of an injury done; the reus, or defendant, is called upon to make satisfaction for it; and the judex, or judicial power, is to examine the truth of the fact, and, if any injury appears to have been done, to ascertain, and by its officers to apply, the remedy. 3 Bl. Comm. 25. The findings of the commissioners of claims, appointed under Act March 28, 1871, are not judgments of a court of law against the state, but are only in the nature of a judgment, which the commissioners shall make out and deliver to the complainant, who may file them with the Auditor of State, who shall draw his warrant on the treasurer, payable out of the moneys appropriated for that purpose. *Clayton v. Berry*, 27 Ark. 129, 134.

#### **County board.**

A court is a body in the government organized for the public administration of justice at the time and place prescribed by law. County boards, acting on allowance and audit of claims, do not constitute courts. *Stenberg v. State*, 67 N. W. 190, 193, 48 Neb. 299.

The board of supervisors of a county is not a court. *Gurnee v. County of Brunswick* (U. S.) 11 Fed. Cas. 117.

"A court is a body in a government to which the public administration of justice

is delegated; a tribunal established for the administration of justice." A board of commissioners sitting to decide an election contest, invested with original, supreme, and final power to adjudicate and determine the rights and privileges of the parties to the contest, is a court." *Pratt v. Breckinridge*, 85 S. W. 136, 142, 86 S. W. 405, 407, 112 Ky. 1.

"A court is a body in the government to which the public administration of justice is delegated. The one common and essential feature of all courts is that of a judge or judges having some sort of judicial function, power, or authority. Boards of commissioners have no judicial functions, and cannot be vested therewith, and therefore are not courts. They are not among the courts specified by the act of Congress vesting the judicial power of the territories in certain courts." *Rupert v. Alturas County Com'rs*, 2 Pac. 718, 720, 2 Idaho (Hasb.) 19.

A board of county commissioners of a county created by the laws of Nebraska is not a court, within the meaning of the acts of Congress providing for the removal of suits from state to federal courts. *Fuller v. County of Colfax* (U. S.) 14 Fed. 177, 178.

#### County judge.

In the construction of statutes the term "court" shall in all necessary cases be deemed to refer as well to county judges and justices of the peace as to courts of record. *Mills' Ann. St. Colo.* 1891, § 4185, cl. 13.

#### Court commissioners.

A court is defined to be a place in which justice is judicially administered. It is the exercise of judicial power by the proper officer or officers at a time and place appointed by law. *United States v. Clark*, 1 Gall. 497, Fed. Cas. No. 14,804. So that a preliminary examination before a United States commissioner is not a proceeding in any court of the United States, within the meaning of Rev. St. § 5406 [U. S. Comp. St. 1901, p. 3657], imposing a penalty for conspiring to deter a witness from attending or testifying in such a proceeding. *Todd v. United States*, 15 Sup. Ct. 889, 891, 158 U. S. 278, 39 L. Ed. 982.

Under the statute providing that, whenever the statute authorizes an order or proceeding to be made or taken by the court, it must be done by the court in session, and the statute authorizing the court or presiding judge to request pleadings to be more definite and certain, a court commissioner has no authority to require such acts. *Balkins v. Baldwin*, 54 N. W. 403, 404, 84 Wis. 212.

#### Court-martial.

A court-martial is a court, within the meaning of Const. art. 1, § 6, declaring that no person shall be held to answer for a capital or otherwise infamous crime, unless on presentment or indictment of a grand jury,

and in any trial, in any court whatever, the party accused shall be allowed to appear and defend in person and with counsel as in civil actions. *People v. Van Allen*, 55 N. Y. 81, 85.

#### Court of inquest.

A court of inquest to assess damages in condemnation proceedings brought by a railroad company cannot be regarded as a court within the usual acceptation of that term, they having no judicial functions; and in addition thereto commissioners or members of such jury form no part of the machinery of a court, and the appropriation of private property for public use has never been held to come under the judicial power. *Grand Rapids, L. & D. Ry. Co. v. Chesebro*, 42 N. W. 66, 68, 74 Mich. 466.

#### Election commissioners.

The term "court" has a well understood and accepted meaning, and, as used in a provision of the Constitution, gave the Supreme Court supervisory control over all other courts in the state, and the term "other courts in the state" gives it no other authority to issue writs to a board of commissioners of elections. *Ex parte Carson*, 5 S. C. (5 Rich.) 117, 119.

#### General Assembly.

Though the General Assembly of the state may have power to set aside the judgment of a state court, yet, since it cannot render a judgment, it does not constitute the "highest court of law or equity of the state," within the meaning of act of Congress allowing a removal of causes from such state court in specified cases to the Supreme Court of the United States. *Olney v. Arnold*, 8 U. S. (8 Dall.) 808, 818, 1 L. Ed. 614.

#### Hearing of criminal complaint before district judge.

The word "court" as employed in Act April 30, 1790, c. 9, § 18, providing that, if any person commit perjury in any controversy pending in any court of the United States, he shall be punished, etc., does not include a hearing of a criminal complaint before the district judge. *United States v. Clark* (U. S.) 25 Fed. Cas. 441, 442.

#### As judge.

The words "judge" and "court" are interchangeable. *Guild v. Meyer*, 46 Atl. 202, 59 N. J. Eq. 390.

By the term "court," as used in the statute requiring the application of an administrator for leave to sell real estate to be heard by the court and the sale thereunder to be reported to the court, is meant the court or judge thereof when authorized to act. *Maul v. Hellman*, 58 N. W. 112, 114, 39 Neb. 322.

In Rev. St. 1881, § 1222, providing that a receiver may be appointed by the court,

or the judge thereof in vacation, in certain specified cases, "court" is synonymous with "judge" in legal parlance. In a legal sense, the judge of a court is the court. There can be no court without a judge, so that the word "court" may be understood as meaning "judge." *Pressley v. Lamb*, 4 N. E. 682, 690, 105 Ind. 171.

A judge alone does not constitute a court. Proceedings at another time or place, or in another manner than specified by law, though in the personal presence and under the direction of the judge, are *coram non judice*, and void. *Ex parte Gardner*, 39 Pac. 570, 22 Nev. 280.

A court is a tribunal organized according to law, and sitting at fixed times and places for the administration of justice, not an individual holding a judicial office. Therefore the statute authorizing the appointment of commissioners by the county judge is in violation of the statutory provision requiring such commissioners to be appointed by a court of record. *People v. Village of Haverstraw*, 45 N. E. 384, 386, 151 N. Y. 75.

The word "court" may be used in an indictment for perjury, alleging that defendant was then and there by the court duly sworn, although the statute provides that oaths shall be administered by a judge or clerk, and does not expressly authorize a court to administer oaths, as the term "court" may sometimes be construed to mean judge of the court, depending upon the connection and object of its use. A court is defined as the judge or body of judges presiding over a court. *State v. Caywood*, 65 N. W. 385, 386, 96 Iowa, 367 (citing *Black, Law Dict.* tit. "Court").

The term "court," in statutes granting appeals from final judgment of courts, does not include a judge of the superior court, and therefore such statutes have no application to his decisions in matters committed to his determination as such judge. *Appeal of Central Ry. & Electric Co.*, 35 Atl. 32, 33, 67 Conn. 197.

By the use of the word "court" in Code, c. 131, § 9, providing that the court may in vacation make up and sign any bill of exceptions, is meant the judge who presided at the trial of the case, regular, special, or temporary. As to such cases he remains the court until everything is done thereon that a court may do. *Carper v. Cook*, 19 S. E. 379, 380, 39 W. Va. 346.

There is a manifest distinction between a court and a judge; a distinction well known by the profession and frequently announced in the books. The court has inherent power to do many things which a judge does not possess, and, while the court may set aside an order theretofore made by it, a judge, as such, has no power to vacate, modify, or suspend a judgment or order of the

court. *Whitlock v. Wade*, 90 N. W. 537, 588, 117 Iowa, 153.

As used in Pub. Acts 1893, c. 661, § 5, relating to actions to quiet title, which says that the court shall hear the several claims and determine the rights of the parties, "court" may mean the judge of the tribunal in which the proceedings are pending, as opposed to the jury, or it may mean—as, for instance, it certainly seems to in one of the principal sections of the practice act (Gen. St. § 877)—the tribunal itself, as established by law for the public administration of justice. The court in this case was of the opinion that it should be held to mean the latter. "We think the Legislature in this act intended to clothe the superior court, and the inferior courts having common-law powers, with power to hear and determine cases of this kind, if in other respects within their jurisdiction according to existing laws, and that the word 'court,' as used in this fifth section, is to be construed just as if it was qualified by the name of some specific court. The word 'court,' when so read, unquestionably means the tribunal, and not merely the judge thereof. The act, then, does not deprive the parties of the right to try by jury questions proper to be tried in that way, and consequently the objection to its validity, founded on the assumption that it does so, cannot prevail." And hence the act does not contravene Const. art. 19, § 21, declaring that the right of trial by the jury shall remain inviolate. *Miles v. Strong*, 36 Atl. 55, 58, 68 Conn. 273.

Under the charter of the city of Hartford, providing that appeals from sewer assessments may be taken to the judge of the superior court, who shall have, for the purposes of the case, all powers of the superior court, etc., the judge, in sitting upon such appeals, was not to be regarded as constituting a "court," within the meaning of the Constitution, providing that the judges of inferior courts shall be appointed annually. *Olapp v. City of Hartford*, 35 Conn. 220, 222.

A change of judges after verdict and before final decree does not change the court, which for all judicial purposes remains identical, and the succeeding judge may render a final decree of divorce, allowing alimony to the wife, without hearing any evidence where answers by the jury to special interrogatories show the amount of the husband's property. *Hedrick v. Hedrick*, 28 Ind. 291, 293.

A "court" is defined by Bacon to be "an incorporeal political being, which requires for its existence the presence of its judges, or a competent number of them, and a clerk or prothonotary, at or during which and at a place where it is by law authorized to be held, and the performance of some public act indicative of a design to perform the functions of a court"; and it is defined by

Lord Coke as "a place where justice is judicially administered," although Lord Coke probably did not mean by his definition that the judicial presence was not indispensable. The casual presence of a judge in the courtroom to direct or overlook his clerk, and not for the performance of judicial functions, does not constitute a court. *Lewis v. City of Hoboken*, 42 N. J. Law (13 Vroom) 877, 379.

A court has been defined to be a body in the government organized for the public administration of justice at the time and place prescribed by law; and it has been said that a court is an incorporeal being, which requires for its existence the presence of the judge. *People v. Opel*, 58 N. E. 996, 999, 188 Ill. 194; *Davis v. Delaware Tp.*, 41 N. J. Law (12 Vroom) 55, 56; *In re Terrill*, 34 Pac. 457, 458, 52 Kan. 29, 39 Am. St. Rep. 327. A clerk, therefore, has no authority to open and adjourn court in the absence of the judge. *In re McClaskey*, 37 Pac. 854, 856, 2 Okl. 568.

The word "court," as used in Const. 1895, art. 5, § 25, providing that each of the justices of the Supreme Court shall have the same power at chambers to issue writs of habeas corpus, etc., as when in open court, implies a court made up of all the justices, so that the provision gives to each justice in chambers the same power as all the justices when in open court. *La Motte v. Smith*, 27 S. E. 933, 934, 50 S. C. 558 (approved in *Salinas v. C. Aultman & Co.* 49 S. C. 325, 27 S. E. 385).

A court is a legal entity. Its judges, or some of them, form by their presence a constituent element of its being. It is, as Bacon defines it, "an incorporeal being, which requires for its existence the presence of the judges or a competent number of them." What shall be such competent number to form a court of general jurisdiction must be determined by the terms of the edict creating it, the emanation of some power endowed with suitable control over it, by its own established usage, or, in the absence of either of these forces to control it, by its own will. A single judge of the court of common pleas may hold that court and perform its functions. *Gray v. Bastedo*, 46 N. J. Law (17 Vroom) 453, 455.

Separated from its officers, the court is invisible, intangible, and exists only in contemplation of law. It lives and moves and has its being only in the acts and personality of living men. The ideal thing called the "court" is beyond the reach of force or fear or fraud. *Ex parte McLeod* (U. S.) 120 Fed. 130, 131.

A court is an incorporeal political being, which requires for its existence the presence of judges. *Davis v. Delaware Tp.*, 41 N. J.

Law (12 Vroom) 55, 56 (citing *Bac. Abr. "Courts"*).

A court is an incorporeal political being, which requires for its existence the presence of its judges, or a competent number of them, and a clerk or prothonotary, at or during which and at a place where it is by law authorized to be held, and the performance of some public act indicative of the design to perform the functions of the court. *In re Terrill*, 34 Pac. 457, 458, 52 Kan. 29, 39 Am. St. Rep. 327 (citing *Bacon*); *In re Lawyers' Tax Cases*, 55 Tenn. (8 Helsk.) 565, 650. To give existence to a court, then, its officers and the time and place of holding it must be such as are prescribed by law. *In re McClaskey*, 37 Pac. 854, 856, 2 Okl. 568 (citing *Hobart v. Hobart*, 45 Iowa, 501, 503). In another sense the judges, clerk or prothonotary, counselors, and ministerial officers are said to constitute the court. *In re Lawyers' Tax Cases*, 55 Tenn. (8 Helsk.) 565, 650.

#### As judge at chamber or presiding.

The word "court," in Code Civ. Proc. § 582, providing that a judgment rendered or final order made by the district court may be reversed, vacated, or modified by the Supreme Court for errors appearing on the record, means not only the tribunal over which a judge presides, but also the judge himself, when exercising at chambers judicial power conferred by statute. *Porter v. Flick*, 84 N. W. 262, 60 Neb. 773.

The term "courts," as used in Const. art. 3, § 45, providing that the power to change the venue in civil and criminal cases shall be vested in the courts, to be exercised in such manner as shall be provided by law, means the judges presiding. *Cox v. State*, 8 Tex. App. 254, 282, 34 Am. Rep. 746.

"A court has been defined as a place where justice is judicially administered. Co. Litt. 58; 3 Bl. Comm. 23. This definition, however, has often been criticised as too narrow, being limited by the word 'place.' The prominence of the word 'place' in this definition no doubt arises from the ancient idea that the king was the fountain and dispenser of justice, and wherever he was domiciled was a court or place where justice was dispensed. In modern times and under our form of government, the judicial power is exercised by means of courts. A court is an instrumentality of government. It is a creation of the law, and in some respects it is an imaginary thing, that exists only in legal contemplation, very similar to a corporation. A time when, a place where, and the persons by whom the judicial functions are to be exercised are essential to complete the idea of a court. It is an organized aspect, with all its constituent elements of time, place, and officers, that complete the idea of a court in the general legal acceptance of the term; but a court may exist in legal contemplation



without any officers charged with the duty of administering justice. The officers might all die or resign, and still the legal fiction would continue to exist. The judge of a court, while presiding over a court, is by common courtesy called 'the court,' and the words 'the court' and 'the judge,' or 'the judges,' are frequently used in our statutes as synonymous." *Levey v. Bigelow*, 84 N. E. 128, 130, 6 Ind. App. 677.

Gen. Laws, § 575, declares that on an appeal from the final judgment of a county court to the district court of the same county, if the judgment be not for the payment of money, the penalty of the appeal bond shall be in such a sum as the court shall deem sufficient. Held, that the term "court," as used in the statute, is not employed synonymously with "judge," and hence the judge has no authority to fix a penalty to a bond, save in open court, when acting as a judge thereof. *Gruner v. Moore*, 6 Colo. 526, 529.

An order of a state judge at chambers, restricting a plea in a higher court proceeding, is not an order of a court, within Rev. St. § 709 [U. S. Comp. St. 1901, p. 575], allowing a writ to return from the Supreme Court of the United States, to the final judgment of the highest court of the state in which a decision of the suit can be had; the single judge at chambers not being regarded as a court within the meaning of the act. *United States v. E. C. Knight Co.*, 15 Sup. Ct. 249, 252, 156 U. S. 1, 39 L. Ed. 325 (citing *McKnight v. James*, 15 Sup. Ct. 248, 155 U. S. 685, 39 L. Ed. 310).

#### As judge in vacation.

Within Act March 3, 1887, forbidding the payment of per diem or attendance fees, except for days when the court is opened by the judge for business or business is actually transacted by the court, the word "court" means something more than a court that is opened by the judge for business at the beginning of a regular term, and continued by adjournment until the close thereof, but will include all acts by the judge as a court which are performed in vacation. *Butler v. United States* (U. S.) 87 Fed. 655, 664.

In the Constitution, vesting the judicial power of the state as to matters of law and equity in certain courts therein named, the word "courts" is used in its technical sense. A court is a judicial assembly. The judge of the court is its presiding officer. While the judge is often called the court, yet he is only so rightly called when the tribunal over which he presides is in session. The Supreme Court of California has said a court is a tribunal presided over by one or more judges for the exercise of such judicial power as has been conferred upon it by law; but it is also essential that this place be designated by law, and that the person or persons authorized to administer justice be

at that place for the purpose of administering justice at such times as must be also designated by law. *Von Schmidt v. Widber*, 99 Cal. 511, 34 Pac. 109. Hence a Legislature does not have power to confer the judicial power on judges in vacation. *State ex rel. Ballew v. Woodson*, 61 S. W. 252, 255, 161 Mo. 444.

The word "court" is often used interchangeably with the word "judge." A judge in vacation is not the court, but the term "court" may be interpreted to mean a judge in vacation, where it is necessary to effect the intention of the Legislature; and, where a statute authorized the court to extend the time for filing a bill of exceptions, an order granting such extension may be made by the judge during vacation. *Louisville & N. R. Co. v. McDonald*, 81 South. 417, 418, 79 Miss. 641.

The term "court," in Rev. St. 1843, c. 37, § 40, providing that an appeal may be allowed from any interlocutory order of the court granting an injunction, is not limited in meaning to a judge or judges actually holding court, but will be construed to mean judge as well; and hence an appeal may be taken from an interlocutory order granting an injunction which is not made in term time. "The words 'the court' and 'the judge,' or judges, are frequently used in our statutes as synonymous, and, when used with reference to orders made by the court or justices, they were, we think, intended to be so understood." *Michigan Cent. R. Co. v. Northern Indiana R. Co.*, 8 Ind. 239, 244.

#### Jury as component part.

"The term 'court,' in its general and enlarged sense, comprehends within its purport both the justice and the jury; both being component parts of a court of law. The right of a jury trial, as guaranteed by the Constitution and the Bill of Rights, necessarily leads one to the conclusion that the jury is an essential part of a court of law, and that a court of law without a jury is not constitutionally organized." *In re Brenner*, 70 N. Y. S. 744, 747, 35 Misc. Rep. 212.

The word "court," in the acts of 1880 and 1888, authorizing comparison of a disputed writing with any writing proved to the satisfaction of the court to be genuine, includes both judge and jury in a case where a jury is present. The statute does not operate to take the entire question of genuineness of documents from the jury, but only requires that the question of genuineness be first presented to the judge to determine their admissibility. *People v. Molneux*, 61 N. E. 286, 308, 168 N. Y. 264, 62 L. R. A. 193.

"The term 'court' may be construed to include a jury, as well as judges and a clerk, or as used in contradistinction from a jury, according to the connection and object

of its use." *Gold v. Vermont Cent. R. Co.*, 19 Vt. 478, 482.

The court, within a statute providing that the court shall allow a reasonable attorney's fee, includes both judge or jury, or judge alone, according as the court may be constituted when the trial occurs; and hence it is not error to submit the question of reasonable attorney fees to the jury in a cause triable before a jury. *Missouri Pac. Ry. Co. v. Merrill*, 19 Pac. 793, 795, 40 Kan. 404.

The term "court," as used in Acts 1897, c. 94, § 8, providing that, on violation of the act, the violator, on conviction, shall be punished by a fine of not less than \$100 or more than \$5,000, in the discretion of the court, does not refer to the judge alone, but to the tribunal, including both judge and jury, and the act, therefore, is not repugnant to Const. art. 6, § 14, as authorizing the court to lay a fine exceeding \$50, not assessed by the jury. *State v. Schlitz Brewing Co.*, 59 S. W. 1033, 1040, 104 Tenn. 715, 78 Am. St. Rep. 941.

Acts 1822, c. 29, provides that the affidavit of a mother of an illegitimate child as to the father of such child shall not be conclusive on the county court, but that the reputed father may file his affidavit setting forth that justice requires an issue to be made to try the truth of the charge, and that thereupon it shall be the duty of the court to hear proof and determine the matter as to right and justice may appertain. Held, that the statute did not confer upon the defendant the right to a trial by jury. Whyte, J., dissenting, held that, since the issue was one of fact, and since it was the policy of the common law that issues of fact should be tried by a jury, the word "court" should be considered in a broader sense, as signifying both judge and jury, and that therefore the defendant was entitled to his trial by jury. *Goddard v. State*, 10 Tenn. (2 Yerg.) 96, 98.

In discussing at what time in progress of arraignment and other formalities preparatory to a trial the trial may be said to be entered into, it was said that a prisoner cannot be put on trial unless he is before a court competent to try the offense, and that one of the members of the court indispensably necessary to a trial for a felony is a jury. *State v. Burket* (S. O.) 2 Mill, Const. 155, 156, 12 Am. Dec. 662.

A court is defined in Burrill's Law Dictionary as an organized body, with defined powers, meeting at certain times and places for the hearing and decision of causes and other matters brought before it. Lord Coke describes it as "a place where justice is judicially administered." Thus a contempt committed in the jury room, after the jury had retired to consider their verdict, was in

the presence of the court; the jury being a constituent part. *People v. Barrett*, 9 N. Y. Supp. 321, 322, 56 Hun, 351.

The word "court," in Pub. Acts 1893, c. 66, giving a right of action to quiet title to lands against others claiming an adverse interest therein, and providing that the court shall hear the several claims and determine the rights of the parties, means the tribunal, and not merely the judge thereof, as opposed to the jury; and hence the act does not contravene Const. art. 1, § 21, declaring that the right of trial by jury shall remain inviolate. *Miles v. Strong*, 68 Conn. 273, 286, 36 Atl. 55, 58.

The word "court," as used in Civ. Code, § 4793, authorizing the court to order a sale of land on partition, applies to the judge, and not to the jury. *Rodgers v. Price*, 31 S. E. 126, 127, 105 Ga. 67, 68.

#### **Justices of the peace and justices' courts.**

In the construction of statutes the term "court" includes justices of the peace, as well as all courts of record. *Hurd's Rev. St. Ill.* 1901, p. 1720, c. 131, § 1, subd. 19.

The word "court" may extend and be applied to a justice's court. V. S. 1894, 6.

The public administration of justice is delegated to justices of the peace. They are among the bodies in whom Const. art. 6, § 1, vests the judicial powers of the state. While engaged in a performance of their public duties as judicial officers, they are courts, within the meaning of Const. art. 6, § 29, providing that "all laws relating to courts shall be general and of uniform operation." *Tissler v. Rhein*, 130 Ill. 110, 114, 22 N. E. 848, 849.

A justice of the peace is not necessarily a court. He is not a court when elected, simply by virtue of his election, and is not vested by the election alone with judicial power; but if the Legislature, after or before his election, vests judicial power in that officer, the exercise of which is made the chief and permanent duty of his office, he thus becomes a court. A court is a tribunal charged as a substantive duty with the exercise of judicial power, and a judicial officer is the person appointed to exercise that power. A judge will be none the less a judicial officer because some duties he may have to perform are administrative in their character; nor will an administrative become a judicial officer, simply because some acts which he may perform may be to some extent judicial in their character. *Baltimore & O. R. Co. v. Town of Whiting* (Ind.) 68 N. E. 266, 270.

As used in Const. art. 6, § 1, providing that the powers of the state shall be vested in the Supreme Court, superior courts, courts of ordinary, and justices of the peace, a

justice of the peace is an officer clothed with judicial powers, when acting in his judicial capacity and within his jurisdiction, and is to all intents and purposes a court. *State v. Port* (U. S.) 3 Fed. 117, 123.

#### **Master commissioner.**

The predominant idea, in all definitions of courts and text writers, is "that a court is a tribunal organized for the purpose of administering justice, and is presided over by a judge or judges." Our Constitution means, by the term "court," a judicial tribunal, presided over by a judge or judges. A master commissioner is not a court, and judicial duties which courts only can exercise cannot be conferred upon him. *Shoultz v. McPheeters*, 79 Ind. 373, 375, 376.

#### **Notary public.**

As the term "court" is used in the rule of law that parties to a suit and their witnesses are protected from arrest in coming to, attending upon, and returning from court, it has received a very liberal construction, and includes any lawful tribunal having jurisdiction of any matter pending before it, but will not include the attendance of a party before a notary public to assist in the taking of depositions. *Greer v. Young*, 11 N. E. 167, 169, 120 Ill. 184.

#### **As persons constituting.**

Act Va. Oct., 1875 (12 Hen. St. p. 154), requiring conveyances of lands made by persons not resident in Virginia to be acknowledged before "any court of law," and certified by such court, meant that the acknowledgment should be before persons constituting a court of law, and not that the acknowledgment should be taken in open court or by the members of the court as a court. *Loree v. Abner* (U. S.) 57 Fed. 159, 164, 6 C. C. A. 302.

#### **As prescribed time and place.**

A court is defined to be "a place where justice is judicially administered." Co. Litt. 58a. Certainty, both as to time and place, is essential to the conception of a court of justice. It would be eminently Caligulan could it act when and where it pleases the judge. Without recourse to the notion of a court as a sort of incorporate entity, it is obvious that a judge does not at all times and places constitute a court, and that he cannot, when he pleases, assert and enforce his judicial power. He becomes a judge when he is appointed or elected, but he becomes a court only when, at the time and place designated by law, he performs judicial duties. As said in *Dunn v. State*, 2 Ark. 220, 35 Am. Dec. 54, the time and place designated by law and the presence of the judge there, acting judicially, are the "union and combination of circumstances" which constitute a court. Jurisdiction is not

predicated of the judge, but of the court. It is true that, by force of statutes and of rules established by courts as essential to the administration of justice, the judge may perform certain judicial acts elsewhere than at the place and at other than the time fixed for the usual administration of justice; but the existence of this limited class of ancillary acts, which he may do elsewhere and at another time, has the force of a denial that he can so act, except with reference to the particular matters embraced in that class. It is the recognized difference between a court and a judge—between acts done in court and at chambers. *Venhoff & Co. v. Morgan*, 11 Ky. Law Rep. 276, 278.

The meeting together of the judge and officers of a court, and the holding proceedings at a place not authorized by law, does not constitute a court. *Williams v. Reutzell*, 29 S. W. 374, 375, 60 Ark. 155.

Where by the law establishing a county court the terms were fixed, and no provision made for holding a special term, a meeting of the court at special term, and business and proceedings had thereat, were void. *Chaplin v. Holmes*, 27 Ark. 414, 417.

The meeting together of the judge and officers of court at the place, but not at the time, fixed by law for holding the court, is not a court, but a mere collection of officers, whose acts must be regarded as *coram non iudice*, and void. *Brumley v. State*, 20 Ark. 77, 78 (citing *Dunn v. State*, 2 Ark. [2 Pike] 229, 35 Am. Dec. 54); *Ex parte Jones*, 27 Ark. 349, 353; *Scott v. State*, 22 Ark. 369, 371.

"A court consists of persons officially assembled under authority of law at an appropriate time and place for the administration of justice," and where the court was held at a county seat, which was recognized and used as such for 12 years, the rightfulness of holding the court there as the proper place cannot be attacked in habeas corpus. *In re Allison*, 22 Pac. 820, 821, 13 Colo. 525, 10 L. R. A. 790, 16 Am. St. Rep. 224.

A court was, when the king was the sole dispenser of justice, defined as "the house or place where the king remaineth with his retinue." When and since the authority to hear and determine controversies has been delegated to constituted tribunals, a court is generally defined as "the place where justice is administered." When judges were created, to whom the judicial power residing in the sovereign was delegated, for a time they were accustomed to attend the sovereign and exercise the power only while in attendance on him. One of the guarantees of Magna Charta is that the court—the power exercising judicial functions—should not migrate with the king, but should hold its sittings at a place and time fixed and certain. When the time and place are fixed

by statute, they are essential elements of jurisdiction. *Ex parte Branch*, 63 Ala. 383, 384.

A court is a tribunal presided over by one or more judges for the exercise of such judicial power as has been conferred upon it by law. Blackstone, following Coke, defines it as "a place where justice is judicially administered." 3 Bl. Comm. 23. But it is also essential that this place be designated by law, and that the person or persons who are authorized to administer justice be at that place for the purpose of administering justice at such times as may be also designated by law. The term "court," as used in the Code of Civil Procedure, means sometimes the place where the court is held, sometimes the tribunal itself, and sometimes the individual presiding over the tribunal, and in many cases is used synonymously, as well as interchangeably, with "judge." Under the present Constitution, whenever a judge of the superior court is present at the place designated for the transaction of judicial business, and there assumes to transact such business, his acts are the acts of the court. *Von Schmidt v. Widber*, 34 Pac. 109, 110, 99 Cal. 511.

#### **Quorum distinguished.**

In determining how many judges shall constitute a court, or a quorum of a court, no distinction can be drawn between the words "quorum" and "court." Each term implies a body capable of exercising the functions of a whole body not otherwise reserved. Therefore the rule that in the House of Lords, the Supreme Court of England, a small minority may sit in deciding appeals, is applicable to show the propriety of the statutory provision that a minority of the Supreme Court judges, constituting the Supreme Court, may constitute a quorum of such court for the transaction of certain business. *Floyd v. Quinn*, 52 Atl. 880, 882, 886, 24 R. I. 147.

#### **Referee or register.**

In section 64, par. "a," of the bankruptcy act of 1898, providing that the court shall order the trustee to pay all taxes due and owing by the bankrupt, and, in case of any question as to the amount or legality of any such tax, the same shall be held and determined by the court, the word "court" includes the referee. *In re Tilden* (U. S.) 91 Fed. 500, 501.

"Court," as used in the bankruptcy act, shall mean the court of bankruptcy in which the proceedings are pending, and may include the referee. U. S. Comp. St. 1901, p. 3419.

Bankr. Act 1867, § 29, providing that the bankrupt may apply to the court for a discharge of his debts, and the court shall thereupon order notice to be given by mail to all creditors to show cause, etc., means

the court, and not the register. *In re Comstock* (U. S.) 6 Fed. Cas. 235, 236.

Blackstone, adopting Coke's definition, says "a court is a place where justice is judicially administered." But this definition obviously wants fullness. It is limited to the place of a court in its expression. In addition to the place, there must be the presence of the officers constituting the court, a judge or judges certainly, and probably a clerk, authorized to record the action of the court. Time must be regarded, too; for the officers of a court must be present at the place and at the time appointed by law, in order to constitute a court. A divorce proceeding, being required by law to be tried in open court, cannot be, therefore, before a referee. *Hobart v. Hobart*, 45 Iowa, 501, 503.

#### **As the same court.**

Act July 27, 1868, in the proviso of section 2, providing that this section shall not be construed so as to deprive aliens, who are citizens or subjects of any government which accords to citizens of the United States the right to prosecute claims against such government in its courts, of the privilege of prosecuting claims against the United States in the Court of Claims as now provided by law, cannot be construed to limit the right of action in a foreign government in a court organized in such government in all respects similar to the Court of Claims. The requirement of the statute will be complied with if a citizen of the United States have the legal right, according to the forms of procedure in such government, to prosecute in its courts to judgment against the government a claim which, if the case arose under this government, he could under the same circumstances prosecute to judgment against the United States. *Rothschild v. United States* (U. S.) 6 Ct. Cl. 204, 219.

Code, § 1292, providing that, where a judgment is set aside for any cause upon motion, the court may direct and enforce restitution in like manner, with like effect, and subject to the same conditions, as when a judgment is reversed upon appeal, means the court which set aside the judgment. *Market Nat. Bank v. Pacific Nat. Bank*, 7 N. E. 302, 303, 102 N. Y. 464.

As used in Gen. Laws, c. 245, § 10, providing that, wherever a case is at issue in the common pleas division involving accounts, the court may appoint auditors, etc., the word "court" means the common pleas division, and not the appellate division. *Blanding v. Sayles*, 42 Atl. 872, 873, 21 R. I. 211.

Under Gen. St. c. 22, § 12, the court by which an action is referred, under the statute, and afterwards finally disposed of, is "the court before whom the action is tried." *Cooley v. Eastman*, 57 N. H. 503, 505.

Under the rule that an application for an extra allowance can only be made "to the court before which the trial is had," the application must be made to the court at which the cause was tried. *Osborne v. Betts* (N. Y.) 8 How. Prac. 31, 32.

#### **Special tribunals.**

By the term "courts," as used in Const. art. 6, § 1, providing that the judicial power is vested in the Supreme Court, in circuit courts, in probate courts, and in justices of the peace, is meant the permanent organizations for the administration of justice, and not those special tribunals that are occasionally called into existence by particular exigencies and that cease to exist with such exigencies. *Streeter v. Paton*, 7 Mich. 341, 347; *Shurbun v. Hooper*, 40 Mich. 503, 505. Hence the banking act, empowering receivers of insolvent banks to allow or reject claims presented against it, does not clothe him with judicial power in violation of Const. art. 6, § 1, vesting such powers in specified courts. *Bissell v. Heath*, 57 N. W. 585, 586, 98 Mich. 472.

The phrase in the Constitution, that in condemnation proceedings, if the landowner refuses to accept the damages assessed, they should be paid into "court" for the owner, must be construed to mean that, if the owner refuses to accept the award of damages, the money shall be paid to the officer or the tribunal designated by the Legislature for the administration of justice in that particular condemnation proceeding. It does not mean, and has not been so construed, that these proceedings can only be conducted in a court in its judicial sense. *Shively v. Lankford*, 74 S. W. 835, 839, 174 Mo. 535.

#### **As term of court.**

The word "court," in a recognizance to appear at a certain court and not depart from said court without license therefor, means the term of court at which the defendant is recognized to appear. *State v. Baker*, 50 Me. 45, 56.

In Rev. St. § 828 [U. S. Comp. St. 1901, p. 635], relating to clerk's fees for attendance, which is as follows: "For traveling from the office of the clerk, where he is required to reside, to the place of holding any court required by law to be held," etc., the word "court" is used in the sense of "term" or "session" of the court, because it is the term or session of the court which is "required by law to be held." *Erwin v. United States* (U. S.) 37 Fed. 470, 476, 2 L. R. A. 229.

Within the meaning of the statute providing that, where an offer for judgment and consent to be defaulted is made in writing by defendant and filed in court, the court shall thereupon enter judgment, such an offer filed in vacation will not be a compli-

ance with the provision during the vacation. But, where it continues on file till the next term, it then becomes operative, and should be entered of record as of the first day of the term, and should be taken as having been made in court on the first day of the term next after it was filed in the clerk's office. *Madden v. Brown*, 97 Mass. 148, 150.

#### **COURT BELOW.**

Rev. St. § 6722, declares that the court below may give leave to enforce a judgment, notwithstanding a supersedeas bond, etc. Held, that when a petition in error is pending in the district court, and a supersedeas bond is given to supersede a judgment of the common pleas, the court of common pleas would be the "court below," within such section; but if the case were a judgment of the district court, superseded by a bond in prosecuting a petition in error in the Supreme Court, then the district court would be the court below which could grant leave. In other words, the court below is the court from which the appeal is taken. *Going v. Schnell*, 6 Ohio Dec. 932, 933.

The term "court below" includes the district or county court from which an appeal or writ of error is taken. Rev. St. Tex. 1895, art. 1386.

#### **COURT COMMISSIONERS.**

As court, see "Court."  
As judge, see "Judge."

#### **COURT COSTS.**

The term "court costs" includes a fee for entering a case on the docket. *Ball v. Duncan*, 30 Ga. 938, 939.

#### **COURT DAY.**

The provision in the statute that, if plaintiff desire an execution to issue, the clerk shall issue the same, so as the day of such return be upon a court day, the term "court day" must be rejected, as there is nothing of a similar description in our legislation which can give meaning to the term. *Harrell v. Martin*, 4 Ala. 650.

#### **COURT HAVING A CLERK.**

Under Act April 14, 1802, providing that any court of record having a clerk or prothonotary may receive an alien's preliminary declaration of his intention to become naturalized, it is held that the phrase "court having a clerk," etc., means a court having a clerk distinct from the judge of the court, so that a court of record, whose recording officer is the judge thereof, is not regarded as a court of record having a clerk. *Ex parte Gregg* (U. S.) 6 Fed. Cas. 796, 797.

**COURTHOUSE.**

See "Nearest Courthouse."

A "courthouse" means the building occupied and appropriated for the holding of courts. *Harris v. State*, 18 South. 387, 388, 72 Miss. 960, 33 L. R. A. 85.

A "courthouse," as the term implies, is chiefly for the use of the court; the remaining uses being subordinate and to a great extent incidental. *Vigo County Com'rs v. Stout*, 35 N. E. 683, 685, 136 Ind. 53, 22 L. R. A. 398.

Under a statute authorizing a board of supervisors to locate and keep in repair a good and convenient courthouse, the board has power to make an appropriation for shade trees in the courthouse yard. *Allgood v. Hill*, 54 Miss. 666, 667.

Where a power of sale, given in a deed of trust, restricted the sale "at the courthouse door in the county of Benton," the court said: "It must be remembered that we are here dealing with a power created in a private contract, by a person using language in its usual and ordinary signification, and when he says 'courthouse in Benton county,' nothing else appearing, he means the house provided by the county for the purpose, and in which are held the terms of the various courts of the county, and in which are generally the offices of the county officers; for that is the meaning usually and ordinarily given to the term 'courthouse' in the counties of Missouri." *Schanewerk v. Hoberecht*, 117 Mo. 22, 27, 22 S. W. 949, 950, 20 L. R. A. 783.

**Chancery clerk's office.**

A courthouse is a house where courts are held, and means the building occupied and appropriated according to law for the holding of courts, and the term does not include a chancery clerk's office maintained outside of the courthouse, but in which no court is ever held, and therefore a statute requiring a board of supervisors to meet in the courthouse does not authorize their meeting in the chancery clerk's office. *Harris v. State*, 18 South. 387, 388, 72 Miss. 960, 33 L. R. A. 85.

**Dedication to public implied.**

A designation of certain blocks on a map of the city of Austin, purporting to have been filed in 1840, when an act was in effect requiring certain eligible lots to be set aside for public purposes, which map was on file in the land office since 1850, was construed to show a dedication of such lot, not to the republic of Texas or the city of Austin, but to the county of Travis, which alone could require such buildings. *Travis County v. Christian (Tex.)* 21 S. W. 119, 121.

A designation on a map of public lands of a certain block as "courthouse" and "jail" operated as a dedication of the use of such

block to the county for constructing and keeping on it the buildings designated, so long as the county might elect to occupy it for such purpose, but the fee remained in the state. *State v. Travis County*, 21 S. W. 1029, 1030, 85 Tex. 435.

The word "courthouse" written on a block marked on a map of a town site filed in laying out the town, considered in connection with the fact that lots are sold with reference to such map, constitutes an irrevocable dedication to the use of the public of the space so represented on the map as a public square. *Town of San Leandro v. Lebreton*, 13 Pac. 405, 407, 72 Cal. 170.

**Destruction of building as affecting.**

Where a trust deed provides for a sale on default at the north door of the courthouse, these words are not restrictive to the site of the courthouse in existence at the date of the instrument, but, on its destruction by fire, the sale may be made at the north door of the building used as a courthouse. *Alden v. Goldie*, 82 Ill. 581, 583.

Where a trust deed provided for the sale on foreclosure at the north door of the courthouse, and before the time of the sale it was destroyed by fire, a sale made on the ground immediately in front of where the north door was at the time of the execution of the deed was a sale at the north door of the courthouse. *Chandler v. White*, 84 Ill. 435, 440.

Where a sale by a sheriff should have been at the courthouse, but there was nothing but the ashes of one, and none other substituted, the sheriff could sell there, or in full view of it, after proclaiming within the hours of sale to the assembled bidders that they would go to a shady place hard by to escape the oppressive heat of the sun. *Longworthy v. Featherston*, 65 Ga. 165, 168.

The term "courthouse," in a trust deed which provides that a sale of the property may be made at a certain door of the courthouse, cannot be construed to be limited to the courthouse as existing at the time of the execution of the trust deed, without regard to changed conditions, and therefore, if the courthouse is partially destroyed by fire, a sale can be properly made at the ruins of the designated door. The essential element in the power is that the place of sale is rendered certain by the description, and whether the same door, or a new one, or none at all, is at the place at the time of sale, is wholly immaterial. In so holding, the court say that if the courthouse should be destroyed by fire, and a new one erected at the same location, a sale could be made at the designated door of the new courthouse. *Waller v. Arnold*, 71 Ill. 350, 353.

**Temporary removal as affecting.**

"Courthouse," as used in the execution law, requiring judicial sales to be made at

the door of the courthouse, means the door of the building used and occupied as a courthouse; and hence, where a judicial sale was made at the door of a church in which the circuit court held its sessions, because the usual courthouse was occupied by a troop of soldiers, and not in condition to be used as a courthouse, the sale was proper. *Kane v. McCown*, 55 Mo. 181, 198.

"Courts are necessarily to be held at the seat of justice, because it is such holding in pursuance of law that characterizes the place as the seat of justice. So the building in which such courts are permanently held becomes, by virtue of such holding and the law authorizing the same, the courthouse. The mere fact that, when the exigency of a case requires it, the court may temporarily be held in a different building, does not prevent the building constructed for the court permanently from continuing to be such courthouse, notwithstanding such building in which the courts are from necessity so temporarily held is to "be deemed by statute (Rev. St. § 650) the courthouse for the time being for all purposes. The courthouse must be at the county seat, except in the special cases prescribed, when from necessity courts may be temporarily held elsewhere." *Pepin Co. v. Prindle*, 21 N. W. 254, 255, 61 Wis. 301.

A deed of trust, which described the place where a sale was to be made as "at the courthouse door," meant the door of the building which was appropriated for courthouse purposes, pending repairs in courthouse proper. *Hambright v. Brockman*, 50 Mo. 52, 57.

#### COURTHOUSE DOOR.

By the courthouse door of a county is meant either of the principal entrances to the house provided by the proper authorities for the holding of a district court; and, where from any cause there is no such house, the door of the house where the district court was last held in that county shall be deemed to be the courthouse door. Where the courthouse or house used by the court has been destroyed by fire or other cause, and another has not been designated by the proper authority, the place where such house stood shall be deemed to be the courthouse door. Rev. St. Tex. 1895, art. 2368. See, also, *Boone v. Miller*, 86 Tex. 74, 79, 23 S. W. 574.

#### COURTHOUSE PURPOSES.

The words "courthouse purposes," as used in a deed conveying land to a county, to hold as long as the county shall use the same for courthouse purposes, includes any incidental and collateral use to which the lot in question may be temporarily devoted, which does not conflict or interfere with its use by the county for courthouse purposes, as by the failure to inclose it entirely with a fence,

allowing hitching posts for public use to be erected on the uninclosed portion or a temporary structure for posting bills. *Henry v. Etowah County*, 77 Ala. 538, 540.

#### COURTHOUSE SITE.

The terms "courthouse site" and "county site," in their ordinary use, mean the same thing, and are taken and understood to signify the seat of government of the county, and in this sense cannot be restricted and confined to the particular lot or the ground by measurement upon which the necessary public buildings are erected. *Matkin v. Marengo County*, 34 South. 171, 174, 137 Ala. 155.

#### COURTHOUSE SQUARE.

The words "courthouse square," written on a block in a plat of a town, when considered in connection with the statute providing that such plats shall vest the fee of lands intended for public use in the county in which such city or town is situated in trust for the uses therein named, expressed, or intended, and for no other use or purpose, operates to vest the fee in the block in the county, in trust for and to be used as a courthouse square, and for no other use or purpose. The county must exercise the control and subordination to the conditions of the trust. Such a trust is not executed by the sale of a portion of the block and the application of the proceeds to the erection of a courthouse. *Franklin County Com'rs v. Lathrop*, 9 Kan. 453, 462.

#### COURT NOT OF RECORD.

A court not of record is the court of a private person intrusted with legal jurisdiction, whom the law will not intrust with any discretionary powers over the fortune or liberty of his fellow subjects. *Erwin v. United States*, (U. S.) 37 Fed. 470, 488, 2 L. R. A. 229 (citing and approving 3 Bl. Comm. 24).

"Blackstone defines a court not of record as one that can hold no plea of matters cognizable by the common law, unless under the value of 40 shillings, nor of any forcible injury whatever." In re *Dean*, 22 Atl. 385, 386, 83 Me. 489, 13 L. R. A. 229.

#### COURT OF APPEALS.

As Supreme Court, see "Supreme Court."

#### COURT OF BANKRUPTCY.

"Courts of bankruptcy," as used in the bankruptcy act, shall include the District Courts of the United States and of the territories, the Supreme Court of the District of Columbia, and the United States Court of the Indian Territory and of Alaska. U. S. Comp. St. 1901, p. 3419.

**COURT OF CHANCERY.**

"A court of chancery," says 1 Pom. Eq. Jur. §§ 34, 35, "as a regular tribunal for the administering of equitable relief and extraordinary remedy, is usually spoken of as dating from a decree of King Edward III; but it is certain that the royal action was merely confirmatory of a process which had come on through many preceding years. The delegation made by this order of the king conferred a general authority to grant relief on all matters, of what nature soever, requiring the exercise of the prerogative of grace. This authority differed wholly from that upon which the jurisdiction of the courts of law was based. These latter tribunals acquired jurisdiction in each case which came before them by virtue of a delegation from the crown contained in the particular writ on which the case was founded, and a writ for that purpose can only be issued in cases provided for by the positive rules of the common law. This was one of the fundamental distinctions between the jurisdiction of the English common-law courts under their ancient organization and that of the English court of chancery. These distinctions have never existed in the United States. The highest courts of law and of equity, both state and national, derive their jurisdiction either from the Constitution or from the statutes. This distinction, as far as inherent powers are concerned, has been destroyed in this state by the statute which provides that there shall be but one form of action hereafter for the enforcement or protection of private rights and the redress of private wrongs, which shall be called a "civil action." *Parmeter v. Bourne*, 35 Pac. 586, 587, 8 Wash. 45.

The expression "court of chancery," as used in a bond reciting the obligor's intention to obtain an injunction, and conditioned to perform such order or decree as the court of chancery shall pass in the premises, does not include the county court sitting as a court of equity, which grants such an injunction, and hence a failure to perform the decrees or orders of the county court does not give a right of action on such bond. *Morgan v. Morgan* (Md.) 4 Gill & J. 395, 401.

An injunction bond, conditioned to pay damages if the same is dissolved by the chancery court, is to be construed as including the Supreme Court, and hence the bondsmen are liable for damages when the injunction is dissolved by the latter court. *Bolling v. Tate*, 65 Ala. 417, 428, 39 Am. Rep. 5.

**COURT OF CLAIMS.**

The term "court of claims" as used in Const. Ky. art. 4, declaring that the General Assembly may provide by law that the justices of the peace in each county shall sit at the court of claims and assist in laying

the county levy and making appropriations, are employed to designate the county court when it sits for the purpose, among others, of ascertaining the claims against the county and expenses incurred by it, and of providing for their payment by appropriations out of the county levy; such levy being the annual tax imposed for county purposes, not on property, but on persons residing in the county without reference to the value of their property. *Meriweather v. Muhlenburg County Court*, 7 Sup. Ct. 563, 564, 120 U. S. 354, 30 L. Ed. 658.

**COURT OF COMMON PLEAS.**

The court of common pleas is the general foundation of justice, and where the rights of a citizen, either derived from the common law or the statutes, are invaded, and the power to protect them is conferred upon no special jurisdiction, he may seek redress in that court. *Moore v. Barry*, 30 S. C. 530, 534, 9 S. E. 589, 590, 4 L. R. A. 294 (citing *Geiger v. Drafts*, 17 S. C. 155).

**COURT OF COMPETENT AUTHORITY OR JURISDICTION.**

See "Competent Authority"; "Competent Jurisdiction."

**COURT OF CONSCIENCE.**

The term "court of conscience" is sometimes used to designate a court of equity. *Harper v. Clayton*, 35 Atl. 1083, 1085, 84 Md. 346, 35 L. R. A. 211, 57 Am. St. Rep. 407.

**COURT OF EQUITY.**

A court of equity is a court of conscience, and whatever is unconscionable is odious in its sight. *Dowell v. Goodwin*, 47 Atl. 698, 695, 22 R. I. 287, 51 L. R. A. 873, 84 Am. St. Rep. 842.

Story's Equity, p. 32, says the "most general, if not the most precise, description of a court of equity, in the English and American sense, is that it has jurisdiction in cases of rights recognized and protected by the municipal jurisprudence, where a plain adequate and complete remedy cannot be had at law. *Thomas v. Phillips*, 12 Miss. (4 Smedes & M.) 358, 423.

**COURT OF INQUEST.**

As court, see "Court."

**COURT OF LAW.**

The term "court of law," as used in Acts 1874, c. 320, providing that in all judgments rendered in any court of law an execution or attachment may issue at any time within 12 years from the date of the judgment, does not include a justice's court. *Weikel v. Cate*, 58 Md. 105, 110.



**COURT OF RECORD.**

The common-law definition of a "court of record" is a court that hath authority to fine and imprison. *De Lovio v. Boit* (U. S.) 7 Fed. Cas. 418, 438 (citing *Groenvelt v. Burwell*, Salk. 200; *Grenville v. College of Physicians*, 12 Mod. 386, 388; *In re Groenvelt*, 1 Ld. Raym. 213, 3 Bl. Comm. 24; *Bac. Abr. "Courts,"* D 2, p. 101); *Erwin v. United States*, 37 Fed. 470, 488, 2 L. R. A. 229; *Wahrenberger v. Horan*, 18 Tex. 57, 59; *Hooker v. State* (Ind.) 7 Blackf. 272, 273; *Bucher v. Thompson*, 32 Pac. 498, 7 N. M. 115.

A "court of record" is defined to be a court where the acts and proceedings are enrolled in parchment for a perpetual memorial and testimony. The *Thomas Fletcher* (U. S.) 24 Fed. 481, 482 (citing 3 Black. Comm. 24); *Erwin v. United States* (U. S.) 37 Fed. 470, 488, 2 L. R. A. 229; *Bucher v. Thompson*, 32 Pac. 498, 7 N. M. 115; *Bellas v. McCarty* (Pa.) 10 Watts, 13, 24; *Wheaton v. Fellows* (N. Y.) 23 Wend. 375, 377; *Hahn v. Kelly*, 34 Cal. 391, 422, 94 Am. Dec. 742; *Lenox v. Pike*, 2 Ark. (2 Pike) 14, 19; *Lenox v. Pike*, 2 Ark. (2 Pike) 14, 19; *Wheaton v. Fellows* (N. Y.) 23 Wend. 375, 377; *Hahn v. Kelly*, 34 Cal. 391, 422, 94 Am. Dec. 742; *Adair's Adm'r v. Rogers' Adm'r* (Ohio) Wright, 428, 429; *Planters' & Mechanics' Bank of Columbus v. Chipley*, Ga. Dec. 50, 51, pt. 1; *Wheaton v. Fellows* (N. Y.) 23 Wend. 375, 377 (citing and approving 3 Bl. Comm. 324). The privilege of having these enrolled memorials constitutes the great leading distinction in English and American law between courts of record and courts not of record, or, as they are frequently designated, superior and inferior courts. *Hahn v. Kelly*, 34 Cal. 391, 422, 94 Am. Dec. 742.

A court of record is one the history of whose proceedings is perpetuated in writing. *Adair's Adm'r v. Rogers' Adm'r* (Ohio) Wright, 428, 429.

A court of record is a judicial tribunal having attributes and exercising functions independently of the person of the magistrate, designated generally to hold it, and proceeding according to the course of the common law. *Ex parte Thistleton*, 52 Cal. 220, 225; *United States v. Hall* (N. M.) 21 Pac. 85, 86; *Bucher v. Thompson*, 32 Pac. 498, 7 N. M. 115.

A court of record is sometimes defined to be a court which has a seal. *Ingoldsbey v. Juan*, 12 Cal. 564, 580.

A "court of record" is a court whose proceedings are fully recorded by authorized persons, such as clerks or prothonotaries. *Ex parte Cregg* (U. S.) 6 Fed. Cas. 796.

A court of record necessarily requires some duly authorized person to record the proceedings. When an act speaks of courts

of record, it speaks of courts whose proceedings are duly recorded by authorized persons. *State v. Whittemore*, 50 N. H. 245, 251, 9 Am. Rep. 196 (citing *Ex parte Cregg*, 6 Fed. Cas. 796).

This classification of courts of record is made by Sir Matthew Hale: "Courts are of two kinds: First, courts of record; second, not of record. Of courts of record, there is this diversity, namely: First, supreme; second, superior; third, inferior. The latter he styles inferior courts of record." *Rhinehart v. Lance*, 43 N. J. Law (14 Vroom) 311, 314, 39 Am. Rep. 592.

**City criminal court.**

The city criminal court of the city and county of San Francisco is a court of record, because it has a clerk and bailiff, and has power to fine and imprison, though it has no seal. *Ex parte Thistleton*, 52 Cal. 220, 225.

It is urged that this is not a "court of record," because, although it has a clerk and record, it has no seal. But this suggests too narrow a definition of the words "courts of record," as these words are employed in modern days, and too broad a definition, perhaps, as they were formerly used. In England and in some of the states every court which had jurisdiction to fine and imprison was a court of record, and the very erection of a new jurisdiction with power of fine and imprisonment made instantly a court of record. 3 Bl. Comm. 24, 25. The city criminal court has power to fine and imprison, and is, therefore, plainly a court of record within the older definition. *Ex parte Thistleton*, 52 Cal. 220, 224.

**County commissioners.**

A court of record, as defined by Blackstone, is a court having power to inflict fines for contempt. Thus, where the board of county commissioners had such power, it thereby became a court of record, and its acts could only be proved by the records thereof. *State v. Conner* (Ind.) 5 Blackf. 325, 327.

As used in Act Cong. April 14, 1802, authorizing district courts to naturalize aliens, and providing that any court of record in any individual state, having common-law jurisdiction, and a seal and clerk, or prothonotary, shall be considered a district court within the meaning of the act, is not simply a tribunal that has a recording officer and seal, and in fact keeping a permanent record of its proceedings; for the probate court and the court of county commissioners would fulfill all of these requirements, and yet neither of these tribunals is deemed technically to be a court of record. It must be an organized judicial tribunal, having attributes and exercising functions independently of the person of the magistrate desig-

nated generally to hold it, and proceeding according to the course of the common law. It is distinguished from the case of a justice of the peace, on whom certain judicial powers are conferred by law. Two centuries ago, in the case of *Groenvelt v. Burwell*, 1 Salk. 200, Chief Justice Holt said: "Whenever a power is given to examine, hear, and punish, it is a judicial power; \* \* \* and whenever there is jurisdiction erected, with power to fine and imprison, that is a court of record, and what is there done is matter of record." Blackstone adopts this statement, adding that the proceedings of a court of record are enrolled as a perpetual memorial. 3 Bl. Comm. 24. Thus in *Woodman v. Inhabitants of Somerset*, 37 Me. 29, 88, Chief Justice Shepley says: "A court of record is one which has jurisdiction to fine and imprison, or one having jurisdiction of civil cases above 40 shillings and proceeding according to the course of the common law." In *re Dean*, 22 Atl. 385, 386, 83 Me. 489, 13 L. R. A. 229.

A court of record is one which has jurisdiction to fine or imprison, or having jurisdiction of civil cases above 40 shillings, and proceeding according to the course of the common law. 1 Inst. 117b, 260a. Whether a court be a court of record does not depend upon the fact that it does or does not keep a record of its proceedings, or that it is or is not required by law to do so. The court of county commissioners is not a court of record. *Woodman v. Inhabitants of Somerset County*, 37 Me. 29, 87, 88.

#### **Federal and admiralty courts.**

The court of admiralty, having a very extensive criminal jurisdiction and power to punish by fine and imprisonment, is a court of record, though its proceedings are according to the course of the civil law, and an appeal, and not a writ of error, lies thereto. *De Lovio v. Bolt* (U. S.) 7 Fed. Cas. 418, 438.

The Circuit Court of the United States is a court of record since a writ of error lies to it. *The Thomas Fletcher* (U. S.) 24 Fed. 481, 482 (citing 3 Bl. Comm. 24).

#### **Justice's court.**

A justice court is a court of record. *Stidham v. Thatcher* (Del.) 47 Atl. 1005, 1006, 2 Pennewill, 567; *Stone v. Proctor* (Vt.) 2 D. Chip. 108, 113.

A court that is bound to keep a record of its proceedings, and that may fine or imprison, is a "court of record." A justice court is within that definition. *Hooker v. State* (Ind.) 7 Blackf. 272, 273.

Justices of the peace being required to keep a docket, in which to make fair and accurate entries of all suits before them, with their proceedings thereon, which docket is a

public book and goes to their successors, their courts are courts of record. *Adair's Adm'r v. Rogers' Adm'r* (Ohio) Wright, 428, 429.

Justices of the peace do not hold courts of record, as they do not enroll on parchment (or paper) their proceedings, and do not hold plea according to the course of common law of real or mixed actions or action quare vi et armis, or have jurisdiction beyond 40s. originally. *Planters' & Mechanics' Bank of Columbus v. Chipley*, Ga. Dec. 50, 51, pt. 1.

A justice court in Pennsylvania is not a court of record. A docket and short minutes of his proceedings are all that is kept by the justice. Hence the act of Congress relating to the manner in which records and proceedings of courts of another state shall be proved does not apply to the judgment of a justice court, but such judgments are "judicial proceedings" to which full faith and credit is required to be given by the Constitution of the United States. *Sliver Lake Bank v. Harding*, 5 Ohio (5 Ham.) 546, 547.

Courts of justices of the peace are not courts of record. They do not proceed according to the course of the common law, and are confined strictly to the authority given them by statute. Therefore a suit cannot be maintained in one state on a judgment obtained in a justice's court in a sister state, unless the statute organizing such court is shown. *Thomas v. Robinson* (N. Y.) 3 Wend. 267, 268.

The words "court of record," as used in a statute prescribing the time within which an action on a judgment may be brought, do not include justices of the peace, however true it may be that for some other purposes they were courts of record. *Mead v. Bowker*, 46 N. E. 625, 168 Mass. 234 (citing *In re Gladhill*, 49 Mass. [8 Metc.] 168, 170; *Thayer v. Commonwealth*, 53 Mass. [12 Metc.] 9, 11).

The justice's court of the city of Albany is not, as between party and party, a court of record, though it may be for some purposes. *Wheaton v. Fellows* (N. Y.) 23 Wend. 373, 377.

A justice court is not a court of record. *Searcy v. Hogan* (U. S.) 21 Fed. Cas. 927.

Courts of record are such as have general jurisdiction of causes of action, and the acts of which are authenticated by seal and recorded in its official records. Courts of justices of the peace are not courts of record, as they do not proceed according to the courts of common law, but are confined to the authority given them by statute, and can take nothing by implication, but must show their authority in every instance, and must comply with the forms prescribed by the statute creating them. *Thomas v. Robinson* (N. Y.) 3 Wend. 267, 268.

**Police court.**

The police court of Lowell is a court of record, within Act Cong. April 14, 1802, relating to the naturalization of aliens by courts of record, and is to be holden by learned, able, and discreet persons, appointed and commissioned by the Governor, pursuant to the Constitution, vested with all the civil and criminal jurisdiction of justices of the peace, and exercising a common-law jurisdiction. *Ex parte Gladhill*, 49 Mass. (8 Metc.) 168, 170. See, also, *Bannegan v. Murphy*, 54 Mass. (13 Metc.) 251, 253.

**Probate court.**

The probate court of New Mexico, having a seal, and all its orders, decrees, etc., being entered of record, which imports verity, and having power to fine and imprison and considerable common-law jurisdiction, is a court of record authorizing its clerk to administer oaths. *Bucher v. Thompson*, 32 Pac. 498, 7 N. M. 115. But see *United States v. Hall*, 21 Pac. 85, 86, 5 N. M. 178, holding that the same court was not a court of record.

The "court of probate," though of limited jurisdiction, is a court of record with large powers, and as to proceedings within its jurisdiction cannot be said to be, in the ordinary sense of the term, an inferior court. The functions of the court are judicial, and not merely ministerial, resting on the discretion of the judge, not only in making the order of sale, but in executing titles. *State v. Burnside*, 33 S. C. 276, 278, 11 S. E. 787, 788.

**COURT OFFICER.**

The county treasurer is not an officer of the court, within Rev. St. c. 3027, as to whom a motion on the motion docket is made notice, not only to the officer, but to the sureties. He is a county officer, not connected with the court, and only subject to its control by proceedings had in due course of law. *Caldwell v. Guinn*, 54 Ala. 64, 66.

Under Rev. Code, § 3577, making disclosure of indictment by an "officer of court" or grand juror an indictable offense, it is held that a deputy sheriff is an officer of court within the meaning of the statute. *White v. State*, 44 Ala. 409, 412.

An attorney at law is an officer of the court, and, if his authority is denied, the burden of proving that he is unauthorized rests on the party making the denial. *Schlitz v. Meyer*, 21 N. W. 243, 244, 61 Wis. 418.

Code, § 1106, declares that all process authorized by the Code to be issued by any court or officer thereof shall run in the name of the state of Oregon, and be signed by the officer issuing the same, and, if issued by the clerk of the court, he shall affix thereto his seal of office. Held, that while an at-

torney was in one sense an officer of the court, he was not such an officer as was meant or referred to by that term as used in the statute, so as to authorize an attorney for a party to issue process of the court. *Bailey v. Williams*, 6 Or. 71, 73.

The expression "officer of the county court," in Pen. Code Ga. § 1092, providing that any officer of the county court, having a claim for insolvent costs, may present to the county judge an itemized bill of the costs claimed, and, when the same is approved and entered on the minutes of the county court, the order of approval shall be a warrant on the county treasurer payable out of the fines and forfeitures arising in the county court, does not include any other person than one who is directly and officially connected with that court, and hence does not include officers of the superior court. *Hardwick v. Burke*, 39 S. E. 433, 113 Ga. 999.

**COURTS-MARTIAL.**

As court, see "Court."

Courts-martial were instituted for the trial of naval and military offenses, and existed as early as the reign of James II, and probably had their origin in the ancient court of chivalry. They are regarded as a necessity in every civilized government, in order to properly discipline the military forces by punishing offenses therein. The tribunal is recognized as a court in the elementary works. *Bouvier* defines it to be "a military or naval tribunal which has jurisdiction of offenses against the law of the service, military or naval, in which the offender is engaged." *Greenleaf* says: "A court-martial is a court of limited and special jurisdiction." 3 *Greenl.* on Ev. 470. A court-martial has all the elements of a court. It has judges to hear the evidence and to determine the facts and apply the law. It has parties, prosecutor and defendant. It has pleadings and a formal trial, renders judgment, and issues process to enforce it. In short, it does everything within the sphere of its jurisdiction which any judicial tribunal can do to administer justice. *People v. Van Allen*, 53 N. Y. 81, 85.

The court-martial is one of the ordinary judicial institutions of the country, employed in time of peace as well as in time of war to administer justice according to the articles of war upon persons actually or constructively in the military service. *Carver v. United States (U. S.)* 16 Ct. Cl. 361, 385.

In the language of Attorney General Cushing, "a court-martial is a lawful tribunal existing by the same authority that any other exists by, and the law military is a branch of law as valid as any other, and it differs from the general law of the land in authority only in this: that it applies to off-

sers and soldiers of the army, but not to other members of the body politic, and that it is limited to breaches of military duty." In re Bogart (U. S.) 3 Fed. Cas. 796, 801 (citing 6 Op. Attys. Gen. 425).

\* Courts-martial "are lawful tribunals existing by the same authority as civil courts of the United States, have the same plenary jurisdiction in offenses by the law military as the latter courts have in controversies within their cognizance, and in their special and more limited sphere are entitled to as untrammelled an exercise of their powers." In re Davison (U. S.) 21 Fed. 618, 620.

A court-martial is a court of limited jurisdiction. It is a creature of the statute—a temporary judicial body authorized to exist by acts of Congress under specified circumstances for a specified purpose. It has no power or jurisdiction which the statutes do not confer upon it. *Deming v. McClaughry* (U. S.) 113 Fed. 639, 650, 51 C. C. A. 349.

In *Wise v. Withers*, 7 U. S. (3 Cranch) 331, 2 L. Ed. 457, the court reversed the judgment of the Circuit Court because a court-martial had no jurisdiction over a person not belonging to the militia, and its sentence in such case, being *coram non jure*, furnishes no protection to the officer who executes it. This decision proves only that a court-martial was considered as one of those inferior courts, with limited jurisdiction, whose judgments may be questioned collaterally. They are not placed on the same high ground with the judgments of a court of record. *Ex parte Watkins*, 23 U. S. (3 Pet.) 193, 208, 7 L. Ed. 650.

A court-martial, under the laws of the United States, is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved. Thus, in *Wise v. Withers*, 7 U. S. (3 Cranch) 331, 2 L. Ed. 457, according to the interpretation given it by Chief Justice Marshall in *Ex parte Watkins*, 23 U. S. (3 Pet.) 193, 209, 7 L. Ed. 650, 655, a court-martial was ranked as one of those inferior courts of limited jurisdiction whose judgments may be questioned collaterally. *McClaughry v. Deming*, 22 Sup. Ct. 786, 791, 186 U. S. 49, 46 L. Ed. 1049; *Bartlett v. Hopkins* (U. S.) 7 Fed. 312, 313.

The naval courts-martial were instituted under Act Cong. April 23, 1880, which created a naval code of martial law for the punishment of crimes and offenses committed in the naval service of the United States. It has been from the beginning an adjudicated principle that the federal courts have no criminal jurisdiction, except what is expressly conferred upon them by act of Congress, but naval courts-martial have jurisdiction to try all crimes and offenses whatever committed in the United States navy, and the sounder

opinion is that the jurisdiction of such courts is in such cases exclusive, and the courts of the United States of civil jurisdiction have no lawful cognizance of such cases. "Courts-martial come under a distinct and peculiar code," says Lord Mansfield; "an established military code, which the wisdom of judges has formed, which punishes all particular crimes, and all crimes committed by persons belonging to the navy, and not therein specified, according to the laws and customs in such cases at sea." *United States v. Mackenzie* (U. S.) 30 Fed. Cas. 1160, 1162.

#### COURTS OF ORDINARY.

"The courts of ordinary in Georgia are courts of original, exclusive, and general jurisdiction over decedents' estates, and the subject-matter of their orders and judgments are no more open to collateral attack than the judgments, decrees, or orders of any other court." *Veach v. Rice*, 9 Sup. Ct. 730, 737, 131 U. S. 298, 33 L. Ed. 163.

#### COURTS OF SAME CLASS OR GRADE.

Within the meaning of Const. § 34, providing that all laws relating to courts shall be general and of uniform operation, and the proceedings and practice of all of the courts of the same class or grade, so far as regulated by law, shall be uniform, the circuit and the county courts, so far as they have concurrent jurisdiction, are courts of the same class or grade. *McLain v. Williams*, 75 N. W. 391, 392, 11 S. D. 60.

#### COURTS OF SESSIONS.

Bacon, in his *Abridgment*, title "Courts of Sessions," etc., says: "Sessions held for the general execution of the authority of the justices of the peace, which are usually holden in the four quarters of the year, are called 'general sessions'; and sessions holden on a special occasion, for the execution of some particular branch of the authority of justices of the peace, are called 'special sessions.'" The term "courts of sessions" in *Laws 1850*, c. 339, § 4, giving the courts of sessions power to grant new trials, includes the court of general sessions of the city and county of New York. *People v. Powell* (N. Y.) 14 Abb. Prac. 91, 93.

#### COURTS OF THE STATE.

The term "courts of the state," within the meaning of the statute relative to the service of process in any of the courts of the commonwealth on foreign corporations, includes the Circuit Court of the United States sitting in Pennsylvania. *Ex parte Schollenberger*, 96 U. S. 369-376, 24 L. Ed. 853.

*Insolvent Law Minn. 1881* (Gen. Laws 1881, c. 148) § 1, declares that, whenever the property of any debtor is attached or levied

on by any officer by virtue of any writ or process issued out of a court of record of this state, etc., such debtor may make an assignment of all his property, etc. Held, that the term "court of record of this state" meant a domestic court of record, and was not limited to courts which derived their jurisdiction from state laws only, but included as well federal courts sitting within the territorial limits of the state; they being regarded as domestic courts, inasmuch as they, as well as the state courts, enforce the same laws. *Simon v. Mann*, 23 N. W. 858, 33 Minn. 412.

### COURTS OF THE UNITED STATES.

The courts of the United States are courts established under the authority of the United States. "They are courts of limited, but not inferior, jurisdiction. Their judgments are conclusive between the parties until reversed, although their jurisdiction does not appear upon the record." *Busteed v. Parsons*, 54 Ala. 393, 401, 25 Am. Rep. 688 (citing *McCormick v. Sullivan*, 23 U. S. [10 Wheat.] 192, 6 L. Ed. 300; *Ex parte Watkins*, 28 U. S. [3 Pet.] 193, 7 L. Ed. 650; *Kennedy v. Bank of Georgia*, 49 U. S. [8 How.] 586, 12 L. Ed. 1209).

When there is mention of the courts of the United States in any statute, we may conclusively assume that only the courts of general jurisdiction intended by the Constitution are meant, unless there is special reason, to be deduced from the context of the statute, for giving to the expression a different meaning. *United States v. Mills* (D. C.) 11 App. Cas. 500, 507.

#### Courts of District of Columbia.

The "courts of the United States," within 13 Stat. 551, providing that in the courts of the United States there shall be no exclusion of any witness on account of color, nor (in civil actions) because he is a party or interested in the issues tried, includes the courts of the District of Columbia. *Noerr v. Brewer* (D. C.) 1 MacArthur, 507, 508.

Although the superior court of the District of Columbia is a court of the United States, the question whether an act of Congress using the words "court of the United States" applies to such court, as well as higher courts, is one of intention. *Ex parte Norvell*, 20 D. C. 348, 353.

#### Military court in Mexico.

Every court of the United States must derive its jurisdiction and judicial authority from the Constitution or the laws of the United States; and neither the President nor any military officer can establish a court in a conquered country, and authorize it to decide upon the rights of the United States, or of individuals in prize cases, nor to administer the laws of the nations. The courts es-

tablished or sanctioned in Mexico during the war, by the commanders of the American forces, were nothing more than the agents of the military power. Their decisions were under control of military power, whenever the commanding officer thought proper to interfere. They were not, therefore, courts of the United States, and had no right to adjudicate upon a question of prize or no prize. *Jecker v. Montgomery*, 54 U. S. (13 How.) 498, 515, 14 L. Ed. 240.

#### Territorial courts.

Territorial courts are courts of the United States, within 1 Stat. 91, § 33. *United States v. Haskins* (U. S.) 26 Fed. Cas. 213, 217.

The fact that Congress established the superior courts in the late territory of Florida did not make them United States courts. *Beatty v. Ross*, 1 Fla. (Branch) 198, 208.

The fact that judges of the district and Supreme Courts of the territories are appointed by the President under acts of Congress does not make the courts which they are authorized to hold courts of the United States. Such courts are but the legislative courts of the territory, created in virtue of the clause of the Constitution which authorized Congress to make all rules and regulations respecting the territories belonging to the United States. Accordingly jurors summoned into them under the acts of Congress applicable only to the courts of the United States—i. e., courts established under the article of the Constitution which relates to the judicial power—are wrongfully summoned, and a judgment on their verdict cannot, if properly objected to, be sustained. *Clinton v. Englebrecht*, 80 U. S. (13 Wall.) 434, 447, 20 L. Ed. 659.

Though Act Cong. May 17, 1884, § 3, creates a district court in the district of Alaska, with the jurisdiction, civil and criminal, of the District Courts of the United States and of the District Courts exercising the jurisdiction of Circuit Courts, such court, in common with other territorial courts, is not a court of the United States, within the meaning of Rev. St. § 1768, which excepts judges of the courts of the United States from the authority therein given the President to suspend any civil officer appointed by and with the advice and consent of the Senate. *McAllister v. United States*, 11 Sup. Ct. 949, 951, 141 U. S. 174, 35 L. Ed. 693.

The words "United States courts," as used in St. Okl. 1890, p. 930, § 2, are used in the same sense as such words are used in the Constitution of the United States, and therefore merely refer to such courts as are a part of the federal judiciary of the United States, under article 3 of the federal Constitution, and do not include the United States courts of a territory. *Fuller & Fuller Co. v. Johnson*, 58 Pac. 745, 746, 8 Okl. 601.

## COUSIN.

See "First Cousin"; "Second Cousin."

"Cousin," as used by a testator in giving legacies to cousins and children of cousins, means first cousins. *Caldecott v. Harrison*, 9 Sim. 457, 461.

Where a will provided that "my aunt O. and my cousins [naming seven persons] shall take an equal share" in certain real estate, the word "aunt" and the word "cousins" will be regarded as merely descriptive of the persons named, for the purpose of identification, and not as indicating a class. *Moffett v. Elmendorf*, 46 N. E. 845, 847, 152 N. Y. 475, 57 Am. St. Rep. 529.

## COUSINS-GERMAN.

"Cousins-german," as used in a bequest to testator's first cousins or cousins-german, is synonymous with "first cousins," and in the dictionaries both are explained as meaning children of a brother or sister. Thus, in Chambers' edition of Johnson: "The children of brothers and sisters are called 'cousins-german,' the only sense in which the phrase is now used." So in Boniface's French Dictionary: "First cousins; cousins-german; children of brothers and sisters." So in Ainsworth, under "Patruellis": "A cousin-german by the father's side; a father's brother's son." It does not conclude the descendants of first cousins. *Sanderson v. Bayley*, 4 Myl. & C. 56, 59.

## COVE LANDS.

Land flowed by the tide in 1870 would naturally fall within the designation of "cove lands"; for that is what the cove originally was. *Murphy v. Bullock*, 87 Atl. 848, 849, 20 R. I. 35.

## COVENANT.

See "Concurrent Covenants"; "Dependent Covenant"; "Express Covenant"; "Implied Covenants"; "Independent Covenant"; "Joint Covenant"; "Mutual Covenants"; "Negative Covenant"; "Personal Covenant"; "Real Covenant"; "Usual Covenants."

A covenant is an agreement duly made between the parties to do or not to do a particular act. *Johnson v. Gurley*, 52 Tex. 222, 226 (citing Tayl. Landl. & T. § 245); *Georgia Southern R. Co. v. Reeves*, 64 Ga. 492, 494. It is a promise under seal. *Greenleaf v. Allen*, 127 Mass. 248, 253; *Cheney v. Straube*, 53 N. W. 479, 480, 35 Neb. 521; *Johnson v. Hollensworth*, 48 Mich. 140, 142, 11 N. W. 843; *Kelley v. Palmer*, 42 Neb. 423, 426, 60 N. W. 924; *Kennedy v. Howell*, 20 Conn. 349, 352; *Bull v. Follett* (N. Y.) 5 Cow. 170, 172. It is an agreement in writing, under 2 Wds. & P.—44

seal. *Petty v. Trustees of Church of Christ*, 70 Ind. 290, 297 (citing Whart. Law Dict.). It is a written agreement under seal, in the nature of a deed between two or more parties. *Northrup v. Northrup* (N. Y.) 6 Cow. 296, 297. It is a contract or agreement to do or suffer a particular thing, evidenced by a writing, under seal, sometimes defined as a "contract by deed." *Benson v. Hobbs* (Md.) 4 Har. & J. 285. It is an "agreement or consent of two or more by deed in writing, sealed and delivered, whereby either one of the parties doth promise to the other that something is done already or shall be done afterward." *Commonwealth v. Robinson* (Pa.) 1 Watts, 158, 160 (citing Jacob, Law Dict. and Shep. Touch.); *Kent v. Edmondston*, 49 N. C. 529-531 (citing Shep. Touch. 160). It is an agreement between two or more parties, reduced to writing and executed by a sealing and delivery thereof, whereby some of the parties named therein engaged, or one of them engages with the other or others, or some of them therein also named, that some act hath or hath not already been done, or for the performance or non-performance of some specified duty. *De Bolle v. Pennsylvania Ins. Co.* (Pa.) 4 Whart. 68, 71, 33 Am. Dec. 38; *Benbury v. Benbury*, 22 N. C. 235, 238. It is an agreement, convention, or promise of two or more parties, by deed in writing, signed and delivered, by which either of the parties pledges himself to the other that something is either done or shall be done, or stipulates for the truth of certain facts. *Sabin v. Hamilton*, 2 Ark. (2 Pike) 485, 490; *Wright v. Tuttle* (Conn.) 4 Day, 813, 821.

## As any contract.

In Rev. St. art. 649, relating to counterclaims, and providing that if the suit be founded on a certain demand the defendant shall not be permitted to set off unliquidated or uncertain damages founded on a tort or breach of covenant on the part of the plaintiff, the word "covenant" is not used in its limited and technical sense of a promise evidenced by a sealed instrument, but in its wider signification of a contract in general. *Riddle v. McKinney*, 2 S. W. 748, 749, 67 Tex. 29.

Plaintiff issued a summons in debt "on a verbal promise and covenant," and filed a statement, agreeable to Act March 21, 1806, § 5, regulating arbitration and proceedings in courts of justice, setting forth a verbal promise only for the payment of money. It was held that although the act did not embrace actions founded on technical covenants, yet the word "covenant," used in this instance, did not vitiate the statement, but might be rejected as surplusage, or understood according to its acceptance among persons unlearned in the law, and construed to mean a verbal covenant, which signifies no more than a verbal promise. *Dixon v. Sturgeon* (Pa.) 6 Serg. & R. 25, 28.

**Agree synonymous.**

See "Agree."

**Condition distinguished.**

See "Condition"; "Condition Subsequent."

**Creation.**

There is no fixed or essential form for a covenant. In ordinary deeds of conveyance several averments are generally contained. Each covenant may constitute a separate sentence, and a single promise may embody the substance of several covenants. *Johnson v. Hollensworth*, 48 Mich. 140, 142, 11 N. W. 843.

A covenant may be created by any words expressing the intention of the parties, and no precise or formal terms are necessary to constitute a covenant more than any other agreement. *Bull v. Follett* (N. Y.) 5 Cow. 170, 172; *Wright v. Tuttle* (Conn.) 4 Day, 313, 321.

Any words in a sealed instrument by which a party manifests an intention to do or not to do an act, either by himself or a third person, if the act be lawful, will make a covenant. *Hambly v. Delaware, M. & V. R. Co.* (U. S.) 21 Fed. 541, 551.

"No particular form of words is necessary to constitute a covenant. Any words will be effectual which show that the parties to the deed have concurred and assented to the performance or forbearance of a future act, or which show that the vendor has stipulated as to the quantity or quality of property sold by him." *Minge v. Smith*, 1 Ala. 415, 417.

"Any words in a deed which show an agreement to do a thing make a covenant, but where words do not amount to an agreement covenant does not lie, as if they are merely conditional to defeat the estate, as a lease on condition that the lessee collect and pay the rents of his other houses. There need not be any formal words, as 'covenant,' 'promise,' and the like, to make a covenant on which to ground an action of covenant, for a covenant may be had by any other words. Words of proviso and condition will be construed into the words of covenant when such is the apparent intention and meaning of the parties." *Hale v. Finch*, 104 U. S. 261, 268, 26 L. Ed. 732.

Any words in an instrument, under the hand and seal of the party, importing an agreement, will be sufficient to create a covenant on which an action will lie. It is said that where a man transfers and assigns a chose in action, though nothing passes thereby, yet it amounts to a covenant that the other shall have the thing, and an acknowledgment to be accountable for money is held to be a covenant. *Kendal v. Talbot*, 5 Ky. (2 Bibb) 614 (citing 1 Bac. Abr.); *Hal-*

*lett v. Wylie* (N. Y.) 3 Johns. 44, 48, 3 Am Dec. 457.

"A covenant can only be created by deed, but may be by a deed poll (the party named in the deed) as well as by indenture; and where lands are conveyed by indenture to a person who does not seal the deed, yet if he enters upon the land and accepts the deed in other matters, he will be bound by the covenant contained in it." *Tayl. Landl. & T.* § 245. Where a grantor, in consideration of certain cash and of the building of a railroad, conveyed to the railroad company a right of way through his land, by a deed reciting that a depot and station was to be located and given to the grantor on the land conveyed, to be permanently located for the benefit of him and his assigns, and to be used for the general purposes of the railroad company, the company, by accepting such deed, entered into a covenant to comply with its terms, which covenant ran with the land, and became obligatory upon any second company purchasing all the rights, privileges, franchises, and property of the former company. *Georgia Southern R. Co. v. Reeves*, 64 Ga. 492, 494.

**Same—Writing.**

While there may be no substantial difference between sealed and unsealed instruments as matters of evidence, there is no such thing as a "covenant," in legal parlance, which is not in writing. *Petty v. Trustees of Church of Christ*, 70 Ind. 290, 297.

The word "covenant" as used in a complaint on a lease, relative to a covenant of insurance, must be considered as intended and understood by the pleader in the sense of a written promise and not referring to any parol agreement. *Johnson v. Kindred State Bank* (N. D.) 96 N. W. 583, 589.

**Same—Seal.**

A covenant is a promise, and something more. It is a promise under seal. If the seal affixed is not that of the party who substantially makes the promise and who is to be charged by it, the promise remains, and is not changed in a contract of a proper nature. *Cram v. Bangor House Proprietary*, 12 Me. (3 Fairf.) 354, 358.

The word "covenant" or "agreement" does not import a sealed instrument, as does the word "deed," "indenture," or "writing obligatory." There is a distinction between "covenants in deed" and "covenants in law," and to show that it is the former an express averment is necessary. An allegation in a declaration that the parties made their covenant, without alleging that they sealed it, is not sufficient, although the covenant is set out in *hæc verba*, including the words "witness our hands and seals." *Hays v. Lamater*, 3 Ark. (3 Pike) 565, 568.

Gen. Laws, c. 202, § 4, provides that no seal shall be required on an instrument conveying land, and that the word "covenant" shall have the same effect as though a seal had been affixed. It was held that the word "covenant" as used in the statute must have been in the sense of an obligation assumed, and not that if the word "covenant" appeared anywhere in the instrument it thereby determines the form of the obligation, without reference to its significance or application; that the statute in its true meaning is to apply only to cases where a party has expressly assumed the covenant, as by the words "I covenant," etc., where "covenant" is the operative word; and hence, where the operative words in a contract are "agree," "agreement," etc., the use of the word "covenant" in a clause, "in consideration of the faithful performance of the foregoing covenants by the party of the first part," etc., the word "covenant" does not make the instrument a specialty. *Providence Telegram Pub. Co. v. Crahan Engraving Co.*, 52 Atl. 804, 805, 24 R. I. 175.

#### Interpretation.

A covenant is simply a contract of a special nature, and the primary rule of interpretation thereof is to gather the intention of the parties from their words by reading, not simply a single clause of the agreement, but the entire context, and, where the meaning is doubtful, by considering such surrounding circumstances as they are presumed to have considered when their minds met. *Clark v. Devoe*, 124 N. Y. 120, 124, 28 N. E. 275, 276, 21 Am. St. Rep. 652. See, also, *Stubbs v. Page*, 2 Me. (2 Greenl.) 378, 381, and *Perry v. Rice*, 10 Tex. 367, 371.

#### Kinds.

Covenants are either dependent and concurrent, or mutual and independent. The first depends on the prior performance of some act or condition, and until the condition is performed the other party is not liable to an action on his covenant. In the second, mutual acts are to be performed at the same time, and if one party is ready and offers to perform his part, and the other neglects or refuses to perform his, he who is ready and offers has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain that either is obliged to do the first act. The third sort is where either party may recover damages from the other for the injury he may have received by breach of the covenants in his favor, and it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff. *Bailey v. White*, 3 Ala. 330, 331; *Hambly v. Delaware, M. & V. R. Co.* (U. S.) 21 Fed. 541, 551, 553; *Jones v. Barkley* (Mich.) 2 Doug. 684, 690, 691; *Northrup v. Northrup* (N. Y.) 6 Cow. 296, 297.

Covenants in deeds are to be considered dependent or independent, according to the

intention of the parties and the good sense of the case, and technical words should give way to such intention. *Bream v. Marsh* (Va.) 4 Leigh, 21, 25.

Covenants are either real or personal. The former are such as are annexed to an estate or are to be performed on it, and are said to run with the land, so that he who has the one is subject to the other. A covenant by a lessee to pay rent, and to furnish the lessor with gas to heat and light the dwelling on the demised premises, was a covenant running with the land. *Indiana Natural Gas & Oil Co. v. Hinton*, 64 N. E. 224, 225, 159 Ind. 398.

#### As liability.

See "Liability."

#### COVENANT (Action of).

"Covenant," at common law, is an action upon a deed. It is the form of action applicable to a claim upon an instrument operating as a deed, although such instrument is not under seal. Where an agreement involving the sale and purchase of lands used throughout the word "covenant," purported to bind the heirs of the respective parties as well as their personal representatives, and was declared to be "the act of the parties, in witness whereof," and they thereunto set their hands and seals, it operated as a deed, although no actual seal or scroll was affixed, and covenant was the proper action thereon. *Jerome v. Ortman*, 66 Mich. 668, 669, 33 N. W. 759.

"Covenant" is a remedy recognized by law for the recovery of damages for the breach of a covenant or contract under seal. *Stickney v. Stickney*, 21 N. H. (1 Fost.) 61, 68.

An action of covenant at common law, "though in form for the recovery of damages, is the action based on a contract under seal." *State v. Harmon*, 15 W. Va. 115, 124.

In *Jerome v. Ortman*, 66 Mich. 668, 33 N. W. 759, it is held that an action of "covenant" in Michigan, as at common law, was an action upon a deed. *Rondot v. Rogers* Tp. (U. S.) 99 Fed. 202, 209, 39 C. C. A. 462.

An action of covenant lies on a specialty exclusively, not on a specialty modified or enlarged by a simple contract. *Vicary v. Moore* (Pa.) 2 Watts, 451, 456, 27 Am. Dec. 323.

The word "covenant" is of too general a character to be used in a record on appeal from a justice of the peace stating that the case is an action of assumpsit on covenant, but the cause of action must be specifically set out, so as to bring it within the jurisdiction of the justice. *Guarantee Friendly Fund of Temperance Mut. Ben. Ass'n of Pennsylvania v. Henderson* (Del.) 50 Atl. 535, 536, 3 Pennewill, 157.



**COVENANT AGAINST INCUMBRANCES.**

As covenant running with the land, see "Covenant Running with the Land."

A "covenant against incumbrances" is a stipulation against all rights to or interest in the land which may subsist in third persons to the diminution of the value of the estate, and, though consistent with the passing of the fee by deed, such covenant, if there be an incumbrance, is broken as soon as made. *People's Sav. Bank Co. v. Parisette*, 67 N. E. 896, 897, 68 Ohio St. 450, 96 Am. St. Rep. 672.

A covenant against incumbrances is a covenant that the grantor will defend the title and possession of the grantee against all claims and liens, whether contingent or not. *Shearer v. Ranger*, 39 Mass. (22 Pick.) 447, 448.

"A covenant against incumbrances is an assurance that the property, at the time of the enfeoffment and delivery of the deed, is then free therefrom." *Sanford v. Wheelan*, 7 Pac. 324, 328, 12 Or. 301.

**COVENANT FOR FURTHER ASSURANCE.**

As covenant running with the land, see "Covenant Running with the Land."

The statutory "covenant for further assurance," implied in the words "grant, bargain, and sell," embraces such incumbrances only as the offender has control of. Where the defect in the title cannot be supplied by the offender, he cannot be made liable on his covenant for further assurance. *Armstrong v. Darby*, 26 Mo. 517, 520.

**COVENANT FOR QUIET ENJOYMENT.**

As covenant running with the land, see "Covenant Running with the Land."

Covenant of seisin distinguished, see "Covenant of Seisin."

Covenant of warranty as, see "Covenant of Warranty."

The "covenant for quiet enjoyment" is one of the covenants for title in a conveyance. It is also said to be an assurance consequent upon a defective title. *Poposkey v. Munkwitz*, 32 N. W. 35, 37, 68 Wis. 322, 60 Am. Rep. 858 (citing Rawle, Cov. 17, 125).

The "covenant of quiet enjoyment" is a covenant that there will be no disturbance in or cessation of possession by the prosecution and operation of legal measures. *Stewart v. Drake*, 9 N. J. Law (4 Halst.) 139, 141.

The "covenant for quiet enjoyment," in a lease, is for the protection of the lessee from the claims of third persons having title paramount to the lessor, and is defined to be

an assurance against the consequence of a defective title, and of any disturbance thereupon. *Kane v. Mink*, 19 N. W. 852, 853, 64 Iowa, 84.

At common law, from the ordinary words of grant or demise in an instrument relating to real estate, was implied a covenant that the grantor would protect the grantee from lawful interference by others in enjoying the demised premises. This is called a "covenant for quiet enjoyment." *Koeber v. Somers*, 84 N. W. 991, 992, 108 Wis. 497, 52 L. R. A. 512.

"A covenant for quiet enjoyment gives no assurance against the wrongful eviction of the covenantee by a third person, nor does it afford any remedy for damages consequent on such an eviction." *Chestnut v. Tyson*, 16 South. 723, 725, 105 Ala. 149, 53 Am. St. Rep. 101.

The "covenant of quiet enjoyment" is a covenant which does not necessarily imply that the covenantor has a perfect title, but is an agreement to defend the covenantee in his possession. The covenant of quiet enjoyment goes to the possession, and not to the title, and therefore to prove the breach it is ordinarily necessary to give evidence of an entry upon the grantee, or expulsion from, or some actual disturbance in, the possession, and this, too, by reason of some adverse right existing at the time of making the covenant, and not of one subsequently acquired. *Christy v. Bedell*, 61 Pac. 1095, 1096, 10 Kan. App. 435.

**COVENANT IN LAW.**

"Properly speaking, a 'covenant in law' is an agreement which the law infers or implies from the use of certain words having a known legal operation in the creation of an estate, so that, after they have had their primary operation in creating the estate, the law gives them a secondary force by implying an agreement on the part of the grantor to protect and preserve the estate so by these words already created." *Williams v. Burrell*, 1 O. B. 402, 429.

**COVENANT OF GENERAL WARRANTY.**

See "Covenant of Warranty."

As covenant running with the land, see "Covenant Running with the Land."

Covenant of seisin distinguished, see "Covenant of Seisin."

The term "general warranty" has often been held by this court to be in substance equivalent to the several special covenants in use under the common law, as that one is seised of the land sold, that he has good and perfect right to convey, that the land is free from incumbrances, that the grantee shall quietly enjoy possession, and that the grantor

will warrant and defend the title against all claims of all persons. *Smith v. Jones*, 31 S. W. 475, 476, 97 Ky. 670 (citing *Butt v. Riffe*, 78 Ky. 352; *Pryse v. McGuire*, 81 Ky. 608).

A covenant of general warranty in a deed "is usually treated as synonymous with a covenant for quiet enjoyment, since the same concurrence of circumstances is necessary to their breach. They equally possess the capacity of running with the land, and the rules as to the measure of damages are the same as to both. *Rawle on Cov.* 196. Such a warranty is not broken till actual eviction, or something equivalent to actual eviction." *Bostwick v. Williams*, 86 Ill. 65, 70, 85 Am. Dec. 385.

A "general warranty" is a covenant for quiet possession. *Harr v. Shaffer*, 43 S. E. 89, 91, 32 W. Va. 207.

A general warranty does not usually extend to defects of apparent or simple inspection, requiring no skill to discover them, nor to defects known to the buyer. *Meckley v. Parsons*, 23 N. W. 285, 286, 66 Iowa, 63, 55 Am. Rep. 261.

#### COVENANT OF INDEMNITY.

See "Covenant to Pay."

#### COVENANT OF RIGHT TO CONVEY.

As covenant of seisin, see "Covenant of Seisin."

As covenant running with the land, see "Covenant Running with the Land."

Mr. Rawle, in speaking of the covenant for "right to convey," says: "The covenant is that a particular state of things exists at the time, and if this be not true the delivery of the deed which contains such a covenant causes an instant breach." *Prestwood v. McGowin*, 29 South. 386, 389, 128 Ala. 267, 86 Am. St. Rep. 136 (citing *Rawle, Cov.* § 205, 214).

#### COVENANT OF SEISIN.

As covenant running with the land, see "Covenant Running with the Land."

A covenant of seisin is an assurance to the purchaser that the grantor has the very estate which he purports to convey. *Pecare v. Chouteau's Adm'r*, 13 Mo. 527, 528; *Recohs v. Younglove*, 67 Tenn. (8 Bart.) 385, 387; *Park v. Cheek*, 44 Tenn. (4 Cold.) 20, 27; *Curtis v. Brannon*, 98 Tenn. 153, 156, 38 S. W. 1073; *De Long v. Spring Lake & Sea Girt Co.*, 47 Atl. 491, 493, 65 N. J. Law, 1; *Wetzell v. Richcreek*, 40 N. E. 1004, 1006, 53 Ohio St. 62; *Howell v. Richards*, 11 East, 633, 641; *Brandt v. Foster*, 5 Iowa (5 Clarke) 287, 294.

A "covenant of seisin," or, what is equivalent, that the party has a good right to con-

vey, does not, if he afterwards acquires a good title, cause such title to inure to his grantee by way of estoppel. The seisin of the grantee may afterwards be divested on elder and better title, and this may subsequently be lawfully purchased by the grantor for his own use, and it will inure to the grantee, who can have no claim whatever for breach of covenant. *Allen v. Sayward*, 5 Me. (5 Greenl.) 227, 231, 17 Am. Dec. 221.

A vendor who has given a covenant of seisin can be called upon at any time after the execution of the deed, and at the caprice of his covenantee, to make out a perfect title. Affirmatively, the covenantee is not required to prove a negative; the grantor and covenantor is bound to show that he was seised in fee at the time of executing the deed, if that issue is made. The covenant of seisin is a covenant in present, and if the grantor had no title it was broken as soon as made. It is an affirmative covenant, and the party making it must establish it. The onus is upon him. *Baker v. Hunt*, 40 Ill. 264, 266, 89 Am. Dec. 846.

#### As covenant of title or possession.

The words have come to be looked upon less as one of the parts of a title than as synonymous with the title itself, and a covenant that one was "seised in fee" is to be regarded as a covenant for title, in contradistinction to a covenant for quiet enjoyment, which is called a "covenant for the possession." *Rawle, Cov. to Tit.* 50. In the United States a covenant that one "is seised" or "lawfully seised" means, by the weight of authority, seised of an indefeasible estate, and a covenant of seisin is regarded as a covenant for the title. *Greenby v. Wilcocks* (N. Y.) 2 Johns. 1, 3 Am. Dec. 379; *Hastings v. Webber*, 2 Vt. 407; *Thomas v. Perry* (U. S.) 23 Fed. Cas. 964; *Pollard v. Dwight*, 8 U. S. (4 Cranch) 421, 430, 2 L. Ed. 666; *Fitzhugh v. Croghan*, 25 Ky. (2 J. J. Marsh.) 429, 430, 19 Am. Dec. 139; *Martin v. Baker* (Ind.) 5 Blackf. 232; *Woods v. North*, 25 Tenn. (6 Humph.) 309, 44 Am. Dec. 312; 4 Kent. Comm. 472; *Gray v. Briscoe*, Noy. 142; *Howelle v. Richards*, 11 East, 641; *Young v. Raincock*, 7 C. B. 310. In Massachusetts, Maine, and to a qualified extent in Ohio, it has been decided that a covenant of seisin is answered by the transfer of an actual seisin, even though tortious, if it be a seisin under color of title. *Marston v. Hobbs*, 2 Mass. 433, 439, 3 Am. Dec. 61; *Bearce v. Jackson*, 4 Mass. 408; *Cushman v. Blanchard*, 2 Me. (2 Greenl.) 266, 268, 11 Am. Dec. 76; *Griffin v. Fairbrother*, 10 Me. (1 Fairf.) 91, 95; *Backus' Adm'r v. McCoy*, 3 Ohio (3 Ham.) 211, 17 Am. Dec. 585; *Foot v. Burnet*, 10 Ohio, 317, 327, 86 Am. Dec. 90. But, in accordance with the general doctrine, where one had no valid right to land which he purported to convey by a deed containing a covenant of seisin, the covenant was broken at the time of the con-

veyance, and the grantee was entitled to set off any and whatever damages he sustained by reason of such want of title as a defense to an action on the note given for the purchase money. *Brandt v. Foster*, 5 Iowa (5 *Marke*) 287, 294.

A covenant of "seisin" has generally been regarded as a covenant for title, the word being used as synonymous with "right." It would seem to be susceptible of but one construction, and that is that the grantor has not only a seisin in deed, so that the possession may be delivered without violation of the champerty act, but that he has likewise seisin in law, or such a legal interest as will pass to the purchaser the quantity and quality of interest in the estate which he purports to sell or convey. And if the grantor has not, at the time of the covenant, the very estate which he purports to convey, the covenant is broken the instant it is made, and an immediate right of action accrues to the purchaser. The Massachusetts doctrine, that the covenant requires merely a seisin in deed, and not a good title, is contrary to the weight of authority both in England and in this country. *Kincaid v. Brittain*, 37 Tenn. (5 *Sneed*) 119, 121.

A covenant of seisin is a covenant that is satisfied only by the transfer of an indefeasible title, especially where the covenant is for an indefeasible estate of inheritance in fee simple. *De Long v. Spring Lake & Sea Girt Co.*, 47 Atl. 491, 493, 65 N. J. Law, 1.

If the grantor is in the exclusive possession of the land at the time of the conveyance, claiming a fee adverse to the owner, although he was in by his own disseisin, his covenant of seisin is not broken until the purchaser or those claiming under him are evicted by title paramount. He has a "seisin in deed," as contradistinguished from a "seisin in law," sufficient to protect him from liability under his covenant so long as those claiming under him may continue so seised. "Actual disseisin," or the actual adverse possession of the lands of another, is the commencement of a right which by lapse of time may ripen into a perfect title in the disseisor or possessor; and, during the time that the grantee of disseisor remains in the undisturbed possession of the land by reason of the conveyance of such disseisor, he cannot maintain an action upon the covenant of seisin. No breach of such covenant will have taken place if the grantor was seised in deed at the time of the conveyance, however that seisin may have been acquired. When the grantor is not seised, either in deed or in law, at the time of conveying, the covenant of seisin must be broken at the moment of executing the deed containing it, and becomes thereby a mere chose in action, and no longer annexed to or passing with the land. *Backus' Adm'rs v. McCoy*, 3 Ohio (3 *Ham.*) 211, 221, 17 Am. Dec. 535.

The "covenant of good right to convey" is synonymous with "covenant of seisin." The actual seisin of the grantor will support both, irrespective of his having an indefeasible title. The covenants, if broken at all, are broken when made. They are personal, and do not run with the land. Consequently, where a grantor put his grantees into possession at the time of the execution of the deed, and the possession continued undisturbed, there was no breach of either the covenant of good right or the covenant of seisin contained in the deed. *Peters v. Bowman*, 98 U. S. 56, 58, 25 L. Ed. 91.

"Seisin" means, *ex vi termini*, the whole legal title. A covenant of seisin is broken if the covenantor have not the possession, right of possession, or the right of legal title. Seisin includes the right to sell. Accordingly, where a declaration in an action for a breach of covenant of seisin charged that a grantor was not seised of the legal title, a plea setting up seisin of the legal title was responsive to the entire breach in the declaration. *Fitzhugh v. Croghan*, 25 Ky. (2 J. J. Marsh.) 429, 430, 19 Am. Dec. 139.

#### **Covenant of right to convey synonymous.**

The "covenant of right to convey" amounts to a "covenant of seisin." The two covenants are synonymous, and the principles and practices applicable to the one apply to the other. *Adams v. Shiffer*, 17 Pac. 21, 32, 11 Colo. 15, 7 Am. St. Rep. 202 (citing 3 Washb. Real Prop. 448).

The "covenant of good right to convey" is synonymous with "covenant of seisin." The actual seisin of the grantor will support both, irrespective of his having an indefeasible title. *Peters v. Bowman*, 98 U. S. 56, 58, 25 L. Ed. 91.

#### **Quiet enjoyment and warranty distinguished.**

The marked distinction between a "covenant of seisin" and those for quiet enjoyment and general warranty consists in this: that the covenant of seisin, if broken at all, must be so at the very instant it is made; whereas in the latter covenants the breach depends upon the subsequent disturbance and eviction, which must be affirmatively alleged and proved by the party complaining of the breach. *Abbott v. Allen* (N. Y.) 14 Johns. 243, 253.

"Covenants of seisin" differ from "covenants of warranty" in that the former do not deprive the grantor from setting up an after-acquired paramount title in himself; otherwise in covenants of warranty. *Thompson v. Thompson*, 19 Me. (1 App.) 235, 240.

As a general rule, a plaintiff cannot recover in an action for a breach of covenant of quiet enjoyment without showing an eviction from the possession under a paramount

title, and the measure of damages in such cases is the price paid for the land, with interest. But in an action upon a covenant of seisin, all the plaintiff need show is that defendant had no title or no right to convey. The reason of the distinction is that a covenant for quiet enjoyment is a covenant for possession, and that of "seisin" is a covenant for title, the word being used as synonymous with "right." In an action upon the former covenant an eviction must be alleged in the complaint or declaration, but on the latter it is only necessary to negative the words of the covenant, and to allege that the grantor had no seisin or title to the land; and, as a general rule, the measure of damages is the same for a breach of covenant of seisin as for a breach of covenant of quiet enjoyment. *Price v. Deal*, 90 N. C. 290, 294.

### COVENANT OF TITLE.

As covenant running with the land, see "Covenant Running with the Land."  
Covenant of seisin as, see "Covenants of Seisin."

A "covenant of title" is an assurance to the purchaser of land that the grantor has the very estate in quantity and quality which he purports to convey. *Bowne v. Wolcott*, 48 N. W. 336, 337, 1 N. D. 415 (citing *Howell v. Richards*, 11 East, 633).

### COVENANT OF WARRANTY.

See "Covenant of General Warranty";  
"Deed with Covenant of Warranty."  
As covenant running with the land, see "Covenant Running with the Land."

The "covenant of warranty" is a contract by which the grantor of land undertakes to protect the land granted from all lawful claims and demands existing at the time of the grant, and the contract is made not only with his immediate grantee, but with whomsoever may become the owner of the land by a title derived through the grantee. *King v. Kilbridge*, 19 Atl. 519, 520, 58 Conn. 109.

A covenant of warranty, "in an agreement for the sale of lands means a warranty of title to the fee simple of the land, and not merely such an estate as the grantor may have therein." *Conover v. Tindall*, 20 N. J. Law (Spencer) 214, 40 Am. Dec. 220.

A "covenant of warranty" is regarded as an assurance to the purchaser of a permanent, undisturbed possession of the premises conveyed, and is only broken by his eviction, actual or constructive. *Kincaid v. Brittain*, 37 Tenn. (5 Sneed) 119, 124; *Wight v. Gottschalk* (Tenn.) 48 S. W. 140, 141.

A "covenant of warranty" is a covenant which does not necessarily imply that the

covenantor has a perfect title, but is an agreement to defend the covenantee in his possession. *Christy v. Bedell*, 61 Pac. 1095, 1096, 10 Kan. App. 435.

A "covenant of warranty," in a deed conveying land or any interest in land, is an undertaking by the warrantee that on the failure of the title which the deed purports to convey, either for the whole estate or for a part only, by setting up a superior title, he will make compensation in money for the loss sustained by such failure of title. It is commonly, in express terms, extended to the heir and assignee of the grantee, but this is immaterial. *King v. Kerr's Adm'rs*, 5 Ohio (5 Ham.) 154, 155, 22 Am. Dec. 777.

A condition to convey a valid title in fee simple with the "usual covenants of warranty," or to cause the same to be done, means a warranty against all other titles and incumbrances. *McAllister v. Moye*, 30 Miss. 258, 263.

A "covenant of warranty," when applied to freehold, has always had a peculiar and technical signification, which is that, if the covenantee was evicted from the freehold, the covenantor would give him lands of equal value instead. *Chapman v. Holmes' Ex'rs*, 10 N. J. Law (5 Halst.) 20, 28.

A "warranty" is defined to be a covenant real, annexed to lands or tenements. To make a warranty binding, there must be some estate conveyed to which the warranty may be annexed. Hence, if one covenant to "warrant" land to another, and make him no estate, or make him an estate that is not good, the warranty is void; and, if the warranty be void, it results that it cannot operate as an estoppel. *Kercheval v. Triplett's Heirs*, 8 Ky. (1 A. K. Marsh.) 493, 495.

A "warranty," according to the law of real estate, was formerly understood to mean a covenant real, by which the feoffor or donor of lands undertook to defend the feoffee or donee in possession, and to give land of equal value in case the latter was evicted therefrom. *Kelley v. Palmer*, 42 Neb. 423, 426, 60 N. W. 924, 925 (citing *Rap. & L. Law Dict.*).

#### As covenant for quiet enjoyment.

The "covenant for quiet enjoyment" and the "covenant of warranty of title" are practically identical in operation, and whatever constitutes a breach of one constitutes a breach of the other. Each extends to all lawful outstanding adverse claims upon the premises conveyed. *Prestwood v. McGowin*, 29 South. 386, 388, 128 Ala. 267, 86 Am. St. Rep. 136 (citing *Copeland v. McAdory*, 100 Ala. 553, 559, 13 South. 545). See, also, *Bostwick v. Williams*, 36 Ill. 65, 69, 85 Am. Dec. 385.

"Our covenant of warranty is a personal covenant, and is substantially a covenant for

quiet enjoyment, although, as Mr. Justice Royce says in *Williams v. Wetherbee* (Vt.) 1 Aikens, 233, we regard a covenant of this description as something more than one for quiet enjoyment. It is a covenant to defend, not the possession merely, but the land and the estate in it. It is connected with the land, and passes to the assignee of it, so that it becomes a covenant to the assignee of the land for the time being that he shall not be disturbed in his enjoyment of the premises by any paramount right." *Kramer v. Carter*, 136 Mass. 504, 508.

A "covenant of warranty" is in the nature of a covenant for quiet enjoyment, and is defined in *King v. Kerr's Adm'rs*, 5 Ohio, 155, 22 Am. Dec. 777, as an undertaking by the warrantor that on failure of title which the deed purports to convey, either for the whole estate or for a part only, by the setting up of a superior title, he will make compensation in money for the loss sustained by such failure. *People's Sav. Bank v. Parissette*, 67 N. E. 896, 897, 68 Ohio St. 450, 96 Am. St. Rep. 672.

#### COVENANT PERFORMED.

The plea "covenants performed," with no "absque hoc" to a declaration in covenant averring performance, was an admission of the plaintiff's performance. *Zents v. Leonard*, 70 Pa. (20 P. F. Smith) 192, 194.

#### COVENANT PERFORMED ABSQUE HOC.

In an action of covenant the plea of "covenants performed absque hoc" amounts to a denial of the allegations of the declaration. *Wilkinson v. Pittsburgh Farmers' & Mechanics' Turnpike Co.*, 6 Pa. (6 Barr) 398.

A plea of "covenants performed absque hoc," though in substance a denial of the breach of covenant alleged, is nevertheless an affirmative plea, and does not put in issue the execution of the instrument sued on, nor do the words "absque hoc"—without this—change such effect, for such words only put in issue the performance on the part of the plaintiff as alleged in his narr. The words "with leave, etc.," attached to such plea, always imply an equitable defense, such as arises out of special circumstances, which the defendant intimates that he means to offer in evidence. *Farmers' & Mechanics' Turnpike Co. v. McCullough*, 25 Pa. (1 Casey) 303, 304; *Ellmaker's Ex'rs v. Franklin Fire Ins. Co.*, 5 Pa. (5 Barr) 183, 189; *Bender v. Fromberger* (Pa.) 4 Dall. 436, 439, 1 L. Ed. 898.

A plea of "absque hoc" in an action of covenant applies only to those covenants of the plaintiff which he must prove as a preliminary to a recovery. *Stewart v. Bedell*, 79 Pa. (29 P. F. Smith) 336, 339.

#### COVENANT RUNNING WITH THE LAND.

A covenant is said to "run with the land" when the liability to perform it on the one hand, or the right to enforce it on the other, passes to the vendee or other assignee of the land. Such covenant must relate to, or, as is more commonly said, "touch and concern" the land, and not as merely collateral to it, in order that the assignee to the land may be charged with their benefit or burden. *Gilmer v. Mobile & M. Ry. Co.*, 79 Ala. 569, 572, 58 Am. Rep. 623; *Shaber v. St. Paul Water Co.*, 14 N. W. 874, 875, 30 Minn. 179; *Savage v. Mason*, 57 Mass. (3 Cush.) 500, 505; *Scheidt v. Belz*, 4 Ill. App. (4 Bradw.) 431, 436; *Willard v. Warsham*, 76 Va. 392, 396.

A covenant which "runs with the land" is one which follows the interest demised. It exists when the right or obligation created by the covenant is attached to the interest conveyed, or to the estate out of which it is created, so that the right or obligation, upon an assignment of the estate, devolves upon the assignee. *Tillotson v. Prichard*, 14 Atl. 302, 307, 60 Vt. 94, 6 Am. St. Rep. 95; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.*, 22 W. Va. 600, 631, 46 Am. Rep. 527. A covenant does not "run with the land" unless contained in a grant thereof, or of some estate therein. *Fresno Canal & Irrigation Co. v. Rowell*, 80 Cal. 114, 22 Pac. 53, 13 Am. St. Rep. 112. It seems to be well settled in law that, if a covenant is not in nature and kind a real covenant, the mere declaration of the parties that it was "running with the land" will not make it a real covenant, though so stated in the document. *Hurxthal v. St. Lawrence Boom & Lumber Co.*, 44 S. E. 520, 522, 53 W. Va. 87 (citing *Gibson v. Holden*, 3 N. E. 282, 115 Ill. 199, 56 Am. Rep. 146).

There are certain covenants concerning realty so necessarily connected with it as to pass with it of necessity, and operate between other parties than the original parties to the covenant. The reason why these covenants run with the land is that unless they do so they cannot be effectual, nor can the party for whose benefit they are created derive from them the benefit intended. There is another class of covenants of a doubtful or equivocal character, and which may be treated either as merely personal, or as annexed to or running with the land. With respect to these it is doubtless competent for the contracting parties to make them either the one or the other, as they think expedient. When, therefore, the party covenants for himself and his assigns, it evinces an intent to bind the land, and the obligation becomes connected with and qualifies his estate. It seems, therefore, that the question whether a covenant runs with the land or not depends upon the nature and purpose of the cove-

nant, and, where this is not decisive, the intent of the parties as expressed in their deed will determine. *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550.

Certain covenants contained in grants of estates in real property are appurtenant to such estates, and pass with them so as to bind the assigns of the covenantor, and to vest in the assigns of the covenantee in the same manner as if they had personally entered into them. Such covenants are said to "run with the land." Civ. Code Cal. 1903, § 1460. Certain covenants contained in grants of estates in real property are appurtenant to such estates, and pass with them, so as to bind the assigns of the covenantor, and to vest in the assigns of the covenantee in the same manner as if they had personally entered into them. Such covenants are said to "run with the land." Civ. Code S. D. 1903, § 1136.

In *Spencer's Case*, 3 Coke, 31, which is recognized as the leading authority on this subject, the rule is said to be that when a covenant extends to a thing in esse, part of a demise, the thing to be done by force of the covenant is annexed and appurtenant to the thing demised, and shall go with the land and bind the assignee, though he be not bound by express words; but when the covenant extends to a thing which is not in being at the time of the demise, it cannot be appurtenant or annexed to the thing which has no being. Those covenants which are held to run with the land and inure to the benefit of the assignees are such as generally affect the land itself and confer a benefit on the grantor. *Gulf, O. & S. F. Ry. Co. v. Smith*, 9 S. W. 865, 866, 72 Tex. 122, 2 L. R. A. 281. See, also, *Hadley v. Bernero*, 71 S. W. 451, 454, 97 Mo. App. 314.

The capacity of running with the land only exists with respect to a covenant that is about or affects the land, although not directly to be performed upon it, if it tends to increase or diminish its value in the hands of the owner. *Trustees of Columbia College v. Lynch*, 39 N. Y. Super. Ct. (7 Jones & S.) 372, 378.

When an instrument conveys or grants an interest or right in land, and at the same time contains a covenant in which a right attached to the estate or interest granted is reserved, or when the grantee covenants that he will do some act on the estate or interest granted which will be beneficial to the grantor, either as respects his remaining interest in the lands out of which an interest is granted, or lands adjacent thereto, such covenant is one which may become annexed to and run with the land, and bind its owners successively. A covenant which may run with the land must have relation to the interest or estate granted, and the act to be done must concern the interest created or conveyed.

*Conduitt v. Ross*, 102 Ind. 166, 169, 26 N. E. 198, 199.

When a covenant in a conveyance of real estate is broken the instant it is made, it does not run with the land, but the obligation is then merely personal, and is limited to the parties to the covenant, and confers no right of action on subsequent purchasers of the estate. *Davidson v. Cox*, 4 N. W. 1035, 10 Neb. 150; *Chapman v. Kimball*, 7 Neb. 899.

To create a "covenant running with the land," it is essential that with the making of the covenant there be a transfer of title from one party to the other, unless there is the equivalent of a grant of an easement or servitude which may attach to the possession of the land and run with it regardless of any change of ownership. Where one party covenants with another in respect of land, and at the same time, with and as a part of the making of a covenant, neither party with nor receives any title or interest in the land, nor creates an easement, nor a right in the nature of an easement, for the benefit of the land, such covenant is at best but a mere personal contract. *Louisville & N. R. Co. v. Webster*, 61 S. W. 1018, 1020, 106 Tenn. 586.

Where the covenant is not of a nature that the law permits it to be attached to the estate as a "covenant running with the land," it cannot be made such by the agreement of the parties. So it is held that where the owners of adjoining properties agreed to construct a party wall, and by the terms of the agreement one of the parties was to build the wall, and the other party was to pay one-half of the cost before he had the privilege of using the wall, and the agreement to pay half the cost was expressly agreed to be a covenant running with the land, nevertheless the covenant was a personal one, and did not pass by a grant of the land to the purchaser. *Gibson v. Holden*, 3 N. E. 282, 285, 115 Ill. 199, 56 Am. Rep. 146.

#### Particular covenants.

A provision in a deed whereby a father conveyed his land to a son, to the effect that the father should have his support and a home as long as he should live, is a "covenant running with the land." *Martin v. Martin*, 24 Pac. 418, 419, 44 Kan. 295.

An agreement to furnish an aged man with a home, and to take care of and assist him to live in a comfortable manner, in consideration of a conveyance by him of his lands, was a personal agreement, and not a covenant running with the land, binding a purchaser from the covenantor. *Divan v. Loomis*, 31 N. W. 760, 761, 68 Wis. 150.

A covenant for a renewal of a lease, made in terms merely in favor of the lessee, runs with the land to one who, by assignment, comes to stand in the place of the

covenantee. *Leppla v. Mackey*, 16 N. W. 470, 31 Minn. 75.

A covenant, in a deed granting a right of way to a railroad, stipulating that, whenever any portion of the land crossing the line of the railroad should be inclosed and used for pasturage, the railroad company should construct a fence on each side of the right of way, is not a covenant that runs with the land, so as to give assignees of the grantor, not named in the deed, a right of action for a breach thereof. *Gulf, C. & S. F. Ry. Co. v. Smith*, 9 S. W. 865, 866, 72 Tex. 122, 2 L. R. A. 281.

In an action for damages against a railroad company for breach of contract, the evidence showed that the railroad company had contracted with plaintiff's husband for a right of way over his land as long as the company should desire it, and had agreed to build its track above the overflow of a certain river. After the death of the husband, plaintiff occupied the land as her homestead. The company failed to build its track above the overflow as agreed in the contract, and plaintiff sued for damages caused by an overflow by reason of the neglect of defendant to so construct its track. Defendant claims that it had no contract with plaintiff, that she was not a party in interest, and could not recover. Held, that the contract was a covenant which ran with the land, and that plaintiff could maintain the action. *St. Louis, I. M. & S. Ry. v. O'Baugh*, 5 S. W. 711, 49 Ark. 418.

Plaintiff's grantor sold defendant's grantor a right of way for a railroad, the deed requiring "the waters on the southeast side of the road to be made to run on the same side of the road, instead of through the cattle guards." Defendant built a culvert carrying the water through the cattle guards. Held, that the provision was a covenant running with the land. *Peden v. Chicago, R. I. & P. Ry. Co.*, 35 N. W. 424, 425, 73 Iowa, 328, 5 Am. St. Rep. 680.

A covenant by a landowner, whereby he agrees that the produce of a stone quarry shall be transported to market exclusively over one line of railroad, is not a covenant real, and does not run with the land. *Kettle River R. Co. v. Eastern Ry. Co. of Minnesota*, 43 N. W. 469, 470, 41 Minn. 461, 6 L. R. A. 111.

A conveyance of a railroad right of way rected, as the consideration thereof, the promise of the grantee to construct a fence on both sides of the track when completed. Held, in an action brought on the contract, by one who afterwards bought the land, against a subsequent purchaser of the railroad, its franchises, etc., that the undertaking was a covenant running with the land, and inseparable from the easement. *Midland*

*Ry. Co. v. Fisher*, 24 N. E. 756, 757, 125 Ind. 19, 8 L. R. A. 604, 21 Am. St. Rep. 189.

A covenant which may "run with the land" must have relation to the interest or estate covenanted, and the act to be done must concern the interest or estate conveyed. Where a landowner, through part of whose land a levee connected with a drain owned by a waterworks company extends, agreed that if the company would construct a levee to a certain point he would continue it through his lands, maintaining the part built by him, and would release the company from liability for damages from high water, past or future, his agreement to maintain his part of the levee did not constitute a "covenant running with the land," and an averment of a sale of all such property of the company under a judicial decree did not show an assignment of the agreement. *Indianapolis Water Co. v. Nulte*, 126 Ind. 373, 377, 28 N. E. 72, 73.

A covenant not to cut timber or plough up meadow lands is one which runs with the land. *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550.

Plaintiff entered into a written contract with R. to furnish him water on his land by means of an irrigating ditch at a stated price for 40 years. The contract declared that "this agreement and the covenants therein contained on the part of the party of the second part run with and bind the land." Held, that the clause providing that the contract should run with the land created a lien thereon for its enforcement. *Fresno Canal & Irrigation Co. v. Dunbar*, 22 Pac. 275, 277, 80 Cal. 530.

A clause in a deed of land reciting that the grant is on the "express condition" that the grantee, his heirs and assigns, shall not thereafter maintain a nuisance on the premises, does not create a condition subsequent, but is a covenant running with the land; and a purchaser at a foreclosure sale of the granted premises cannot refuse to complete his purchase on the ground of defect in the title, as the covenant does not bind him any further than he would be bound by law in the absence of any covenant. *Clement v. Burtis*, 24 N. E. 1013, 121 N. Y. 708 (affirming 10 N. Y. Supp. 364).

In 1807 the owner of two large farming estates, "A" and "C," in the upper portion of New York Island, agreed to sell and convey "A" to M. The agreement contained the clause, "upon the special condition that no part of the land or buildings should ever be used or occupied as a tavern." Four years later, in 1811, the owner conveyed both estates in trust, the conveyance of "A" being subject to the agreement, and a few months afterwards the trustees and the owner joined in a deed for "A" to M., which conveyed the estate in fee, with covenants of title and

warranty, the habendum clause containing the following: "Provided always, and these presents are upon the express condition, that the aforesaid premises shall not, nor shall any part thereof, or any building or buildings thereon erected or to be erected, be at any time hereafter used or occupied as a tavern or public house or tavern of any kind." In 1812 "C" was sold and conveyed by the owner and the trustees without any such restrictions on its use. Held, in view of the situation of the parties, that the restrictive clause in the deed created a covenant running with the land, and not a condition subsequent. *Post v. Well*, 22 N. E. 145, 115 N. Y. 361, 5 L. R. A. 422, 12 Am. St. Rep. 809.

While in some cases it may be difficult to determine whether the particular covenants therein involved are such as run with the land, yet there is no doubt that a covenant to surrender possession to the lessors and his assigns is a covenant that runs with the land, and passes to the assignee entitled to its benefit. *Scheidt v. Belz*, 4 Ill. App. (4 Bradw.) 431, 436. See, also, *Garrison v. Sandford*, 12 N. J. Law (7 Halst.) 361, 364.

The ordinary covenants for title, to wit, that the grantor is lawfully seised, that he has a good right to convey, and that the land is free from incumbrances, are personal covenants, and do not run with the land, while the covenants of warranty and for quiet enjoyment run with the land, and descend to the heirs, and vest in assignees. *Carter v. Denman's Ex'rs*, 23 N. J. Law (3 Zab.) 260.

#### Same—Covenant against incumbrances.

Covenants against incumbrances are not "covenants running with the land," since, if broken at all, they are broken upon the execution of the deed, and right of action then accrues. *Swasey v. Brooks*, 30 Vt. 692. See, also, *Lawrence v. Montgomery*, 37 Cal. 183, 188; *Davis v. Lyman*, 6 Conn. 249, 255; *Sanford v. Wheelan*, 7 Pac. 324, 323, 12 Or. 301; *Peters v. Bowman*, 98 U. S. 56, 58, 25 L. Ed. 91; *Jewett v. Fisher*, 58 Pac. 1023, 9 Kan. App. 630; *Allen v. Little*, 36 Me. 170, 175; *McClure v. Dee*, 88 N. W. 1093, 1094, 115 Iowa, 546, 91 Am. St. Rep. 181; *Cemansky v. Fitch* (Iowa) 96 N. W. 754, 756; *Davis v. Lyman*, 6 Conn. 249, 255; *Smith v. Perry*, 26 Vt. 279, 292; *Fuller v. Jillett* (U. S.) 2 Fed. 30, 31.

A "covenant against incumbrances" is a continuing covenant, inuring to the benefit of the grantee, upon whom the loss may fall in regular line of succession, but upon the breach of which only nominal damages can be recovered before a loss occurs. *Walker's Adm'r v. Deaver*, 5 Mo. App. 139, 147, 149.

#### Same—Covenant against waste.

A covenant against waste runs with the land. *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550.

#### Same—Covenant for further assurance.

A "covenant for further assurance" runs with the land. *Scheidt v. Belz*, 4 Ill. App. (4 Bradw.) 431, 436; *Garrison v. Sandford*, 12 N. J. Law (7 Halst.) 261, 264; *Colby v. Osgood* (N. Y.) 29 Barb. 339, 349. See, also, *Willard v. Worsham*, 76 Va. 392, 396.

#### Same—Covenant for quiet enjoyment.

The "covenant of quiet enjoyment" is a covenant real, which runs with the land, that is, passes with the land according to its subsequent alienation. *Garrison v. Sandford*, 12 N. J. Law (7 Halst.) 261, 264; *Willard v. Worsham*, 76 Va. 392, 396; *Scheidt v. Belz*, 4 Ill. App. (4 Bradw.) 431, 436.

#### Same—Covenant of general warranty.

A "general warranty," in its nature, is a covenant real, which runs with the land conveyed, descends to heirs, and vests in assignees. *Mitchell v. Warner*, 5 Conn. 497, 517.

The "covenant of general warranty," binding the grantor to warrant and forever defend the title to the grantee, his heirs and assigns, is universally held to be a continuing obligation, and a covenant running with the land. *Flaniken v. Neal*, 4 S. W. 212, 214, 67 Tex. 629.

#### Same—Covenant of right to convey.

The "covenant of right to convey" is a personal covenant, not running with the land or passing to the assignee, for there is a breach of them as soon as the deed is executed, and they become choses in action, which are not technically assignable. *Jewett v. Fisher*, 58 Pac. 1023, 9 Kan. App. 630; *Lawrence v. Montgomery*, 37 Cal. 183, 186, 188; *Peters v. Bowman*, 98 U. S. 56, 58, 25 L. Ed. 91; *Smith v. Perry*, 26 Vt. 279, 292.

A covenant that land conveyed is "the property of the grantor," and that it "has a good right to sell and convey the same," runs with the land, and will inure to the benefit of his subsequent transferee. *Hall v. Scott* (U. S.) 7 Fed. 341.

#### Same—Covenant of seisin.

Covenants of seisin are not covenants running with the land, since, if broken at all, they are broken upon the execution of the deed, and right of action then accrues. *Swasey v. Brooks*, 30 Vt. 692. See, also, *Davis v. Lyman*, 6 Conn. 249, 255; *Sanford v. Wheelan*, 7 Pac. 324, 328, 12 Or. 301; *McClure v. Dee*, 88 N. W. 1093, 1094, 115 Iowa, 546, 91 Am. St. Rep. 181; *Peters v. Bowman*, 98 U. S. 56, 58, 25 L. Ed. 91; *Jewett v. Fisher*, 58 Pac. 1023, 9 Kan. App. 630; *Lot v. Thomas*, 2 N. J. Law (1 Penning.) 407e, 410e, 2 Am. Dec. 354; *Curtis v. Brannon*, 98 Tenn. 153, 156, 38 S. W. 1073; *Allen v. Little*, 36 Me. 170, 175; *Lawrence v. Montgomery*, 37 Cal. 183, 186, 188; *Clement v.*



Bank of Rutland, 17 Atl. 717, 61 Vt. 298, 4 L. R. A. 425; *Smith v. Perry*, 26 Vt. 279, 292.

A "covenant of seisin" is a covenant of indemnity, and runs with the land. *Johnson v. Johnson*, 70 S. W. 241, 245, 170 Mo. 34, 59 L. R. A. 748 (citing *Allen v. Kennedy*, 91 Mo. 324, 2 S. W. 142).

The phrase, "grant, bargain, and sell," conveying by statute an express covenant of indefeasible seisin in fee simple of the land conveyed, constitutes a covenant of indemnity which runs with the land, continuing to successive grantees, and inuring to the one on whom the loss falls. Rights which may arise under such covenant, but which have not yet inured at the time of the bankruptcy of the grantor, are not barred by his discharge from bankruptcy. *Magwire v. Riggin*, 44 Mo. 512, 514.

When a defeasible title, or possession without any title, has passed under a deed containing the words, "grant, bargain, and sell," the statutory covenant of defeasible seisin implied in such words is one of indemnity, which, running with the land until the damage is sustained, inures to the benefit of the party on whom the loss falls. *Dickson v. Desire's Adm'r*, 23 Mo. 151, 166, 66 Am. Dec. 661.

A covenant of seisin extends not only to the land itself, but to whatever is properly appurtenant to and passes by the conveyance of land, and is appropriate in leases and assignments of them. Therefore a contract by an assignor of a lease stipulating that the lease was in full force and effect at the time of its assignment and delivery to the assignee, and guarantying to him the right and title to said lease, amounted to a covenant of seisin. *Wetzel v. Richcreek*, 40 N. E. 1004, 1006, 53 Ohio St. 62.

#### Same—Covenant of warranty.

A covenant of warranty runs with the land, and inures to the benefit of the assignee of the covenantee, who may bring an action for breach of it in his own name against the original covenantor. *Suydam v. Jones* (N. Y.) 10 Wend. 181, 184, 25 Am. Dec. 552; *Peters v. Bowman*, 98 U. S. 56, 58, 25 L. Ed. 91; *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550; *Willard v. Warsham*, 76 Va. 392, 396; *Allen v. Little*, 36 Me. 170, 175; *Smith v. Ingram*, 44 S. E. 643, 644, 132 N. C. 959, 61 L. R. A. 878, 95 Am. St. Rep. 690 (citing *Wiggins v. Pender*, 44 S. E. 362, 132 N. C. 628, 61 L. R. A. 772).

The "covenant of warranty" is said to be the most effective of the covenants in American deeds, and in some of the states is in general use. It runs with the land, passes with the fee to any subsequent grantee of the same title, and the last vendee with warranty may therefore maintain an action for a breach of the covenant against

the first or any other warrantor. *Real v. Hollister*, 24 N. W. 833, 835, 17 Neb. 661.

A "covenant of warranty" is a covenant real, in the sense that it is annexed or incident to the estate conveyed by the deed, and runs with it inseparably for the benefit of all who may succeed to the title by purchase, and who sustain the relation toward the original covenantee of privies in estate, whether those who should succeed to the title as assignees are expressly named as such in the covenant or not. *Lewis v. Cook*, 35 N. C. 193; *Markland v. Crump*, 18 N. C. 94, 27 Am. Dec. 230. In this state the warranty has been treated as a personal covenant annexed to the estate, and it is not regarded strictly as a covenant real, within the meaning of the old law and the operation of the principles concerning real actions. *Wiggins v. Pender*, 44 S. E. 362, 366, 132 N. C. 628.

"Covenants of warranty" in a deed are regarded as personal covenants only, and the remedy of the covenantee, in case of eviction, is by action on the covenant against the grantor, or his real or personal representatives, to recover any damages for the land lost. *Pollock v. Spedel*, 17 Ohio St. 439.

A "warranty" is a covenant running with the land, which, by the ancient law, bound the grantor, and those to whom his estate descended, to give to the grantee land of equal value in case of eviction from the land conveyed. *Patterson's Lessee v. Pease*, 5 Ohio (5 Ham.) 190, 192.

#### Same—Covenant to convey.

It is held in Vermont that the covenant in a lease by which the lessor agreed to convey the land to the lessee during the term ran with the land and was assignable by the lessee, although the covenant did not require anything to be done upon the land itself. "This covenant did not bind the lessor to the doing of anything upon the land itself," said the court, "but did bind him to that which would affect the estate granted by the lease in respect to the time it should continue, and upon what land, by providing for an enlargement of it into an estate in fee. This covenant was a chose in action, and, apart from the estate in the land, would not have been assignable at law. It could not pass to an assignee of the lease, so that an action at law could be maintained upon it in the name of the assignee, unless it would pass as a part of, and with the estate in, the land; in other words, unless it would run with the land." But as the covenant in question respected the thing leased, and affected the value of the term and of the reversion, and hence the land, it was held that it passed with an assignment of the lease. *Hagar v. Buck*, 44 Vt. 235, 239, 5 Am. Rep. 368.

**Same—Covenant to pay.**

A covenant by the grantee of mortgaged premises to pay the mortgage debt is a mere personal covenant; it does not run with the land, and is binding only upon him who creates it. *Willard v. Worsham*, 76 Va. 392, 396.

A covenant running with the land is created by an agreement of a lot owner for himself, his heirs and assigns, that he or they will pay the full value of one-half the original cost of a party wall, whenever he or they shall, in any building to be erected on the lot, use the wall or any part thereof. *Conduitt v. Ross*, 102 Ind. 166, 169, 26 N. E. 198, 199.

A promise by an adjoining lot owner to the builder of a party wall to compensate him for the use thereof is personal to the promisee, and not a covenant running with the land. *Cook v. Paul* (Neb.) 93 N. W. 430.

Where a lease of land for a term of five years provided that the lessee was to have the privilege to erect thereon a store building, to be paid for by the lessor at the end of the term, at a fair valuation, the covenant to pay for improvements was a covenant running with the land, and bound not only the lessor, but the assignee of the lease receiving rent as such assignee during the term. *Ecke v. Fetzer*, 26 N. W. 266, 267, 65 Wis. 55.

**Same—Covenant to repair.**

A covenant to repair runs with the land. The subsequent grantee takes the property charged with the burden of any agreement whereby property otherwise real becomes, by the terms of the covenant, personal in character. *Mitchell v. McNeal*, 34 Pac. 840, 841, 4 Colo. App. 36; *Kellogg v. Robinson*, 6 Vt. 276, 27 Am. Dec. 550; *Scheidt v. Belz*, 4 Ill. App. (4 Bradw.) 431, 436. See, also, *Garrison v. Sandford*, 12 N. J. Law (7 Halst.) 261, 264.

While assignees of a leasehold are tenants in common, they are jointly and severally liable on covenants to repair and deliver up at the end of the term, which covenants are connected with the estate and run with the land, and bind the assignees of the lease although they are not mentioned in the lease. *Coburn v. Goodell*, 14 Pac. 190, 193, 72 Cal. 498, 1 Am. St. Rep. 75.

Where a riparian owner contributes so much of his lands, dam, ditch, etc., as may be necessary for the creation and enjoyment of a new water privilege to be owned jointly by himself and two others, his covenant to keep the dam for the new privilege in repair, and to rebuild it if necessary at the sole expense to himself, his heirs and assigns, runs with the land, as it is connected with the subject of the grant and enters

into its value. *Nye v. Hoyle*, 24 N. E. 1, 3, 120 N. Y. 195.

**COVENANT TO PAY.**

As covenant running with the land, see "Covenant Running with the Land."

There is an essential difference in legal effect between "covenants of indemnity" strictly—that is, of indemnity against loss—and "covenants to pay" or assume or stand for the debt, or a surety's liability thereon. A right of action accrues on those of the latter class as soon as the debt matures and is unpaid, because the liability then becomes absolute, and the failure to pay is a breach of the express terms of the covenant; while those of the former class are not broken, and no right of action accrues, until the indemnitee has suffered a loss against which the covenant runs. This distinction grows out of the express terms of the contract, and is well established by authority. It is expressed by Mr. Justice Swayne in *Wicker v. Hoppock*, 73 U. S. (6 Wall.) 94-99, 18 L. Ed. 752, 753, as follows: "In that class of cases [contracts of indemnity] the obligee cannot recover until he is actually damaged, and he can recover only to the extent of the injury he has sustained up to the time of the institution of the suit. But there is a well-settled distinction between an agreement to indemnify and an agreement to pay. In the latter case a recovery may be had as soon as there is a breach of the contract, and the measure of damages is the full amount agreed to be paid." *Henderson-Achert Lithographic Co. v. John Shillito Co.*, 60 N. E. 295, 298, 64 Ohio St. 236, 83 Am. St. Rep. 745.

**COVENANT TO RENEW.**

A "covenant to renew" gives a privilege to the tenant, but is nevertheless an executory contract, and until the tenant has exercised the privilege he cannot be held for the additional term. *Andrews v. Marshall Creamery Co.*, 92 N. W. 706, 707, 118 Iowa, 595, 96 Am. St. Rep. 412, 60 L. R. A. 399 (citing *Swank v. St. Paul City Ry. Co.*, 61 Minn. 423, 63 N. W. 1088; *Id.*, 72 Minn. 380, 75 N. W. 594).

**COVENANT TO REPAIR.**

As covenant running with the land, see "Covenant Running with the Land."

At common law there was no duty resting on the lessor to repair, and where he made an express covenant to repair it was construed to mean in a reasonable time after notice from the tenant. *Sieber v. Blanc*, 18 Pac. 260, 261, 76 Cal. 173 (citing 1 Tayl. Landl. & Ten. [8th Ed.] § 330; *Wood, Landl. & Ten.* [Ed. 1881] 610).

**COVENANT TO STAND SEISED.**

"Covenants to stand seised" are a species of conveyance, founded upon the statute of uses. It is in form a covenant by the landowner to stand seised to the use of another. The use of the words "covenant to stand seised" is not absolutely necessary, but the conveyance must be based on a consideration. The conveyance creates a use in favor of the person to whom the property is to be conveyed, which is immediately executed by the statute of uses. *French v. French*, 3 N. H. 234, 261.

Blackstone defines a "covenant to stand seised to uses" to be a conveyance "by which a man seised of land covenants, in consideration of blood or marriage, that he will stand seised of the same lands to the use of his wife, child, or kinsman; but this covenant can only operate when made on such weighty and interesting considerations as those of blood or marriage." *Corwin v. Corwin* (N. Y.) 9 Barb. 219, 224. It is where a man seised of lands in fee covenants, in consideration of blood or marriage, to stand seised of the same to the use of his children, wife, or some other relation. *Barrett v. French*, 1 Conn. 354, 363, 6 Am. Dec. 241.

No particular form of words is necessary to constitute a "covenant to stand seised." The consideration is the chief requisite to characterize it, and to support it as such a conveyance. This consideration is blood and marriage. If the consideration appears on the deed, though there be no express words of consideration, yet it is sufficient to raise a use by the way of covenant. *Barry v. Shelby*, 5 Tenn. (4 Hayw.) 229, 231.

A deed containing the words "grant, bargain, and sell," etc., and a proviso that "it is understood that the parties of the first part reserve to themselves the use of the premises during their natural lives," will operate as a covenant to stand seised, and, where the right of one of the parties of the first part was only an inchoate right of dower, it will be effectual to secure to her the enjoyment of the premises during her life, though it could not have had that effect as an exception or reservation. *Jackson v. Swart* (N. Y.) 20 Johns. 85, 87, 88.

**Bargain and sale distinguished.**

Burton says: "The only essential difference between a covenant to stand seised to uses and a bargain and sale, setting aside the external formalities required to give validity to the latter—that is, the enrollment thereof—is the nature of the consideration; and hence the deed may operate for the benefit of the different parties both as a bargain and sale and a covenant to stand seised." *Burt. Real Prop.* 45, pl. 145. Cornish also takes it for granted that there is no difference between a bargain and sale enrolled,

and a covenant to stand seised, in conveying a future freehold under the statute of uses; hence he concludes that a grant of lands generally by either of these modes of conveyance, with the habendum limiting the freehold to commence in futuro, will be valid to convey such estate, though it could not be thus limited by any common-law conveyance. *Rogers v. Eagle Fire Co. of New York* (N. Y.) 9 Wend. 611, 630 (citing *Cornish, Purch. Deeds*, 35).

Where a grantor covenants to "stand seised of his land to the use of another," such language creates a good deed of bargain and sale, if made for a pecuniary consideration, or one of pecuniary value, though ever so small, even a barleycorn. *Krider v. Lafferty* (Pa.) 1 Whart. 308, 316.

**COVENTRY ACT.**

The "Coventry Act" was that of 22 and 23 Car. II, c. 1, which enacted that if any person shall of malice aforethought, and by lying in wait, unlawfully cut and disable the tongue, put out an eye, slit the nose, cut off the nose or lip, or cut off or disable any limb or member of any person, with intent to maim or disfigure him, such person should be guilty of felony, etc. It was enacted "in consequence of an assault on Sir John Coventry in the street, and slitting his nose, in revenge, as it is supposed, for some obnoxious words uttered by him in Parliament." *State v. Cody*, 23 Pac. 891, 894, 18 Or. 506.

**COVER.**

Webster defines the verb "cover": "To overspread; envelop the surface or whole body; to lay or set over; to enwrap; to enfold." When the outside pages of a publication, though of the same color as the rest of the publication, overspread or overlay the publication, such pages may be considered the outside "cover," within the meaning of Act Sept. 26, 1888, c. 1039, § 3, 25 Stat. 496, making it criminal to place defamatory, indecent, or threatening language on the outside cover of any mail matter, and making such matter nonmailable. *United States v. Burnell* (U. S.) 75 Fed. 824, 829.

An ordinance providing that, where steps projecting beyond the line of street and descending into cellars are "covered," they shall be inclosed with rails, with gates, and chains across the entrance, means those flights of steps which are covered by movable coverings, by the raising of which the steps may be made of service in connection with the basement to which they lead. *Schroeck v. Reiss*, 61 N. Y. Supp. 1054, 1056, 46 App. Div. 502.

A firm wrote to their agent: "We here-with hand you exchange covering commis-

sions for last year's business." The language used showed that this was intended as a remittance in full for the commissions. The word "covering" was obviously used in the sense expressed in the following definitions of "cover" by the Century Cyclopaedia and Dictionary, vol. 2: "To be equal to, be of the same extent or amount, be coextensive with; as, 'the receipts therein cover the expenses'; to counterbalance; compensate for; as, 'to cover one's loss.'" *Off v. J. B. Inderrieden Co.*, 74 Ill. App. 105, 109.

#### COVERED BY.

A circular issued by a commission firm inviting consignments of produce, and stating that it would be "covered by insurance" as soon as received, did not mean that the firm personally were to be the insurers of such produce against fire, but was merely a promise that the produce should be insured as soon as received, and was fulfilled by obtaining a reasonable and proper security against a contingent loss. *Johnson v. Campbell*, 120 Mass. 449, 453.

A note reciting that it shall be "covered by" a prior mortgage shows an intention on the part of the maker to create an equitable lien or mortgage on the premises described in the mortgage, and hence the note must be construed as an equitable mortgage. *Butts v. Broughton*, 72 Ala. 294, 298.

#### COVERED INTO.

"Covered into the treasury," as used in the United States Treasury Department, means that money has actually been paid into the treasury in the regular manner, as distinguished from merely depositing it with the Treasurer. *United States v. Johnston*, 8 Sup. Ct. 443, 454, 124 U. S. 236, 31 L. Ed. 389.

#### COVERINGS.

A "covering" is anything which covers or conceals, as a roof, a screen, a paper, clothing, etc.; but to speak of a liquid as being "covered" by the bottle which contains it is such an extraordinary use of the English language that nothing but the most explicit words of a statute would justify that construction, and hence the duty on filled glass bottles prescribed by the tariff act of 1883 was not repealed by the provision of the customs administrative act of 1890, § 19 (Act June 10, 1890, c. 407, 26 Stat. 139 [U. S. Comp. St. 1901, p. 1924]), that the duty on ad-valorem goods shall be assessed upon their actual market value, including the value of all cartons, cases, crates, boxes, sacks, and coverings of any kind. *United States v. Nichols*, 22 Sup. Ct. 918, 919, 136 U. S. 298, 46 L. Ed. 1173.

#### COVERTURE.

See "During Coverture."

The term "coverture" implies that the wife is, during its continuance, under the protection of her husband, and the common law will not allow her to do anything which may prejudice her rights or interests, without his advice, consent, and approval. In this respect she is incapable of acting alone. In defining the meaning of the word "coverture," Mr. Webster has laid down this rule of law with much succinctness and perspicuity. He says: "The coverture of a woman disables her from making contracts to the prejudice of herself or husband, without his allowance or confirmation." I am incapable of adding anything to this statement of the rule of common law without detracting from its force. *Osborn v. Horine*, 19 Ill. (9 Peck) 124, 125.

"Coverture" is a personal disability springing from the conjugal relation, and does not attach to the administrator of the wife. *Roberts v. Lund*, 45 Vt. 82, 86.

#### COVIN.

"Covin" is defined by Lord Ellenborough as a contrivance between two to defraud or cheat a third. *Mix v. Muzzy*, 28 Conn. 186, 191.

"Covin" is a secret contrivance between two or more persons to defraud and prejudice another of his rights. To establish covin, it is necessary to prove both of the persons charged therewith with having secretly assented to the doing of something prejudicial to another. *Anderson v. Oscamp* (Ind.) 35 N. E. 707, 708.

"The common law doth so abhor fraud and covin, that all acts, as well judicial as others, and which of themselves are just and lawful, yet being mixed with fraud and deceit, are in judgment of law wrongful and unlawful." *Fermor's Case*, 3 Co. 78. "Covin may be when the title is good, and the title shall not give benefit to him that has it by reason of the covin; for the mixture of good and evil together makes the whole bad; the truth is obscured by the falsehood, and the virtue drowned in vice." *Hyslop v. Clarke* (N. Y.) 14 Johns. 458, 465 (quoting *Wimblish v. Talbols*, Plow. 54).

Prov. St. 1742-43, c. 27, § 4, declaring that if any person losing money by playing at cards should not, without "covin or collusion," sue and with effect prosecute for the thing lost, it should be lawful for any person to sue and recover treble the value thereof, means covin or collusion between the person who lost and the person who won. *Cole v. Applebury*, 136 Mass. 525, 529.

**COW.**

See "Milch Cow."  
As beef, see "Beef."  
As beast, see "Beast."

In construing a statute exempting one cow from execution, the courts say that the word "cow" implies something more than simply an animal of that species, otherwise the word "ox" would have been equally appropriate. *Brigham v. Bush* (N. Y.) 83 Barb. 596, 600.

A cow is a mature female of bovine animals, and hence an indictment describing the animal stolen as "a cow" is sufficient, under Comp. Laws 1897, § 79, making it an offense to steal any neat cattle. *Wilburn v. Territory*, 62 Pac. 968, 969, 10 N. M. 402.

A cow is a female of the bovine genus of animals; hence, under an indictment for "stealing a cow," a defendant cannot be convicted of stealing a bull. *State v. McMinn*, 84 Ark. 160, 162.

**Heifer.**

In the construction of statutes, "cow" includes heifer. *Ky. St. 1903, § 456*.

"Cow," when used in the exemption statute, includes a two year old heifer, if the debtor has no other cow. "Possibly, if the statute were a penal one, it might be considered that the term 'cow' only applies to the animal after she has brought forth a calf. This is undoubtedly not only the common, but the correct, meaning of the term; but the tendency of the courts to construe exemption statutes liberally has led to a general holding that the term 'cow' should be construed to include a heifer not with calf." *Freeman v. Carpenter*, 10 Vt. 438, 434, 33 Am. Dec. 210.

The Vermont statute exempting one "cow," etc., from execution, includes a two year old heifer forward with calf, when the debtor has no other cow. *Dow v. Smith*, 7 Vt. 465, 29 Am. Dec. 202; *Kennedy v. Bradley*, 55 Me. 107, 92 Am. Dec. 572.

There is a general tendency of the courts to hold that, where a statute exempts "cows," young animals of the species and description, that by time and subsequent growth would become such in a popular sense, are within the meaning and import of that term as used in the statute. *Berg v. Baldwin*, 18 N. W. 821, 822, 31 Minn. 541 (citing *Mundell v. Hammond*, 40 Vt. 641; *Mallory v. Berry*, 16 Kan. 293).

Under a statute exempting a "cow" from execution, it did not require that the animal should be actually giving milk, but included a heifer calf taken with the expectation and purpose of keeping her for a cow. *Carruth v. Grassie*, 77 Mass. (11 Gray) 211, 71 Am.

Dec. 707; *Johnson v. Babcock*, 90 Mass. (8 Allen) 583. See, also, *Nelson v. Fightmaster*, 44 Pac. 213, 215, 4 Okl. 38; *Stirman v. Smith* (Ky.) 10 S. W. 131, 132. Contra, see *Mitchell v. Joyce*, 28 N. W. 473, 474, 69 Iowa, 121.

In a replevin suit a writ described an animal as a "heifer," and in the certificate of appraisal it was described as a "cow." Held, that the words should be construed as practically synonymous, and hence there was no variance justifying the dismissal of the writ. *Pomeroy v. Trimper*, 90 Mass. (8 Allen) 398, 403, 85 Am. Dec. 714.

**Same—In criminal law.**

Under the rule that penal statutes must be construed liberally in favor of an alleged offender, it has been held in *Richard Cooke's Case*, Leach's C. L. 109, that an act made to punish the person who stole a "cow" is not applicable to him who steals a heifer. *Daggett v. State*, 4 Conn. 60-64, 10 Am. Dec. 100.

The defendant was indicted for stealing a "cow," and the proof was that the animal alleged to have been stolen was a heifer about 1½ years old. It was contended that this was a fatal variance between the indictment and the proof. In the principal dictionary of our language a "heifer" is defined to be a young cow. The Penal Code provides that the rule of common law that penal statutes are to be strictly construed has no application to the Code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice. The statute enumerates by particular designation "cows," "bulls," "steers," and "calves," and it cannot reasonably be inferred that it intended to exclude heifers, but rather that it intended to designate them as "cows." *People v. Soto*, 49 Cal. 67, 70.

Where an indictment charged the defendant with stealing a "cow," the personal property of R., there was no variance precluding the conviction, the evidence being that the animal stolen was a heifer between two and three years old that had never had a calf. *Parker v. State*, 39 Ala. 365.

Where an indictment charges the larceny of a "heifer," there is no variance between it and the verdict fixing the value of the "cow" stolen at a certain sum, as a "heifer" is defined to be a young cow. *Garvin v. State*, 52 Miss. 207, 209.

A heifer two or three years old that had never had a calf may be described in an indictment for larceny as a "cow." *Parker v. State*, 39 Ala. 365, 366.

**COWKEEPER.**

A farmer who found it a convenient and profitable mode of cultivating his farm to

keep cows for the purpose of consuming the produce on the land, and who sold the surplus of milk over that for his own use, is not a "cowkeeper" within Bankr. Act 12 & 13 Vict. c. 106, § 65, the same referring to persons keeping cows for the purpose of carrying on the trade of dealers in milk. *Bell v. Young*, 15 C. B. 524, 530.

### COW KIND.

Rev. Code, § 3706, making the stealing of animals of the "cow kind" grand larceny, should be construed to include a steer. "We entertain no doubt that the statute was intended to embrace, and such is the proper signification of the words, every animal which is the offspring of the female of the bovine genus of animals." *Watson v. State*, 55 Ala. 150.

### COWARDICE.

"Cowardice" is an antonym of "courage," and hence an instruction that if a person shoots another through mere "cowardice," or under circumstances which are not sufficient to induce a reasonable and well-grounded belief of danger to life, etc., in the mind of an ordinarily fearless person, it will not constitute self-defense, is not erroneous. *Coll v. State*, 86 N. W. 925, 928, 62 Neb. 15.

### CRACK-LOO.

"Crack-loo" is a game played by two or more persons tossing up a coin and letting it fall on the floor, the one whose coin falls and remains nearest a crack in the floor being the winner. The court remarks, in the course of the opinion, that the dictionaries and the books on gaming, so far as they have found, do not contain the word, or any definition thereof, and that it seems to be peculiarly a Texas game; but it is ultimately decided that under Pen. Code, art. 388, making it criminal for any person to bet or wager on poker dice, jackpot, or high dice, dominoes, muggins, "crack-loo," or any game of any character that can be played with dice or dominoes, conviction may be had for betting at a game called "crack-loo," though it is not played with dice or dominoes, but in the manner as above described. *Donathan v. State*, 66 S. W. 781, 782, 43 Tex. Cr. R. 427.

### CRAFT.

#### As an occupation.

In an act allowing the books of all persons in the practice of any regular craft to go to the jury in proof of open accounts, the term "craft" applies to any occupation which makes it necessary for books to be kept as a

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record of its transactions—the monuments of its daily business—as factories, foundries, forges, gasworks, banks; no matter what, if books are required to be kept, these books are to be let in under the law. *Ganahl v. Shore*, 24 Ga. 17, 23.

#### As a vessel.

See "Bay Craft"; "River Craft"; "Water Craft."

Other craft, see "Other."

"Craft," as used in St. 7 & 8 Geo. IV, c. 75, § 37, imposing a penalty on any person who, not being a freeman of the watermen's company, shall work or navigate any "wherry, lighter or other craft" upon the Thames for hire or gain, does not include a steamtug of 87 tons burden employed in moving another vessel. *Reed v. Ingham*, 3 E. & B. 888, 898; *Regina v. Reed*, 28 Eng. L. & Eq. Rep. 135.

The word "craft" generally implies small vessels, though it is sometimes used to embrace vessels of all sizes; and, in an act regulating the anchorage of bay or river "craft," it was not intended to confine the privilege as to the use of wharves to small vessels. The privilege was intended to be given to the bay and river trade. The word "craft" may have been used because at that time the bay and river trade was exclusively conducted in small sail vessels, and therefore the whole trade was included in the exemption given to bay and river craft. That it is now conducted in steamboats, instead of sail vessels, makes no difference, and the word therefore embraces steamboats as well as sailing vessels, though it would not probably have been chosen if steamboats of 500 tons burden had been in use when the word was first used in this connection. *The Wenonah (Va.)* 21 Grat. 685, 697.

### CRAMP.

The word "cramp" is a common term, well understood to relate to a painful affection of the muscles, and frequently associated with an acute disease of the stomach or bowels; so that the term "cramp cure" is descriptive of the purpose of the medicine, and hence cannot be appropriated as a trademark. *Harris Drug Co. v. Stucky (U. S.)* 46 Fed. 624, 626.

### CRANK.

Calling a person a "crank" is not of itself an actionable slander. "It is not a word which by its common meaning in the English language imports that a person has been guilty of a crime, or exposes him to hatred, contempt, ridicule, obloquy, or which would tend to injure him in his trade or profession. The word has no necessary defamatory

meaning, and, if it was used by the defendant in a defamatory sense, such sense must be given it by an appropriate allegation or innuendo to that effect. It is urged that since the assassination of President Garfield by Guiteau the word 'crank' has obtained a definite meaning in this country, and is understood to mean a crack-brained and murderously inclined person, and is so used by the public press. I do not think so short a term of use would give to such a word a libelous sense or meaning, without an allegation or innuendo as to the sense in which it is used by defendant. In Ogilvie's Imperial Dictionary, published in England in 1889, and republished in this country in 1885, the word is found in the supplement with the following definition: 'Crank: Some strange action caused by a twist of judgment; a caprice, a whim, a vagary; violent temper subject to sudden cranks. Carlyle.' So that by this authority, which I think may be deemed the latest and probably the best, the word would seem to have no necessary defamatory sense. It would not necessarily imply that a man had been guilty of a crime, or tend to subject him to ridicule, or to say of him that he is capricious or subject to vagaries or whims; and such implications or intent could only be shown by an apt averment and proof in support of such an averment." *Walker v. Tribune Co. (U. S.)* 29 Fed. 827, 828.

## CRAPE VEILS.

Tariff Act June 30, 1864, c. 171, § 8, 13 Stat. 210, taxed imported silk veils at 60 per cent. ad valorem, and provided that manufacturers of silk, or of which silk is the component material of chief value, not otherwise provided, should be taxed at 50 per cent. ad valorem. Held that, though crape veils were manufactured from silk, the crape is a material composed of silk, and to which a resinous substance has been applied; and as neither the merchant nor the ordinary buyer understands "crape" to be identical with "silk," such veils were not classifiable under the 60 per cent. schedule as "silk veils," but should be classified as "manufactures of silk, or of which silk is the component material of chief value." *Arthur v. Morrison*, 96 U. S. 108, 24 L. Ed. 764.

## CRAPS.

The game of "craps" or "oontz" is a game ordinarily played with two dice. "They are shaken up in the hand, and then rolled or thrown from it. The player wins if he throws the numbers 7 or 11; otherwise he loses. It can be played with any four-cornered thing or cube, with numbers on it, that can be thrown or rolled, and upon any surface, as the floor, the ground, a box, a hat, etc." *Commonwealth v. Kammerer (Ky.)* 13 S. W. 108.

The game of "craps" is played by one man taking two dice and throwing them on the table, betting on 7 and 11 to win, the other party betting against him. First one and then another will throw the dice. The game can be played on any flat surface. *Chappell v. State*, 27 Tex. App. 310, 312, 11 S. W. 411.

## CRAZY.

In its popular sense, the term "crazy" imports a broken, shattered or deranged mind, rather than one enfeebled by age or disease, and is not an equivalent of "testamentary incapacity." *Shaver v. McCarthy (Pa.)* 5 Atl. 614, 615.

## CREAM.

It is true that the word "cream" is often used to designate the best part of a thing, but not the thing itself, as, for instance, the "cream of a story"; but only in that relation is the word given any such signification. The word "cream" in combination with other words, as "Price's Cream Baking Powder," is not descriptive of the article, or of its quality or kind. The baking powder is neither composed of part cream, nor does that word convey the idea that it is the best or choicest. *Price Baking-Powder Co. v. Fyfe (U. S.)* 45 Fed. 799, 800.

## CREAMERY.

A "creamery" is an establishment or place for the making of butter, and a company which has a right to the exclusive use of its corporate name. The "Elgin Butter Company" cannot claim the exclusive right to the use of the "Elgin Creamery Company," so as to prevent another corporation doing business under the latter name, notwithstanding the former added to its title the words, "Proprietor of the Elgin Creamery Company." *Elgin Butter Co. v. Elgin Creamery Co.*, 40 N. E. 616, 617, 155 Ill. 127.

For the purpose of the pure food act, "creamery" shall be defined as "a factory where cream from milk, with or without the addition of salt and coloring matters, is churned into butter." *Cobbey's Ann. St. Neb.* 1903, § 9410.

## CREATE.

The word "create" has a clear, well-settled, and well-understood significance, and means to bring into existence something which did not exist. *Roth v. State*, 63 N. E. 460, 469, 158 Ind. 242.

Rev. St. c. 73, § 11, provides that all trusts concerning land must be created and manifested by some writing signed, etc. Held, that the words "created and manifested," as used in prior statutes, were not

synonymous with the words "created or declared," but it was sufficient, under the statute as changed, that the trust should be subsequently declared by a writing signed by the party charged with the trust, though it was not created originally by a writing. *McClellan v. McClellan*, 85 Me. 500.

"Created," as used in Act Dec. 22, 1812, § 10, providing that every estate in lands or slaves "which now is, or shall hereafter be created an estate in fee tail, shall from henceforth be an estate in fee simple," is broad enough to include devises as well as conveyances. *Edwards v. Bibb*, 54 Ala. 475, 481.

#### As applied to corporations.

"Create," as used in speaking of the creation of a charter, means to make one which never existed before. *Moers v. City of Reading*, 21 Pa. (9 Harris) 188, 189.

The creation of a corporation is the bringing into being of an artificial person having the essential attributes of a corporation; the creation of a distinct independent franchise called a "corporation," which when created has a capacity, among other things, by its corporate name to receive and enjoy such other franchises, privileges, and immunities, property and rights, as the Legislature itself, or other persons with its permission, may grant to it. The word has a clear, well-settled, and well-understood signification. It means to bring into being, to cause to exist, to produce. It appears to be one thing to create or bring into being a corporation, and quite another to deal with it as an existing entity, a person, after it is created, by regulating its intercourse, relations, and acts as to other existing persons, natural and artificial. *Southern Pac. R. Co. v. Orton* (U. S.) 32 Fed. 457, 473.

The word "create" has a clear, well-settled, well-understood signification, meaning to bring into being, to cause to exist, to produce, to make, etc.; and hence an act limiting fares of a street railway company to a certain amount in cities having a certain population does not violate Const. art. 11, § 13, which provides that corporations other than banking shall not be created by special act, it being one thing to create or bring into being a corporation, and quite another to deal with it as an existing entity, after it is created, by regulating its intercourse, relations, and acts as to other existing persons. *City of Indianapolis v. Navin*, 47 N. E. 525, 528, 51 N. E. 80, 151 Ind. 139, 41 L. R. A. 337, 344.

An act providing that building and loan associations might bring and maintain suits, after the expiration of their charter, for the sole purpose of enabling them to wind up their affairs, is not in violation of article 1, § 25, Const., declaring that no law shall "create, renew or extend the charter of more than one corporation." The act neither created charters, nor did it renew or extend the time

of their existence, within the meaning of the Constitution. *Cooper v. Oriental Savings & Loan Ass'n*, 100 Pa. 402, 406.

A statute that does not profess to create a banking corporation, but merely remedies defects in the organization of one already existing, is not a violation of the constitutional prohibition against granting special charters for banking purposes. *Syracuse City Bank v. Davis* (N. Y.) 16 Barb. 188, 193.

Any corporation accepting the provisions of Act March, 1889, providing generally that railroad companies organized under the laws of another state may be incorporated in the state on compliance with certain conditions, was "created and organized" under the laws of the state, within the meaning of Act April 24, 1899, providing that no corporation shall hereafter be created or organized under the laws of the state without the payment of a certain fee into the state treasury. *State v. Sioux City & N. R. Co.*, 44 N. W. 1032, 43 Minn. 17.

#### CREATED BY LAW.

See "Liability Created by Law."

#### CREATURE.

See "Reasonable Creature."

#### CREDIBLE—CREDIBILITY.

"Credibility" and "competency" are sometimes applied to a witness as if they were synonymous in meaning. Credibility relates to whether the witness is such as is entitled to credit or belief. It may not attach by reason of extreme youth, idiocy, insanity, or, under our statutes, conviction of perjury. Competency relates more to the relation of witnesses to the matter under investigation. The person, though incompetent in a particular matter, may be a credible witness in other relations to such matters. Formerly incompetency arose from being directly interested in the matter under investigation, or because charged with the commission of the crime under investigation, or because of his relation to the party interested, as husband or wife. *Smith v. Jones*, 34 Atl. 424, 68 Vt. 132.

#### CREDIBLE PERSON.

A credible person is one worthy of belief, and, as used in the statute providing that the summons may be served by any credible person, the person must be one worthy of belief. This appears from the use of the distinguishing word "credible," and again from the provision which follows, "and the return of such person verified by his affidavit shall be evidence of the time and manner of service," for, if the return of process by persons un-



worthy of credit is to be held conclusive and unassailable, the property and rights of individuals would no longer be safe. *Peck v. Chambers*, 28 S. E. 706, 708, 44 W. Va. 270.

The expression "credible person," as used in Code Cr. Proc. art. 404, providing that an information shall not be presented by the district or county attorney until oath has been made by some credible person, charging the defendant with an offense, meant a competent as well as a credible witness. "Such has been the construction of the word 'credible' by our Supreme Court in the case of attesting witnesses to a will, and the reasons given for so holding in that case apply with equal force here." And therefore, as the husband is not a competent witness against the wife in a prosecution for adultery, to the same extent he is incompetent to make an affidavit charging her with the offense. *Thomas v. State*, 14 Tex. App. 70, 72.

Code Cr. Proc. art. 583, providing that the credibility of the persons making an affidavit for change of venue, or their means of knowledge, may be attacked by the affidavit of a credible person, means persons who are not only truthful, in the ordinary acceptance of the term, but who, from motives, intent, feelings, or relationship to the party, and the like, and their opportunities and means of knowledge, would be likely to testify to the truth. *Dunn v. State*, 7 Tex. App. 600, 605.

In discussing the meaning of the word "disinterested," the court stated that in *Wakefield v. State*, 41 Tex. 556, it was held that the words "credible person," as used in the provision for change of venue on the oath of two credible persons, involved more than a general character for truth, but embraced the means of knowledge, the intelligence, and the relation of such persons with the defendant. *Territory v. Leary*, 43 Pac. 688, 689, 8 N. M. 180.

#### CREDIBLE WITNESS.

The term "credible," as applied to a witness, means deserving of confidence; but, as applied to a story, it may signify worthy of belief, or probable only, or barely not incredible. *Noland v. McCracken*, 18 N. O. 594, 595.

A credible witness is one who, being competent to give evidence, is worthy of belief. *Peck v. Chambers*, 28 S. E. 706, 708, 44 W. Va. 270.

The phrase "credible witness" refers only to the integrity of the witness. *Bierbach v. Goodyear Rubber Co.*, 11 N. W. 514, 517, 54 Wis. 208, 41 Am. Rep. 19.

The term "credible witness," as used in Code Cr. Proc. art. 746, providing that no person shall be convicted of perjury, except on the testimony of two credible witnesses, or

one credible witness corroborated strongly by other evidence, means one whose character for truth is above reproach. *Bouvier*, in his *Law Dictionary*, defines a credible witness "to be one who, being competent to give evidence, is worthy of belief." *Smith v. State*, 2 S. W. 542, 544, 22 Tex. App. 196; *Wilson v. State*, 10 S. W. 749, 750, 27 Tex. App. 47, 11 Am. St. Rep. 180. And hence it cannot be construed to mean one whose credibility was impaired by proof that his general reputation for truth and veracity was bad. *Kitch-en v. State*, 14 S. W. 392, 29 Tex. App. 45.

The statute providing that a record might be proved by a copy certified under the hand of the clerk and the seal of his office, or by a copy examined and sworn to by credible witnesses, meant witnesses giving testimony under the sanction of the witnesses' oath, and who might be cross-examined as to the existence of the record and the accuracy of the copy. *Dibble v. Morris*, 26 Conn. 416, 425.

The use of the word "credible," as applied to witnesses within an act authorizing a conviction on the oath of one or more credible witnesses, is synonymous with "credible." The use of the word to signify worthy of belief is said by lexicographers to be obsolete, but in the statute it means one whose testimony is worthy of credit, credence, belief; that is, in more modern phrase, a credible witness. *State v. Kenilworth*, 54 Atl. 244, 245, 69 N. J. Law, 114.

#### As competent.

The phrase "credible witnesses," in a statute requiring a will to be attested by credible witnesses, means competent witnesses. *Chicago Title & Trust Co. v. Brown*, 55 N. E. 632, 633, 183 Ill. 42, 47 L. R. A. 798; *In re Noble*, 15 N. E. 850, 851, 124 Ill. 206; *Harp v. Parr*, 48 N. E. 113, 117, 168 Ill. 459; *Fisher v. Spence*, 37 N. E. 314, 315, 150 Ill. 253, 41 Am. St. Rep. 360; *In re Sloan's Estate*, 56 N. E. 952, 953, 184 Ill. 579; *Fuller v. Fuller*, 83 Ky. 345, 349; *Hall v. Hall*, 18 Ga. 40, 44; *Smalley v. Smalley*, 70 Me. 545, 548, 35 Am. Rep. 353; *Jones v. Larrabee*, 47 Me. 474, 476; *Warren v. Baxter*, 48 Me. 193, 195; *In re Trinitarian Congregational Church & Society of Castine*, 40 Atl. 325, 326, 91 Me. 416; *In re Marston*, 8 Atl. 87, 94, 79 Me. 25; *Hawes v. Humphrey*, 26 Mass. (9 Pick.) 350, 357, 20 Am. Dec. 481; *Workman v. Dominick* (S. C.) 3 Strob. 589, 590; *Appeal of Combs*, 105 Pa. 155; *Garland v. Crow's Ex'rs* (S. C.) 2 Bailey, 24; *Snelgrove v. Snelgrove* (S. C.) 4 Deaux. 274, 279; *Kennedy v. Upshaw*, 1 S. W. 303, 313, 66 Tex. 442; *Brown v. Pridgen*, 56 Tex. 124, 126; *Eustis v. Parker*, 1 N. H. 273, 274; *Smith v. Chamberlain*, 2 N. H. 440, 441; that is, such persons as are not legally disqualified from testifying in courts of justice by reason of mental incapacity, interest, or the commission of crime, or other cause excluding them from testifying generally, or rendering them incompetent in respect to the

particular subject-matter, or in the particular suit, *Robinson v. Savage*, 15 N. E. 850, 851, 124 Ill. 266; and is not used in a loose sense, as descriptive of persons of a good moral character and reputation—in fact, a person worthy of belief. The word "credible" denotes persons capable of obtaining credit, *Haven v. Hilliard*, 40 Mass. (23 Pick.) 10, 16; nor does it require such witnesses to be persons of veracity. *Johnson v. Johnson*, 58 N. E. 237, 240, 187 Ill. 86.

The question of competency relates to the time of attestation. *Rucker v. Lambdin*, 20 Miss. (12 Smedes & M.) 230, 250; *Sears v. Dillingham*, 12 Mass. 358, 361; *Higgins v. Carlton*, 28 Md. 115, 140, 92 Am. Dec. 666; *Taylor v. Taylor*, 1 Rich. Law, 531, 534; *Hindson v. Kersey* (Conn.) 1 Day, 41, 50, note, per Campden, J., dissenting; *Hodgman v. Kittredge*, 32 Atl. 158, 67 N. H. 254, 68 Am. St. Rep. 661; *Lord v. Lord*, 58 N. H. 7, 8, 42 Am. Rep. 565; *Gillis v. Gillis*, 23 S. E. 107, 96 Ga. 1, 30 L. E. A. 143, 51 Am. St. Rep. 121; *Frink v. Pond*, 46 N. H. 125, 126; *Carlton v. Carlton*, 40 N. H. 14, 17. The term includes a party who takes an interest under the will. Act 1864, c. 109; *Estep v. Morris*, 38 Md. 417, 424.

"A credible witness to prove a will" means a witness who is competent to testify at common law, or, in other words, a person having no pecuniary interest in the estate. This, however, does not prevent a will from being proved or established by reason of the fact that one or more of the witnesses is not a credible or competent witness, by reason of interest, if such witness, before testifying, remove his incompetency by releasing his interest. *Mathews v. Marchants*, 20 N. C. 33, 35.

"Credible witnesses to a will," as used in St. 1783, c. 24, § 2 (Rev. St. c. 62, § 6), requiring a will to be signed by credible witnesses, means witnesses who would not sustain any loss or inconvenience if the will should be set aside—persons having no interest either in the probate or disallowance of the will. *Bacon v. Bacon*, 34 Mass. (17 Pick.) 134.

The term "credible witnesses," used in a statute in speaking of witnesses to wills, means competent witnesses; and the use in instructions of the words "incompetent" and "incredible," as applied to witnesses, as being synonymous terms, is correct. In *re Noble's Estate*, 22 Ill. App. 535, 537.

"Credible witness," as used in the statute of wills, means competent; and those witnesses are credible whom the law will trust to testify to a jury, who may afterwards ascertain the degree of credit they have. *Amory v. Fellowes*, 5 Mass. 219, 228.

The wife of a person named as executor is a credible witness to the execution of a will, if such executor takes no beneficial in-

terest under it. *Stewart v. Harriman*, 56 N. H. 25, 31, 22 Am. Rep. 408.

## CREDIT.

See "Bill of Credit"; "For Collection and Credit"; "Full Faith and Credit"; "Letter of Credit"; "Line of Credit"; "Mutual Credit"; "Rolling Credit."  
Of witness, see "General Credit."

Credit is confidence or trust reposed in one's ability to pay what he may promise. Abb. Law Dict. The ability to borrow on an opinion conceived by the lender that he will be repaid. Bouv. Law Dict. Credit is the capacity of being trusted. *People v. Wasservogle*, 19 Pac. 270, 77 Cal. 173 (citing *Dry Dock Bank v. American Life Ins. & Trust Co.*, 3 N. Y. [3 Comst.] 344, 356).

"Credit" may be defined as the ability to borrow money or obtain goods by virtue of the opinion conceived by the lender or sender that the party will repay. *Donnell v. Jones*, 13 Ala. 490, 513, 48 Am. Dec. 59 (cited in *Seattle Crocker Co. v. Haley*, 33 Pac. 650, 653, 6 Wash. 302, 36 Am. St. Rep. 156).

"The credit of an individual is the trust reposed in him by those who deal with him that he is of ability to meet his engagements, and he is trusted because, through the tribunals of the country, he may be compelled to pay. The credit of a government is founded on a belief of its ability to comply with its engagements, and a confidence in its honor—that it will do that voluntarily which it cannot be compelled to do." *Owen v. Branch Bank at Mobile*, 3 Ala. 258, 267.

The word "credit," derived from the Latin "credere," to trust, is used in Cr. Code, § 97, providing that "whoever, by any false representations in writing, signed by him, of his own respectability, wealth or mercantile correspondence or connections, obtains credit, and thereby defrauds any person of money, goods," etc., "shall be sentenced," etc., in its commercial sense. It is the confidence reposed in the ability and intention of a purchaser or borrower to make payment at some future time, either specified or indefinite. When a merchant sells his wares upon an expressed or implied promise that the purchaser will pay for them at some future time, he gives credit. When the banker or broker lends money upon the promise of the borrower to repay it at some future time, he thereby gives credit. It may be given because of the reputation or representations for solvency and honesty of the purchaser or borrower, or because of tendered and approved security. It is against the obtaining of it by false representations, whereby the seller or lender is defrauded of his money or goods, that section 97 is directed. Where a loan is procured by false represen-

tations of the borrower as to his solvency, the case falls within the section. *Lucas v. People*, 75 Ill. App. 662, 665.

An indorsement by a mortgagee on notes secured by a mortgage of a certain sum "as the balance of credit" for certain lands conveyed to said mortgagee by third parties "implies a right of the person credited to that for which he is given credit." *Lyman v. Babcock*, 40 Wis. 508, 513.

Every contract for labor not paid for in advance is necessarily a contract upon credit, because the labor, when once performed, cannot be recalled. It is otherwise in case of the purchase of property to be paid for on delivery. Still, if the property consists of several parcels, as of several loads of lumber or of stone, to be delivered at different times, and paid for when all are delivered, this is a contract upon credit for all, except the last load. *Ketchum v. City of Buffalo*, 14 N. Y. 356, 364.

By "credit"—one of the sources from which the profits of a partnership may be drawn—is meant not only a reputation for responsibility as to pecuniary concerns, but also any quality or other circumstance that may acquire the good will of others and contribute to the prosperity of the partnership. *Civ. Code La. 1900, art. 2810*.

"Credit" is a term attaching to the creditor, and designates property possessed by him, in contradistinction to the word "debt," which has reference to the debtor, and a personal obligation resting upon him. *North Carolina R. Co. v. Commissioners of Alamance*, 91 N. C. 454, 456.

"Credit," is a term attaching to the creditor, and designates property possessed by him, in contradistinction to the correlative word "debt," which has reference to the debtor, and the personal obligation resting upon him. *North Carolina R. Co. v. Commissioners of Alamance*, 91 N. C. 454, 456.

#### **Extensions of credit in guaranty included.**

A guaranty was in the following words: "If you give him credit, we will be responsible that his payments will be regularly made." Held, that such guaranty was not a guaranty of credit on any particular terms, but should be construed to bind the guarantors if the principal was given, not the usual credit, but credit generally, which might properly be interpreted, "If you trust him to a fair and reasonable credit, we will be bound." The difficulty arises from the use of the word "credit," since, if, after the time for payment has elapsed, time was given to the principal, the guarantors would be discharged; and therefore the term was not here used in the sense of an extension of credit after debt due, but merely that the creditor should be paid his debt according to the terms on which they and the principal

should deal. *Simpson v. Manley*, 2 Crompt. & J. 12.

As used in a written guaranty stipulating that a writer would be accountable to the person addressed, that a third party "will pay you for a credit on bonds," etc., "which he may require in his business," the words "a credit" are not used in a limited or restricted sense, but in an enlarged and commercial sense, as implying reputation and confidence—a basis on which a third party might trade as he desired, without payment to the extent limited, and looking to a continuous credit, including several extensions of credit. *Rindge v. Judson*, 24 N. Y. 64, 71.

#### **As payment or security.**

"Credited," with reference to accounts between partners, is synonymous with "paid." Thus, where one partner was credited with a sum of net profits, he was, therefore, as much paid his share of the same as if it had actually been handed to him in cash; and this though the credit was subsequently exhausted by a debit of losses. *Welsh v. Canfield*, 60 Md. 469, 475.

In an instrument directed to a certain company, as follows, "58 days after date credit P. & Co. or order with the sum of 500 pounds in cash, on account of this corporation," the words "credit in cash" was an order to hold to the use at the command of P. & Co. the sum named. It meant to pay the money to him. *Wiles, O. J.* "Credit in cash" clearly means "pay over the money." *Creswell, J.* "Credit in cash" is equivalent to "pay." *Williams, J.* *Ellison v. Collingridge*, 9 C. B. 570, 573.

As used in a letter relating to the terms of a purchase of brimstone, in which the purchasers stated that they opened credit in reimbursement of purchases with certain firms, "credit" is a term perfectly well understood in commercial circles, and implies security for the meeting of his obligations by the holder of the credit, and is not intended ordinarily as a substitute for those obligations. "A credit with a banker," said Chief Justice Gibson, "is not payment, but a means of payment, more or less secure, according to the solidity of the depository, and the greater or less certainty of the security cannot affect the question of its character. It is but a security still." *Ainis v. Ayres*, 16 N. Y. Supp. 905, 906, 62 Hun. 376.

Credit with a banker is not payment, but a means of payment, more or less secure, according to the solidity of the depository, and the greater or less certainty of the security cannot affect the question of its character; and that the consignee of goods had given the consignors a credit with the banking house, to enable them to draw on it in payment of purchases, was not a payment for such goods, so as to prevent a stoppage in

transitu. *Bell v. Moss* (Pa.) 5 Whart. 189, 203.

#### As standing.

In an action for malicious prosecution, the court, having submitted the element of exemplary damages to the jury, charged that, if they found for plaintiff, the measure of actual damages would be such sum as would be compensation for the injury sustained as the proximate result of the prosecution, taking into consideration the injury, if any, to plaintiff's feelings, credit, and reputation. Held, that the word "credit," as so used, related to standing in the community in which plaintiff lived, and not to credit in a commercial sense. *Curlee v. Rose*, 65 S. W. 197, 198, 27 Tex. Civ. App. 259.

#### CREDIT COMPANY.

Credit companies, such as the Credit Foncier and the Credit Mobilier, are strictly analogous to land mortgage banks, except that they invest their funds in loans on the security of general industrial undertakings, to which business they have added the functions of negotiators of direct loans between companies formed for the conduct of such undertakings and the capitalistic public. *Barrett v. Bloomfield Sav. Inst.*, 54 Atl. 543, 551, 64 N. J. Eq. 425 (citing *Encyclopædia Britannica*, p. 382).

#### CREDIT MAN.

A credit man is one in a commercial house whose special business it is to inquire in reference to the merits of all persons applying to purchase on credit, and who determines to whom credit shall be given, and the amount. The credit man of a house may or may not be a principal. It frequently occurs that he is a mere clerk or agent. *Erber v. Dun* (U. S.) 12 Fed. 526, 534.

#### CREDIT THE DRAWER.

The words "credit the drawer," written on the face of a note by an indorsee, do not imply an undertaking on his part, but are merely a direction to all persons to whom the note may be presented to trade with the maker as the owner, notwithstanding the apparent title of the indorsee. *Temple v. Baker*, 17 Atl. 516, 517, 125 Pa. 634, 8 L. R. A. 709, 11 Am. St. Rep. 926.

#### CREDIT MY ACCOUNT.

The words "credit my account," indorsed on a bill of exchange, are restrictive, and put an end to the negotiability of the bill. It is an appropriation of the proceeds which renders any other appropriation illegal. The credit should be given when the bill became payable. This is the ordinary course of dealing, and the court will not presume a

different course. *Lee v. Chillicothe Branch Bank*, 15 Fed. Cas. 149, 151.

An indorsement on a bill of exchange of the words "credit my account," signed by the payee, is restrictive in its character, and suspends the further transfer and negotiability of the bill. The instrument is intended to authorize the indorsee to hold the bill until its maturity, and receive the proceeds and place them to the credit of the indorser. The words are equivalent to a direction to credit the proceeds to the account of the indorser. *Lee v. Chillicothe Branch Bank*, 15 Fed. Cas. 149, 151.

#### CREDIT OF THE BUILDING.

It was contended that where a laborer, in working on granite columns, did not know into what building they were to be placed, he could not have done the labor on the credit of the building, within the mechanic's lien law; but it was held that if these columns were not furnished by the plaintiff on the credit of the building, in the technical sense in which that term is ordinarily used, yet, as the statute creates this credit, and carries it to every laborer performing work and furnishing skill, in cases of this kind we may not inappropriately say that, in law, such labor and skill were furnished on the credit of the building, and that the creditor may safely rely on such credit in the performance of such work and furnishing such skill. *Emery v. Hertig*, 61 N. W. 830, 832, 60 Minn. 54.

#### CREDITABLE WITNESS.

See "Credible Witness."

#### CREDITOR.

See "Attaching Creditor"; "Bona Fide Creditor"; "Certificate Creditors"; "Confidential Creditor"; "Equitable Creditor"; "Existing Creditors"; "General Creditor"; "Judgment Creditor"; "Principal Creditor"; "Subsequent Creditor"; "Warrant Creditors."

Any creditor, see "Any."

Other creditors, see "Other."

The ordinary and almost universal definition of the word "creditor" is a person to whom a debt is owing by another person. *Nicolin v. Weiland*, 56 N. W. 587, 588, 55 Minn. 130; *Woolverton v. George H. Taylor Co.*, 43 Ill. App. 424, 426.

A creditor is one to whom a sum of money or other thing is due by obligation, promise, or in law. *New Jersey Ins. Co. v. Meeker*, 37 N. J. Law (8 Vroom) 282, 300 (citing Webster).

A creditor is a person who has a right to require the fulfillment of an obligation or contract. *Walsh v. Miller*, 88 N. E. 381, 387, 51 Ohio St. 462 (citing Bouv. Law Dict.).

*State v. Georgia Co.*, 17 S. E. 10, 11, 112 N. C. 34, 19 L. R. A. 485; *Foss v. Lord*, 59 N. E. 529; *Dunnigan v. Stevens*, 13 N. E. 651, 654, 122 Ill. 396, 3 Am. St. Rep. 496; *Mohr v. Minnesota Elevator Co.*, 41 N. W. 1074, 1076, 40 Minn. 343; *Rea v. Jaffray & Co.*, 48 N. W. 78, 81, 82 Iowa, 231; *Atwater v. Manchester Sav. Bank*, 48 N. W. 187, 188, 45 Minn. 341, 12 L. R. A. 741; *Kalkhoff v. Nelson*, 62 N. W. 332, 334, 60 Minn. 284; *In re Wilson's Estate*, 80 Ill. App. 217, 218, 219.

Any one is a creditor who has a right by law to demand, either presently or upon some future contingency, the fulfillment of any obligation or contract. *Gannard v. Eslava*, 20 Ala. 732, 741.

A creditor is one who gives credit in business matters. *Rea v. Jaffray & Co.*, 48 N. W. 78, 81, 82 Iowa, 231 (citing Cent. Dict.); *Swarts v. Slegel* (U. S.) 117 Fed. 13, 17, 54 C. C. A. 399.

A creditor is any one who has a debt or demand against another on contract, express or implied, for the payment of money. *Atwater v. Manchester Sav. Bank*, 48 N. W. 187, 188, 45 Minn. 341, 12 L. R. A. 741.

A creditor is any one who has a legal right to damages, capable of enforcement by judicial process. *Bishop v. Redmond*, 83 Ind. 157.

A creditor, in its strict, legal sense, is one who voluntarily trusts or gives credit to another for money or other property, but, in its more general or extensive sense, is one who has a right by law to demand and recover of another a sum of money on any account whatever. *Keith v. Hiner*, 38 S. W. 13, 14, 63 Ark. 244; *Cardenas v. Miller* (Cal.) 89 Pac. 783, 785, 49 Am. St. Rep. 84; *De Ruiter v. De Ruiter* (Ind.) 62 N. E. 100, 103; *Stanly v. Ogden* (Conn.) 2 Root, 259, 261; *Walsh v. Miller* (Ohio) 38 N. E. 381, 387; *Stewart v. Walterboro & W. Ry. Co.*, 41 S. E. 827, 828, 64 S. C. 92; *Deseret Nat. Bank v. Kidman* (Utah) 71 Pac. 873, 878. Or he is a creditor who has a legal demand on another for money or other property after it has come into the hands of another without his consent, by mistake or accident, which he is entitled to have, or to compensation in damages for, on the ground of an implied promise. *Stanly v. Ogden* (Conn.) 2 Root, 259-261. The word is susceptible of latitudinous construction. *El Paso Nat. Bank v. Fuchs*, 34 S. W. 206, 207, 89 Tex. 197.

A "creditor" is one in whose favor an obligation exists, by reason of which he is or may become entitled to the payment of money. Civ. Code Cal. 1903, § 3430; Civ. Code Mont. 1895, § 4481; Rev. Codes N. D. 1899, § 5048; Civ. Code S. D. 1903, § 2364; Rev. St. Okl. 1903, § 2770; *Melvin v. State*, 121 Cal. 16, 25, 53 Pac. 416.

An obligee or creditor is the person in favor of whom some obligation is contracted,

whether such obligation be to pay a sum of money, or to do or not to do something. Civ. Code La. 1900, art. 3556, subd. 20.

The word "creditor" includes every person having a claim or demand upon which a judgment for a sum of money, or directing the payment of money, could be recovered in an action. Code Civ. Proc. N. Y. 1899, § 2514, subd. 3; *Cook v. Woodward* (N. Y.) 5 Dem. Sur. 97, 100.

Every one who owes to another the performance of an obligation is called a "debtor," and the one to whom he owes it is called the "creditor." Rev. Codes N. D. 1899, § 5113; Civ. Code S. D. 1903, § 2417; Rev. St. Okl. 1903, § 2786.

"Creditor," as used in the bankruptcy act, shall include any one who owns a demand or claim provable in bankruptcy, and may include his duly authorized agent, attorney, or proxy. U. S. Comp. St. 1901, p. 3419; *Swarts v. Seigel* (U. S.) 117 Fed. 13, 17, 54 C. C. A. 399; *In re Lazoris* (U. S.) 120 Fed. 716, 717.

The word "creditor" does not mean, under all circumstances, a person having an obligation against another which is capable of legal enforcement. *Champion v. Buckingham*, 42 N. E. 498, 499, 165 Mass. 76.

Unless there be a debtor—one whose duty it is to pay, and of whom the debt can be demanded—there cannot be a creditor to enforce and compel payment. One of these parties cannot have a being without his correspondent, and it would be a most perplexing task, should we attempt to sustain an assertion that there still remained a creditor after the debt, as such, had ceased to exist. One who has released a debt due from a corporation is no longer a creditor thereof. *Mohr v. Minnesota Elevator Co.*, 41 N. W. 1074, 1076, 40 Minn. 343.

#### As all creditors.

Rev. St. C. 32, § 16, declaring that the directors and officers of a corporation whose indebtedness exceeds the amount of its capital stock shall be personally liable to creditors for such excess, etc., means not one creditor of the corporation, but all, and therefore contemplates a pro rata distribution of the amount received from the imposition of such liability among all the creditors, in a proceeding in a court of equity. *Woolverton v. Taylor*, 23 N. E. 1007, 1009, 132 Ill. 197, 22 Am. St. Rep. 521 (citing *Low v. Buchanan*, 94 Ill. 70).

Acts 1857, § 9, declaring that stockholders of manufacturing corporations shall be severally and individually liable to creditors of the company, to the amount of stock held by them, for all debts, etc., meant all the creditors of the corporation, and therefore the liability in such a case was "not to some particular creditor, but should be enforced

for the benefit of all the creditors." *Harper v. Union Mfg. Co.*, 100 Ill. 225, 231.

"Creditors," as used in the bankrupt law, prohibiting a bankrupt from incumbering his property with the intent to defraud his creditors, meant all his creditors, as a body—generally—and would not relate to a mortgage given to secure a debt due to one of the creditors. In *re Dunham* (U. S.) 8 Fed. Cas. 83, 35.

The term "creditors," as used in Bankr. Act 1841, § 5, providing that no creditor or other person coming in and proving his debt or other claim shall be allowed to maintain any suit therefor, etc., means every species of direct creditor of the bankrupt. *Morse v. Hovey* (N. Y.) 1 Sandf. Ch. 187, 190.

St. 1799, c. 128, § 65, giving priority to the debts of the United States when a debtor not having sufficient property to satisfy all his debts shall have made a voluntary assignment of his property for the benefit of his creditors, means all his creditors.—*United States v. McClellan* (U. S.) 26 Fed. Cas. 1127, 1130.

The Code provides: "The words 'creditors' and 'purchasers,' where used in any previous section of this chapter [the recording act], shall not be restricted to creditors of and purchasers from the grantor, but shall extend to and embrace all creditors and purchasers who, but for the deed or writing, would have title to the property conveyed or a right to subject it to their debts." Therefore, in our recording acts, the word "creditors" means all creditors who, but for the deed or writing, would have a right to subject the land embraced therein to the payment of their debts. *Snyder v. Martin*, 17 W. Va. 276, 288, 41 Am. Rep. 670.

The term "creditors," as employed in Rev. St. Mo. 1899, § 3412, declaring void, as against creditors of the vendee, a conditional sale of chattels, unless evidenced by a recorded writing, applies to all creditors of the vendee, whether prior or subsequent. In *re Fraizer* (U. S.) 117 Fed. 746, 747.

The words "creditors and purchasers," as used in the chapter dealing with acts valid between the parties, but void as to creditors and purchasers, shall not be restricted to the protection of creditors of and purchasers from the grantor, but shall extend to and embrace all creditors and purchasers who, but for the deed or writing, would have had title to the property conveyed, or a right to subject it to their debts. Code Va. 1887, § 2472.

The phrase "subsequent purchasers for value, and creditors," as used in Code, § 2465, providing that, so long as a deed remains unrecorded, it shall not affect subsequent purchasers for value and creditors, applies to all creditors, and not merely to subsequent cred-

itors. *Price v. Wall's Ex'r*, 33 S. E. 599, 600, 97 Va. 334, 75 Am. St. Rep. 788.

The word "creditors," as used in Comp. Laws, § 4379, providing that a mortgage of personal property is void, as against creditors of the mortgagor, unless filed with the register of deeds of the county where the property is situated, embraces persons to whom the mortgagor was indebted at the time of the execution of the mortgage, as well as those to whom he may subsequently become indebted. *Pierson v. Hickey* (S. D.) 91 N. W. 839, 840.

The term "creditors," as used with reference to a chattel mortgage not followed by actual or conditional change of possession, includes all persons who were such while the chattels remained in possession of the mortgagor under an agreement for the sale of the same by him at retail, and it was not essential to their rights that they did not obtain judgment or a specific lien until after the delivery of the property to the mortgagee. *Mandeville v. Avery*, 124 N. Y. 376, 26 N. E. 951, 21 Am. St. Rep. 678.

The simple word "creditor," standing by itself, means creditor at large. So it is generally used and generally understood, and so it must be held to have been used in the statute (section 16) providing that, if the indebtedness of any stock corporation exceeded the amount of its capital stock, the directors and officers of such corporation assenting thereto shall be personally and individually liable for such excess to the creditors of such corporation. *Woolverton v. George H. Taylor Co.*, 43 Ill. App. 424, 426.

The term "creditors" shall be construed to include all persons who shall be creditors of the vendor or assignor at any time whilst such goods and chattels shall remain in his possession or under his control. Rev. St. Wis. 1898, § 2242.

#### As assignee of claim.

Code Civ. Proc. § 2717, providing that the creditor of an estate may petition the surrogate's court for the payment of his debt, should be construed to include the assignee of a claim against an estate, for the language of the section does not limit it to original creditors, but to any person who at the time of filing his petition is a creditor of such estate. In *re Moderno*, 17 N. Y. Supp. 781, 63 Hun, 261.

#### Assignee of judgment.

An assignee of a judgment is a creditor, within the statute making it lawful for any creditor to redeem from a sale on execution. He is a creditor having a lien, within the terms of the act, and comes within its spirit and object, which are to make the land pay as many judgments as possible. *Van Rensselaer v. Sheriff of Onondaga County* (N. Y.) 1 Cow. 443, 457.

**As attachment, judgment, or lien creditors.**

In order that a person having a claim against a judgment debtor may maintain a suit in equity to open or set aside the judgment, he must be a creditor of such judgment debtor, entitled to standing in a court of equity; and, in order to be such, he must be a judgment creditor, or be one whose claim is judicially established, and must have tried all other legal means of obtaining satisfaction of the judgment, and failed, before he can ask the court to aid him in a proceeding to set aside a judgment between other parties. Thus a plaintiff in attachment is not a creditor, as the term is so used, since he may or may not turn out to be so, according to the exigencies of his attachment suit. *Melville v. Brown*, 16 N. J. Law (1 Har.) 363, 365.

Code 1876, § 2200, declaring that a latent equity affecting real property, good as against the trustee, shall be unavailing as against the title of creditors or purchasers for a valuable consideration, without notice, meant judgment creditors having a lien; and therefore, if a suit is pending to enforce a trust in lands when the lien of a creditor attaches, he is chargeable with constructive notice of it, and cannot claim the protection of the statute. *Walker v. Elledge*, 65 Ala. 51, 57.

As used in a statute declaring that no trust, whether implied by law or created by the parties, can defeat the rights of creditors or purchasers for value without notice, the word "creditors" means creditors having a lien. *Carter v. Challen*, 3 South. 313, 314, 83 Ala. 135.

A provision in a policy of insurance against fire that a loss under it shall not be payable until the assured produces the certificate of loss of a magistrate "not concerned in the loss as a creditor," means a magistrate not concerned in the loss by reason of having an interest in the property insured or in the policy as security for an obligation to him, and does not disqualify a magistrate who was a general creditor of the insured. *Dolliver v. St. Joseph Fire & Marine Ins. Co.*, 131 Mass. 39, 45.

The term "creditor," as used in Rev. St. 1853, c. 463, § 35, authorizing any creditor to maintain an action to procure the removal of a trustee of a corporation for an abuse of trust, means a judgment creditor, and does not include the owner of a paid-up policy issued on his life by a life insurance company. *Belknap v. North American Life Ins. Co.* (N. Y.) 11 Hun, 282, 285.

Rev. St. c. 98, §§ 2, 3, and St. 1844, c. 154, § 10, requiring notice to be given to the creditor before any person committed on execution shall be discharged on taking the debtor's oath, means the judgment creditor. *Foliansbee v. Bird*, 62 Mass. (8 Cush.) 289, 290.

As used in Act. 1858 (Laws 1858, c. 314), authorizing an assignee or other trustee of an insolvent, for the benefit of creditors, to disaffirm and set aside fraudulent conveyances by the debtor, the term "creditor" is not limited to judgment creditors, but includes, as well, simple-contract creditors. *Southard v. Benner*, 72 N. Y. 424, 426.

The word "creditors," in the insolvent law (Pub. St. c. 201, § 26), providing that all pledges, payments, mortgages, sales, and transfers, whenever made, if fraudulent as to creditors, shall be void, cannot be construed in its general and popular sense, and means lien creditors having a right to attack and set aside such conveyances. *Thompson v. Esty*, 45 Atl. 566, 572, 69 N. H. 55.

It is not necessary that a person holding a claim against another, in order to be a creditor, as the term is used with reference to fraudulent conveyances void as to creditors, should have recovered a judgment, and issued an execution thereon, at the time of the transfer; but if at the time the claimant had recovered a judgment, which was then or afterwards appealed, and judgment was afterwards again rendered on the prior proceedings had in the appellate court, the holder of the judgment became a creditor, so as to entitle him to take advantage of the prior fraudulent transfer. *Boles v. Henney*, 32 Ill. 130, 131.

2 Rev. St. p. 116, § 18, declares that an order may be obtained by any creditor of a deceased person, whether at large or with a judgment, and whether judgment were by default or after trial on the merits, at any time after six months from the granting of letters testamentary, and not before. Held, that the word "creditor," as used in such statute, includes not only a judgment creditor having obtained his judgment by default, but also one who has no judgment, and any other person having a valid claim against the estate of a deceased person, which he could have enforced against him by action during his life. *Mills v. Thursby* (N. Y.) 12 How. Prac. 385, 392.

The term "creditors," as used in Comp. St. 1901, c. 32, § 14, making an unrecorded chattel mortgage void as to such creditors when the mortgagor retains possession of the property, applies only to such as by legal process have fastened a lien or charge upon the property for the satisfaction of their debts, and not to general creditors. *Folsom v. Peru Plow & Implement Co.* (Neb.) 95 N. W. 635, 636.

Bankr. Act July 1, 1898, § 67, subd. "a," 30 Stat. 564, c. 541 [U. S. Comp. St. 1901, p. 3449], provides that claims which would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate; and subdivision "f," that whenever a creditor is prevented from

enforcing his rights as against a lien created by his debtor, who afterwards becomes a bankrupt, the trustee of the bankrupt's estate shall be subrogated to the rights of such creditor for the benefit of the estate. Section 70 provides that the trustee of a bankrupt shall be vested with the title of the bankrupt as of the date he was adjudged a bankrupt, except as to exempt property, property transferred in fraud of creditors, and property which prior to the filing of the petition the debtor could have transferred, or which might have been levied upon and sold under judicial process. Held, that the word "creditors" referred only to those who had secured some specific claim or lien on the property involved in bankruptcy. *Skilton v. Codington*, 83 N. Y. Supp. 351, 355, 86 App. Div. 166.

As used in Rev. St. c. 65, § 24, providing that no creditor shall be allowed to enforce the lien created by the statute to the prejudice of any other creditor or incumbrancer, unless, etc., means a person who has a lien by contract made under the law. *Shaeffer v. Weed*, 8 Ill. (3 Gilman) 511, 514.

"Creditor," in connection with the rule of law that an oral chattel mortgage is good as between the parties and others having notice thereof, and invalid only as to creditors, means judgment, execution, or attachment creditors, and does not apply to a subsequent mortgagee with notice. *Reiss v. Argubright* (Neb.) 92 N. W. 988, 989.

The word "creditor," as used in connection with the provision of a statute that, where there has been no change of possession, a sale is void as to the creditors of the vendor, means one who has seized the property by judicial process. *Dexter v. Citizens' Nat. Bank* (Neb.) 94 N. W. 530, 531.

#### Same—in recording acts.

As used in a recording act, requiring a recordation of title papers, and declaring that they should be deemed notice to all subsequent purchasers and creditors, and take effect from and after the time of filing for record, and not before, as to all creditors, the term "creditor" meant one who, without actual or constructive notice of a prior conveyance or incumbrance, institutes such proceedings or takes such steps as effect a lien on the land before the recording of such conveyance or incumbrance, whether the debt be prior or subsequent to them, and whether the vendor at the time of conveying or incumbering had other property sufficient to pay the debt, or not. *Martin v. Dryden*, 6 Ill. (1 Gilman) 187, 217. This definition has been followed in many subsequent cases. In *Massey v. Westcott*, 40 Ill. 160, it is said: "Under the statutes, a purchaser and a judgment creditor having a lien stand upon the same equity." *McFadden v. Worthington*, 45 Ill. 362. The holders of judgments on claims against an estate are not creditors within such act (Con-

veyance Act, p. 944, § 80), since such creditors must be judgment creditors having a lien, and such judgments are not liens on land left by the intestate; and grantees of the intestate take the land free from such judgments, though their deeds were recorded after the judgments were entered. *Noe v. Montray*, 48 N. E. 709, 711, 170 Ill. 169.

Code Iowa, 1873, § 1922, providing that no sale or contract wherein the transfer of title to personal property is made to depend on any condition shall be valid against any creditor, unless, etc., means any creditor who has by suit perfected a right to impeach the transaction. *Myer v. Car Co.*, 102 U. S. 1, 12, 26 L. Ed. 59.

The term "creditors," as used in the statute declaring unrecorded conveyances void as to all purchasers without notice and creditors, etc., refers to judgment creditors, or creditors having a lien; and such deed is not void as to general creditors, unless, perhaps, to those who have been induced to deal and give credit because of the apparent ownership. *Pickett v. Banks*, 19 Miss. (11 Smedes & M.) 445, 451; *Loughridge v. Bowland*, 52 Miss. 546, 547.

Within the meaning of Rev. St. 1895, §§ 3327, 3328, providing that chattel mortgages and deeds of trust, not accompanied by immediate delivery and change of possession, shall be void as to creditors unless recorded, includes all persons whose claims are upon certain conditions charged by law as specific liens upon certain property, such as holders of attachment, execution, judgment, landlords' and mechanics' liens, and excludes all others. *Bowen v. Lansing Wagon Works*, 43 S. W. 872, 875, 91 Tex. 385; *Oak Cliff College for Young Ladies v. Armstrong* (Tex.) 50 S. W. 610, 613; *Berkey & Gay Furniture Co. v. Sherman Hotel Co.*, 16 S. W. 807, 810, 81 Tex. 125.

Comp. St. Neb. 1899, § 3188, provides that every mortgage of chattels not accompanied by actual delivery of the property mortgaged shall be filed in the office of the county clerk, or shall be absolutely void as to creditors. The term "creditor," as thus used, means a judgment or attachment creditor, or a creditor who is using the courts of law and their processes for the collection of his debts. *Farmers' & Merchants' Bank v. Anthony*, 39 Neb. 343, 57 N. W. 1029, 1031. Under such definition, the creditors of the bankrupt who have instituted proceedings in involuntary bankruptcy are creditors. In *re Pekin Plow Co.* (U. S.) 112 Fed. 308, 309, 50 C. C. A. 257.

Chattel Mortgage Act, § 4, declaring unrecorded mortgages to be invalid as against creditors and purchasers and mortgagees in good faith, means judgment creditors. *Milton v. Boyd*, 22 Atl. 1078, 1082, 49 N. J. Eq. 142.



The term "creditor," as used in a statute providing priority of creditors over an unrecorded mortgage without notice, means a creditor who has recovered a judgment and sued out execution before notice of such unrecorded mortgage; and, unless such creditor is placed in that attitude before notice of the mortgage, he cannot claim priority over the same. *Underwood v. Ogden*, 45 Ky. (6 B. Mon.) 606.

The word "creditors," as used in an act requiring chattel mortgages to be filed, applies to simple-contract creditors, and is used in its most comprehensive sense, and does not require that the creditor shall be a judgment creditor, *Farmers' Loan & Trust Co. v. Baker*, 46 N. Y. Supp. 266, 268, 20 Misc. Rep. 387; *Karst v. Gane*, 136 N. Y. 316, 323, 82 N. E. 1073; although such simple-contract creditors cannot assert their rights until they have obtained judgment, and, as to the personal property, had execution thereon, *Thompson v. Van Vechten* (N. Y.) 5 Abb. Prac. 458, 468.

The term "creditor," as used in Laws 1833, c. 279, § 1, providing that the failure to file a mortgage shall only render it void as against the creditors of the mortgagor and subsequent purchasers and mortgagees in good faith, means "a creditor armed with legal process which authorizes him to seize the property—such as an execution issued upon a judgment, or an attachment." It does not include a simple creditor. *Button v. Rathbone, Sard & Co.*, 27 N. E. 266, 126 N. Y. 187; *Bullard v. Kenyon*, 21 N. Y. Supp. 32, 66 Hun, 628.

The term "creditors," as used in a statute making chattel mortgages, unaccompanied by an affidavit of good faith, absolutely void, as against creditors of the mortgagor, includes all classes of creditors, and not merely secured creditors; and, where a person was an unsecured creditor, the mere fact that he, after the date of filing the mortgage, filed a lien on the property, does not affect his situation as a creditor; the term "creditor" having reference to the inception of the obligation of the creditor, rather than to the conditions which might afterwards arise. *Blumauer v. Clock*, 64 Pac. 844, 845, 24 Wash. 596, 85 Am. St. Rep. 966.

#### **Claimant ex contractu.**

The word "creditor," as used in Revision, p. 189, § 72, relating to insolvent corporations, and providing that, after the receiver has disposed of the assets, the creditors are to be paid proportionately to the amount of their debts, except mortgage and judgment creditors, is not used in a restrictive or technical sense, but will include all justly entitled to damages for breaches of contracts occasioned by insolvency and suspension. *Spader v. Mural Decoration Mfg. Co.*, 20 Atl. 378, 47 N. J. Eq. 18.

A creditor is one who credits, believes, or trusts another; one who gives credit in business matters; hence one to whom money is due. *Webst.* But a person whose claim against another is for damages for breach of contract is not a creditor, within the provisions of a deed of trust conveying property for the payment of liabilities, and providing for notice to be given to the creditors of the enforcement of the deed. *Witz v. Mullin's Personal Representative*, 20 S. E. 783, 784, 90 Va. 805.

Rev. St. tit. 1, § 229, providing that any creditor may avail himself of process of foreign attachment against his debtor, includes a person having a claim against another for unliquidated damages growing out of contract, as well as persons having liquidated claims. *New Haven Sawmill Co. v. Fowler*, 28 Conn. 103, 108.

1 Gen. St. p. 920, § 72, provides that the assets of an insolvent corporation shall be collected and sold, and that the proceeds of the sale shall be divided among the creditors of the corporation. Held, that the term "creditor" is not used in any narrow, restricted, or technical sense, but includes claims sounding in unliquidated damages. *Rosenbaum v. United States Credit System Co.*, 40 Atl. 591, 593, 61 N. J. Law, 543.

#### **Claimant ex delicto.**

A creditor, as usually defined and understood, is one to whom money is due. Strictly speaking, a person whose suit is founded upon a claim not arising from a contract is not a creditor until his action is merged into a judgment. *Winans v. Beidler*, 52 Pac. 405, 406, 6 Okl. 603.

The term "creditor," as used in the statute of frauds, providing against fraudulent conveyances of a debtor's property with intent to defraud creditors, was not used in a strict, technical sense, but includes all parties who have demands, accounts, interests, or causes of action for which they might recover any debt, damages, penalty, or forfeiture, and includes claims arising *ex delicto* as well as *ex contractu*. *Bongard v. Block*, 81 Ill. 186, 25 Am. Rep. 276; *Walradt v. Brown*, 6 Ill. (1 Gilman) 397, 399, 41 Am. Dec. 190; *McKenna v. Crowley*, 17 Atl. 354, 355, 16 R. I. 364.

Within the provision of the statute making transfers of property without consideration, and with intent to hinder, delay, and defraud creditors, void, one having a claim for tort is a creditor before the commencement of the action thereon, as well as after, and hence a person who has a cause of action for slander is a creditor. *Chalmers v. Sheehy*, 64 Pac. 709, 712, 132 Cal. 459, 84 Am. St. Rep. 62.

Rev. Codes, § 5052, provides that every transfer of property, etc., made with intent

to delay or defraud any creditor or other person of his demand, is void as against all creditors of the debtor. Section 5048 provides that a creditor, within the meaning of this chapter, is one in whose favor an obligation exists, by reason of which he is or may become entitled to the payment of moneys. Under such definition, the term "creditors," in section 5052, will include a person who is entitled to recover from another damages for criminal conversation with his wife. In *Pierstoff v. Jorge*, 86 Wis. 128, 58 N. W. 735, 39 Am. St. Rep. 881, the term "creditors," employed in such a statute, was held not to be used in its technical sense, but to be construed liberally, as including all parties who have demands, accounts, interests, or causes of action for which they might recover any debt, demand, penalty, or forfeiture. *Soly v. Aasen*, 86 N. W. 108, 109, 10 N. D. 108.

The term "creditor," as used in a statute relating to proceedings by a creditor against the trustees of concealed or absconding debtors, cannot be construed to include a person claiming damages for a conversion of his property. *Hutchinson v. Lamb* (Vt.) *Brayt*, 234, 235.

A railroad corporation, after acquiring all the stock of another railroad corporation, accepted a transfer of all the latter's property, "subject to its bonded indebtedness and all other indebtedness, without affecting the rights of creditors therein." Held, that the word "creditors" should be construed as including all persons holding claims against the grantors, whether such claims arise ex contractu or ex delicto. *Louisville & N. R. Co. v. Biddell*, 66 S. W. 34, 85, 112 Ky. 494.

A claim for damages makes the claimant a creditor, within the meaning of an act authorizing the consolidation of railroads, but preserving unimpaired all rights of creditors. *Stewart v. Walterboro & W. Ry. Co.*, 41 S. E. 827, 828, 64 S. C. 92. As used in Rev. St. art. 152, speaking of persons suing out attachments as creditors, the term does not include one holding a claim sounding in tort. *El Paso Nat. Bank v. Fuchs*, 34 S. W. 206, 207, 89 Tex. 197.

3 Rev. St. (8th Ed.) p. 1724, §§ 9, 10, providing that, on the dissolution of a corporation, the directors shall be trustees for the creditors and stockholders, cannot be construed to include a person having a claim against a corporation for damages resulting from personal injuries. *Grafton v. Union Ferry Co.*, 19 N. Y. Supp. 966, 967, 22 Civ. Proc. R. 402. See, also, *Marstaller v. Mills*, 38 N. E. 370, 371, 143 N. Y. 398.

Within the statute making a transfer of property by a corporation in contemplation of insolvency void as to its creditors, the word "creditors" includes all those to whom the corporation was under an enforceable obligation, as well as those to whom it was in-

debted; and, within such definition, a person who is entitled to recover for a tort or for a personal injury is a creditor. *Munson v. Genesee Iron & Brass Works*, 56 N. Y. Supp. 139, 147, 37 App. Div. 203.

In *Slater v. Sherman*, 68 Ky. (5 Bush) 206, it was held that one who had a claim against another growing out of an assault had the right to have a fraudulent conveyance set aside, though made before judgment in his favor. The doctrine in that case settles the question that one having an unliquidated claim for assault is a creditor of one being charged with intent to defraud. *Anglin v. Conley* (Ky.) 71 S. W. 928, 927.

A creditor, under the bankruptcy act, is one who owns a demand or claim provable in bankruptcy. An unliquidated claim is not provable in bankruptcy, so that a claim arising out of a tort does not make the party a creditor. *Beers v. Hanlin* (U. S.) 99 Fed. 695.

A disputed claim for damages, sounding in tort, is not a debt before it has been prosecuted to judgment, and does not constitute the claimant a creditor, or vest him with the right given by law to creditors to question voluntary transfers of their debtor's property. *Hill v. Bowman*, 35 Mich. 191, 192.

Corporations Act, § 75 (P. L. 1896, p. 301), provides that the court may limit the time within which creditors of an insolvent corporation shall make proof of their claims, "and may bar all creditors and claimants failing to do so within the time limited," etc. Section 76 requires that every claim shall be presented in writing and on oath, and the claimant, if required, shall submit to such examination in relation to the claim as the receiver shall direct. Section 77 (page 302) provides that any creditor or claimant may demand a jury to decide on his claim. Held, in view of these provisions, that a claimant for a tort committed before the declaration of insolvency, but not reduced to judgment until after, could come in and share on an equality as a creditor, pursuant to section 86, providing for the distribution of the assets among the creditors. *Lehigh & W. Coal Co. v. Stevens & Condit Transp. Co.*, 63 N. J. Eq. 107, 110, 51 Atl. 446.

#### **Claimant of specific property.**

The term "creditor," in the provision of the probate law requiring creditors of an estate to present their claims, does not include the claimant of specific property. *Gunter v. Janes*, 9 Cal. 643, 658.

The insolvency law (Gen. Laws 1881, c. 148), relating to transfers of property by an insolvent to a creditor creating a preference, should be construed to include the holder of a wheat ticket or receipt issued by a warehouseman who has become insolvent, and does not mean a creditor in a strictly technical sense, having and holding an immediately provable claim or a pre-existing debt

against the insolvent—according to the word “debt,” as used in this connection, its most limited and narrow construction—or that he must be a person resting under a liability in behalf of the insolvent. *Bouvier* defines a creditor as one who has a right to require the fulfillment of an obligation or contract, and in this sense it means more than a person to whom money may be owing. *Burrill* states that the word “debt” is of large import, and that, properly speaking, it includes all that is due to a man under any form of obligation or promise. The word “creditor” is used in its broad sense in the insolvency act. *Daniels v. Palmer*, 42 N. W. 855, 856, 41 Minn. 116.

#### **Commissioner to collect purchase money.**

A person appointed by a court of equity in a pending cause to receive and collect purchase money of land sold by him, as commissioner, under a previous decree in the cause, and for which he had taken a bond with surety to himself as commissioner, is not a creditor, in the sense of the statute, to whom a surety on the bond may give the notice to bring suit upon it. *Davis' Adm'r v. Snead* (Va.) 33 Grat. 705, 709, 710.

#### **Contingent liability as affecting.**

A creditor is one to whom a debt is owing by another person, called the “debtor.” In its strictest sense, a creditor is one to whom money is due. In a more extensive sense of the term, a creditor is one who has a right to recover money of another on any account whatever. Thus, where a city, in granting a franchise to a railroad company to use its streets, received in payment certain shares of the company, with a provision that, in case the company should become indebted, the city should have a lien on the company's franchise and property, the city was not a creditor of the railroad company. *Guaranty Trust Co. v. City of Galveston* (U. S.) 107 Fed. 311, 317, 46 C. C. A. 305.

3 Rev. St. (6th Ed.) p. 143, § 9, providing that every mortgage of goods and chattels, unaccompanied by an immediate delivery, shall be absolutely void against the creditors of the mortgagor, unless the mortgage, or a true copy thereof, shall be filed as directed, cannot be construed to include an indorsee of commercial paper indorsed by the mortgagor, where the liability of the indorser has not become fixed, for, until the maker of the paper is in default, no obligation is created by it against the indorser; and it is only from the time when the paper shall become dishonored, and the liability of the indorser fixed in this manner, that the indorsee can be held to be a creditor of the indorser. *Karst v. Gane*, 16 N. Y. Supp. 385, 386, 61 Hun, 533.

The holder of a note is a creditor of the indorser, within 2 Rev. St. p. 137, § 1, pro-

viding that every conveyance made with intent to hinder, delay, or defraud creditors shall be void, though the note is not due. The mere fact that the liability was contingent at the time of the conveyance does not make any difference. *Citizens' Nat. Bank v. Fonda*, 41 N. Y. Supp. 112, 114, 18 Misc. Rep. 114.

The term “creditor,” as used in a statute against fraudulent conveyances, authorizing any creditor of the grantor to maintain a suit to set the same aside, means one having a contingent liability, as well as one whose claim is certain and absolute. The rights of a surety or other contingent promisor are regarded for many purposes as commensurate in point of time with the date of the suretyship, and not with the date when the surety actually paid the security debt for the principal. *Keel v. Larkin*, 72 Ala. 493, 500; *Loughbridge v. Bowland*, 52 Miss. 546, 547.

Rev. St. c. 3, § 67, providing that any creditor whose debt or claim against a decedent's estate is not due may present the same for allowance and settlement, should be construed to include the indorsee of a note indorsed by the decedent, who has waived presentment for payment, protest, and notice of protest and nonpayment, though the note is not due. *Dunnigan v. Stevens*, 13 N. E. 651, 654, 122 Ill. 396, 3 Am. St. Rep. 496.

In *Cutler v. Steele*, 85 Mich. 627, 48 N. W. 631, the court said that the term “creditors,” as used in statute making chattel mortgages void, as against creditors of the mortgagor, unless filed in the office of the township clerk, includes those who have entered into contracts with parties as indorsers, guarantors, or sureties. Under such definition, one who takes from the executors of an estate, as part of his patrimony, a note made by a third person to the testator, becomes on that date a creditor of the maker, within the meaning of such statute. *Cutler v. Huston*, 15 Sup. Ct. 868, 870, 158 U. S. 423, 39 L. Ed. 1040.

Until it has been decided by the probate court that the living apart of the wife from her husband is justified, she is not a creditor, within the meaning of Pub. St. c. 151, § 2 cl. 11, or Id. § 3, providing for creditors' bills. *Willard v. Briggs*, 36 N. E. 687, 688, 161 Mass. 58.

The charter of a corporation provided that each stockholder should be liable for dues from the corporation, over and above stock by him owned, to a further sum at least equal in amount to such stock. Rev. St. § 3258, provides that the stockholders of a corporation shall be deemed liable to the creditors of the corporation, to secure the payment of the debts and liabilities of such corporation, in addition to their stock, in an amount equal to such stock. Held, that the use of the word “creditor” in the statutes

does not have the effect to limit or narrow the liabilities of stockholders who had sold their stock to insolvents, on sums owed by the corporation, the liabilities for which had accrued prior to the sale, but which were not due until after the sale. *Herrick v. Wardwell*, 50 N. E. 903, 906, 58 Ohio St. 294.

Wag. St. p. 89, § 40, authorizing the executor or administrator of any estate to assign any note or bond of the estate to any creditor in discharge of the amount of his claim, equal to the amount of such note or bond, means a person having a direct legal claim against the estate, and not a person to whom the estate is liable in a collateral manner only, as, where a person is jointly liable with the estate on a note, he is not a creditor of the estate until he has become such by paying off the note. *Ohandler v. Stevenson*, 68 Mo. 450, 452.

"Creditors," as used in a statute invalidating voluntary conveyances as against creditors of the transferor, has always been construed literally, and includes every person who has a right, claim, or demand founded on contract, whether contingent or absolute, for the performance of a duty, or the payment of damages in case of nonperformance, though no breach may occur until after the execution of the conveyance. *Anderson v. Anderson*, 64 Ala. 403, 405.

Where a negotiable note not yet due is indorsed by the payee and held by an indorsee, the indorsee, and not the indorser, is the creditor of the maker, in the sense in which that term is used in the statute with regard to the estates of deceased persons. *Meriden Steam Mill Lumber Co. v. Guy*, 40 Conn. 163, 168.

A creditor of an infant in Illinois, whose debt the infant is entitled to repudiate at majority, cannot have the infant adjudged an involuntary bankrupt, since he is not a creditor in the sense of the bankruptcy act of July 1, 1898, c. 541, 30 Stat. 544 [U. S. Comp. St. 1901, p. 3418]. In *re Eldemiller*, 105 Fed. 595, 5 Am. Bankr. R. 570.

#### Covenantee in deed.

The covenantee in a deed for land, containing a general covenant of warranty, is a creditor of the covenantor from the making of the deed, within the meaning of the statute of frauds (Clay's Dig. p. 254, § 2), in all cases where there is a paramount outstanding title by which he may be, or actually is, afterwards evicted. The debt created by such a deed from the warrantor to the warrantee differs in no essential particular from the debt created by a bond with condition. In both cases it is "debitum in præsenti, solvendum in futuro," upon a contingency. The deed is in substance but a bond for the purchase money; with a condition that the penalty of the bond shall be paid if the grantee be evicted, or that the grantor shall

refund to the grantee whatever sum it may become necessary for him to pay out in the purchase of a paramount outstanding title to save himself from such eviction. *Gannard v. Eslava*, 20 Ala. 732, 741.

#### Creditor antecedent to conveyance.

3 Rev. St. (8th Ed.) p. 143, § 9, providing that every mortgage of goods and chattels, unaccompanied by an immediate delivery, and not followed by an actual and continued change of possession, shall be void as against the "creditors of the mortgagor," unless the mortgage, or a true copy thereof, shall be filed as required by law, cannot be construed as designed only for the protection of persons who became creditors of the mortgagor after the execution of the mortgage, and prior to the time when they were filed, but includes creditors generally; including all persons sustaining that relation during the time the mortgage is withheld from the files, whether their debts were created before the execution of the mortgage or afterwards. *Karst v. Gane*, 16 N. Y. Supp. 385, 386, 61 Hun. 533; *Karst v. Gane*, 32 N. E. 1073, 136 N. Y. 316; *Cardenas v. Miller*, 39 Pac. 783, 785, 108 Cal. 250, 49 Am. St. Rep. 84. See, also, under Illinois recording act, *Martin v. Dryden*, 6 Ill. (1 Gilman) 187, 217; *Massey v. Westcott*, 40 Ill. 160, 163; *McFadden v. Worthington*, 45 Ill. 362, 365.

The term "creditor," as used in a statute providing that mortgages of personal property, given with intent to hinder, delay, or defraud creditors, shall be void, includes any person whose debt accrued either before or after the chattel mortgage was given, or before it was filed. *Stephens v. Perrine*, 24 N. Y. Supp. 21, 22, 69 Hun. 578 (citing *Thompson v. Van Vechten*, 27 N. Y. 568; *Vreeland v. Pratt*, 17 N. Y. Supp. 307, 63 Hun. 626).

The term "creditors," as used in Laws 1890-91, c. 7, §§ 5, 11, making a chattel mortgage void, as against creditors, unless, within 60 days after maturity, affidavit of interest be filed as therein provided, includes antecedent creditors. *First Nat. Bank v. Ludvigsen*, 56 Pac. 904, 995, 8 Wyo. 230, 80 Am. St. Rep. 928.

Under a statute requiring contracts for the sale of property to a railroad to be registered, in order to be valid against subsequent purchasers for value without notice or creditors, one is not a creditor who at the time of his levy, or before the sale under execution, receives notice that the property is subject to an unrecorded lien or mortgage. A previously existing mortgagee of the property of the railroad is not a creditor, within such statute. *Evans v. Kister* (U. S.) 92 Fed. 828, 834, 35 O. C. A. 28.

#### As creditor at appointment of receiver.

By the expression "creditors of the bank," as used in discussion of the rules of

equity which should control the settlement of the affairs of an insolvent bank, is meant those to whom the bank was indebted at the date of the appointment of the receiver, whether the debts were then due or not. A creditor may thereafter assign his claim, but the assignee holds it subject to the receiver's right to set off against it claims he holds against the creditor. *Davis v. Industrial Mfg. Co.*, 19 S. E. 371, 372, 114 N. C. 321, 23 L. R. A. 322.

#### **As creditor at time of decedent's death.**

Within the provisions of Ballinger's Ann. Codes & St. § 6141, declaring that if the persons entitled to letters of administration shall neglect for a certain time to petition therefor, or if one of the heirs or one or more of the principal creditors waive their right to administer, or if there be no principal creditors, the court may appoint any competent person to administer such estate, the term "creditors" relates only to such as were creditors of the deceased at the time of his death, and a creditor whose claim is for decedent's funeral expenses has no right to administer. In *re Sullivan's Estate*, 65 Pac. 793, 795, 25 Wash. 430.

Within Code, § 2643, declaring that no person shall be entitled to administration on the estate of a deceased person unless he is a creditor of the decedent, or a person interested in the estate, the term "creditor" means a person having a claim contracted by the decedent in his lifetime; and hence a person who contracted with the executors of the deceased person was not a creditor, within the meaning of such term. *Fowler v. Walter* (N. Y.) 1 Dem. Sur. 240.

A trustee of a company of which decedent was a shareholder was authorized to collect an assessment due said company, and had obtained judgment against the decedent's estate. It was held that the trustee was not a creditor of decedent, within the provision that, if there be no relatives, administration should be granted to the largest creditor applying for the same. *Glenn v. Reid*, 24 Atl. 155, 74 Md. 238.

A creditor, within the meaning of the statute (Rev. St. § 48, c. 3) providing for the administration of estates, is one to whom a sum is due from, and to be paid out of, an estate, after allowing all just credits. Where the petition showed that, at the time of his death, decedent was indebted to the petitioner in a sum more than \$200 less than the sum in which the petitioner was at the time indebted to the deceased, the petitioner was not a creditor, within the statute. In *re Wilson's Estate*, 80 Ill. App. 217-219.

#### **As creditor of fraudulent grantor.**

Under a statute making unrecorded deeds void as to creditors and subsequent purchasers, it is held that the phrase means subse-

quent purchasers from the grantor only, and does not include creditors of the grantee and subsequent purchasers from him. *Pierce v. Turner*, 9 U. S. (5 Cranch) 154, 165, 3 L. Ed. 64.

Although the word "creditor" is used in Rev. St. § 2507, providing that "in cases where personal property shall be sold, to be paid for, in whole or in part, in installments," etc., "on condition that the same shall belong to the person purchasing," etc., "whenever the amount paid shall be a certain sum, the title to the same shall remain in the vendor's hands until the value of such property shall be paid, such condition in regard to the title so remaining until such payment shall be void as to all subsequent purchasers in good faith, and creditors, unless such condition shall be evidenced by writing," etc., "as provided in case of mortgages of personal property," is used in the statutes without qualification, and the word "purchasers" is qualified by the word "subsequent," yet we are clear, in view of the manifest purpose of the statute, that the word "creditors" should be construed to mean subsequent creditors. This construction comports with the general policy of all acts which require the recording of instruments conveying personal property. That policy is that a purchaser should not be allowed, by the possession of personal property which does not belong to him, or upon which another has a secret lien, to acquire a false credit, either by giving him credit, or by becoming a purchaser of the property. But the statute was never intended to enable a prior creditor to get title to the property of a stranger on no better ground than the fact that the stranger had been incautious enough to intrust the possession and use of the property to his debtor. *Defiance Mach. Works v. Trisler*, 21 Mo. App. 69, 71.

#### **Creditor of partnership.**

Under Code Civ. Proc. § 2514, subd. 3, defining a "creditor of an estate" as a person having a claim or demand on which a judgment for a sum of money could be recovered in an action, it was held that one who sold goods to a firm composed of a surviving creditor and an executor of the deceased partner, under whose will the executor could devote to the firm's business only so much of the estate as was invested in the firm at decedent's death, was not a creditor, within the provision of Code, § 2653, providing for the revocation of letters testamentary on the petition of a creditor of the estate. In *re Sten's Estate*, 9 N. Y. Supp. 445, 446, 2 Con. Sur. 204.

#### **As creditor while possession is in debtor.**

The term "creditors," as used in defining sales fraudulent as to creditors, shall be construed to include all persons who shall be creditors of the vendor or assignor

at any time whilst such goods and chattels shall remain in his possession or control. *Mills' Ann. St. Colo.* 1891, § 2028; *Horner's Ann. St. Ind.* 1901, § 4912; *Comp. Laws Mich.* 1897, § 9521; *Gen. St. Minn.* 1894, § 4220; *Comp. Laws Nev.* 1900, § 2704; *Roberts v. Hawn*, 20 *Colo.* 77, 79, 38 *Pac.* 886; *Densmore v. Tomer*, 14 *Neb.* 392, 15 *N. W.* 734; *Snyder v. Dangler*, 63 *N. W.* 20, 21, 44 *Neb.* 600.

The statute of frauds declares that every sale made by a vendor of goods in his possession or under his control, and every assignment of goods by way of mortgage or security, unless the same be accompanied by the immediate delivery, and be followed by an actual and continued change of possession, shall be presumed fraudulent as against creditors of the vendor or mortgagor of the beneficiary, unless it be made to appear on the part of the person claiming under such sale or assignment that the same was made in good faith. Held, that the term "creditors" does not include all persons to whom the mortgagor or vendor may be indebted at any time, but means those who are his creditors while the sold or mortgaged property is in his possession or under his control. *Turner v. Killian*, 12 *N. W.* 101, 103, 12 *Neb.* 580; *Murch v. Swenson*, 42 *N. W.* 290, 291, 40 *Minn.* 421; *Southard v. Benner*, 72 *N. Y.* 424, 426; *Allen v. Steiger*, 31 *Pac.* 226, 227, 17 *Colo.* 552.

**As creditor with claim allowed against estate.**

Under *Code Civ. Proc.* §§ 1589, 1590, which direct the administrator, on the application of creditors of the decedent, to sue for the purpose of setting aside fraudulent conveyances made by decedent in his lifetime, only creditors whose claims have been allowed by the administrator, or who have established them by judgment, can compel the administrator to bring the action. *Ohm v. Superior Court of City and County of San Francisco*, 26 *Pac.* 244, 245, 85 *Cal.* 545, 20 *Am. St. Rep.* 245.

The term "creditor," as used in a statute authorizing the surrogate, on the application of any creditor of an estate, to decree the payment of the debt, or a portion thereof, after six months from the time of granting letters, etc., "means a person having claims that are recognized and admitted, or such as have been ascertained and established by the judgment of a competent court, and not those that have been disputed or rejected." *Wilson v. Baptist Education Soc.*, 10 *Barb.* 308, 319.

*Gen. St.* 1878, c. 55, § 5, giving creditors a right of action upon the executor's bond, means those who have been found or determined to be such by an allowance of their claims by the person or tribunal provided by statute for the examination and

allowance of claims against the estates of decedents. *First Nat. Bank of St. Paul v. How*, 9 *N. W.* 626, 627, 28 *Minn.* 150.

Within the provisions of *Code Civ. Proc.* § 1589, authorizing the administrator to sue to set aside a deed of his intestate, as void against creditors, a creditor is one whose claim has been allowed by the administrator, or is evidenced by a judgment. *Ohm v. Superior Court*, 26 *Pac.* 244, 85 *Cal.* 545 (followed in *Field v. Andrada*, 39 *Pac.* 323, 324, 106 *Cal.* 107).

**As creditor with claim filed or proved in bankruptcy.**

Within *Act March 2, 1867* (14 *Stat.* 517) § 9, providing that in cases of voluntary bankruptcy no discharge shall be granted to a debtor whose assets shall not be equal to 30 per cent. of the claims proved against his estate on which he shall be liable as principal debtor, without the assent of at least one-fourth of his creditors in number, and one-third in value, the term "creditors" means creditors to whom he is liable as principal debtor, and who have proved their debts against his estate. *In re Derby* (U. S.) 7 *Fed. Cas.* 517, 518.

By *Bankr. Law 1898*, c. 541, § 4, 30 *Stat.* 547 [U. S. *Comp. St.* 1901, p. 3423], notice to all creditors who have proved their debts, and other persons in interest, to appear and show cause why a discharge of the bankrupt and certificate shall not be granted is required. *In re King* (U. S.) 14 *Fed. Cas.* 507, it was held that the term "other persons in interest," used in this section, is employed to designate those who could not prove debts as creditors, and does not embrace, but excludes, creditors. That these words may embrace those who are not properly creditors, but have an interest in the matter, may be admitted, but that they exclude creditors who have not proved their debts is a gratuitous assumption, not warranted by law. Such persons, if not strictly creditors of the bankrupt, are at least equitable creditors, and have an interest in the property to be administered in bankruptcy. *In re Book* (U. S.) 3 *Fed. Cas.* 867, 868.

*Gen. Laws 1889*, c. 30, § 6, provides that, on the petition of a majority in number and amount of the creditors of an insolvent, it shall be the duty of the court to remove an assignee or receiver appointed under the statute, and appoint another. Held, that "creditor" means any person to whom an insolvent is actually indebted, and a creditor need not file his claim with the assignee or receiver in order to take part in proceedings to remove such assignee or receiver. *Nicolin v. Welland*, 56 *N. W.* 587, 588, 55 *Minn.* 130.

The term "creditor," as used in the insolvent act (*Gen. St.* 1878, c. 41), providing

that no creditor of an insolvent debtor shall receive any benefit under the provisions of the act unless he shall have filed with the clerk of the court, in consideration of the benefits of the provisions of the act, a release to the debtor of all claims other than such as may be paid under the provisions of the act for the benefit of such debtor, means a person who was a creditor at the time of the filing and allowance of the claim, and in whose behalf it was filed and allowed. *Adamson v. Cheney*, 29 N. W. 71, 85 Minn. 474.

The Court of Appeals held in *Re Pekin Plow Co.* (U. S.) 112 Fed. 308, 50 C. C. A. 257, that, though the term "creditor," employed in a correlative statute, means a creditor armed with legal process, yet all creditors of a bankrupt, after adjudication in bankruptcy and the presentation of their claims, become creditors, within the meaning of the statute aforesaid and the various provisions of the bankrupt act. In *re Fraulzer* (U. S.) 117 Fed. 746, 747.

#### **As creditor with money judgment.**

The word "creditor," as used in the California probate act, requiring that any creditor of an estate shall present his claim to the administrator for payment before he can maintain an action to recover the same, must be construed to mean a person having a money judgment against a deceased, and not one merely entitled to enforce an equitable claim against his estate. *Toulouse v. Burkett*, 10 Pac. 26, 28, 2 Idaho (Hasb.) 184.

The word "debts," as used in the Code, relating to the sale of a decedent's land for the payment of his debts, includes any claim or demand upon which a judgment for a sum of money, or directing the payment of money, can be recovered in an action, and the word "creditor" includes any person having such a claim or demand. In *re Wilcox's Estate* (N. Y.) 11 Civ. Proc. R. 115, 125.

#### **Directors of corporation.**

"Creditors," as used in Laws 1848, c. 40, § 10 (General Manufacturing Act), providing that all stockholders of the corporations named in the act shall be liable to creditors thereof until the entire stock shall have been paid in, means outside creditors of a corporation, dealing with and trusting it, and generally ignorant of its precise financial condition, and cannot be construed to include directors of the corporation, to whom the corporation is indebted for salaries, for it can have no relation to the creditors, of the corporation, who manage its affairs, and can generally know its condition, who create the debts, and can generally protect themselves, if creditors, before disaster overtakes them. *McDowall v. Sheehan*, 29 N. E. 299, 301, 129 N. Y. 200.

#### **Grantee with warranty of title.**

Within the meaning of the statute of frauds (Clay's Dig. p. 254, § 2), prohibiting the transfer of property with intent to defraud creditors, the term "creditor" includes the covenantee in a deed for land containing a general covenant of warranty. *Ganard v. Eslava*, 20 Ala. 732, 741.

Where one warrants the title of personal property, and in fact the title is defective, the purchaser is not the creditor of the seller, or of the personal representative of the seller after his death, until the assertion and establishment of the adverse title, and consequently the statute of limitations does not commence to run until such time. *Capliger v. Vaden*, 24 Tenn. (5 Humph.) 629, 630.

A person who was entitled to sue for a breach of a covenant which runs with the land is a creditor of a railroad company, within the meaning of the act of Alabama authorizing a consolidation of the railroad company with another, and providing that the consolidation shall not affect the rights of the creditors of the consolidated company. The word "creditors," there used, includes the secured and unsecured creditors as well. *Mobile & M. Ry. Co. v. Gilmer*, 5 South. 133, 141, 85 Ala. 422.

#### **Heirs of estate.**

Gen. St. c. 180, § 12, authorizes the judge of probate to extend the time allowed to the creditors of an estate for proving their claims. In answer to a contention that the term "creditors" should be construed so as to include heirs, and authorize an extension of time for an heir to contest a creditor's claim, the court said that neither term had any technical or legal meaning different from that belonging to it in the ordinary sense of language, and that, so far from being synonymous or associated in the class of similar condition, they were, when applied to an interest in an estate, so dissimilar as to be antagonistic. *Graves v. Graves*, 58 N. H. 24.

Heirs and distributees cannot be deemed creditors, within the purview of Acts 1788, c. 66, providing that "no executor or administrator that shall hereafter undertake that trust shall be compelled or held to answer to the suit of any creditor of his testator, or intestate, unless the said suit shall be commenced within the term of three years," etc. *Trecothick v. Austin* (U. S.) 24 Fed. Cas. 105, 108.

#### **Holder of equitable right.**

We are told in *Anderson's Law Dictionary* that a creditor is one who has a right by law to demand and recover of another a sum of money on any account whatever. In *Bishop v. Redmond*, 83 Ind. 157, a creditor is defined as one having a legal right to damages, capable of enforcement by

judicial process. A wife having equities in her husband's real estate which may subsequently ripen into legal, subsisting claims, she is a present and continuous creditor of her husband, and is within the protection of the statute against fraudulent conveyances. *De Ruiter v. De Ruiter*, 62 N. H. 100, 108, 28 Ind. App. 9, 91 Am. St. Rep. 107.

In Rev. St. p. 436, § 172, providing that every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or any goods in action, or the rents and profits thereof, made with intent to hinder, delay or defraud creditors or other persons, shall be void, the term "creditors or other persons" embraces others than those who are strictly creditors. Even the word "creditor" does not receive a strict definition, for a party who is not, strictly speaking, a creditor, may stand in the equity of a creditor, and have an interest that may be defrauded. *Twell v. Twell*, 9 Pac. 537, 543, 6 Mont. 19.

#### **Indorsers, guarantors, or sureties.**

The term "creditor," used in a recording act, includes those who have entered into contract with parties, either as indorsers, guarantors, or sureties. *Cutler v. Steele*, 85 Mich. 627, 632, 48 N. W. 631, 633.

An indorser, an accommodation maker, or a surety on the obligation of a bankrupt is a creditor, under Bankr. Act 1898. *Goldberg v. Harlan* (Ind.) 67 N. E. 707, 710 (citing *Swarts v. Siegel* [U. S.] 117 Fed. 13, 54 C. C. A. 399).

The relation of debtor and creditor between principal and surety, so as to entitle the latter to avoid a voluntary conveyance made by the former, commences at the date of the obligation by which the surety becomes bound, and not from the time he makes payment. *Howe v. Ward*, 4 Me. (4 Greenl.) 195. A surety on an administrator's bond, against whom a judgment in an action on such bond has been rendered, is a creditor, within the statute protecting creditors from fraudulent conveyances. *Choteau v. Jones*, 11 Ill. (1 Peck) 300, 318, 50 Am. Dec. 460.

#### **As one relying on property conveyed.**

Recording Act, § 2, declares that conveyances made in consideration of marriage shall not be good against a purchaser for valuable consideration or any creditor unless recorded. Held, that the word "creditor," as used in such statute, meant persons only who had trusted the grantor on the faith of the ownership of the property, and therefore, if an alleged creditor trusted the grantor while he was not in possession of the property, want of possession being constructive notice of the conveyance, he could not be said to have trusted the grantor on the faith of the ownership of such property, and was therefore not a creditor, as the term was used in

the statute. *Dixon v. Lacosta*, 9 Miss. (1 Smedes & M.) 70, 106, 107.

Comp. Laws, § 4379, providing that a mortgage of personal property is void, as against creditors of the mortgagor, unless the original or an authenticated copy thereof be filed in the office of the register of deeds, refers only to those who have given credit to, or changed their position with reference to, the mortgagor, to their detriment, relying on the record, after the execution of the mortgage, and before the filing thereof. *Union Nat. Bank of Oshkosh v. Olum*, 54 N. W. 1034, 1037, 3 N. D. 193, 44 Am. St. Rep. 533.

#### **As one who loans credit.**

A firm who signs the notes of a dry goods company thereby gives it credit, and one who loans his credit to another is as much his creditor as one who loans his money to him. *Swarts v. Selgel* (U. S.) 117 Fed. 13, 17, 54 C. C. A. 399.

#### **Purchaser.**

A creditor who takes a bill of sale from the debtor in payment of his debt becomes a purchaser of the property, and therefore is not within the protection of Laws 1883, c. 279, § 1, providing that a chattel mortgage, unless filed, shall be absolutely void as against creditors of the mortgagor. *Volckers v. Struke*, 42 N. Y. Supp. 84, 85, 18 Misc. Rep. 457.

Where land which had previously been conveyed by a warranty deed, which had not been recorded, was sold by a trustee under a power in a deed of trust to secure payment of a note, the grantee in the trustee's deed stands on the footing of a junior purchaser, and not of a lien creditor; thus putting the burden of proof on the grantee in the trust deed to show that he had no notice of the senior unrecorded mortgage. *Turner v. Cochran*, 61 S. W. 923, 924, 94 Tex. 480.

#### **Purchaser of unassigned dower right.**

Purchasers of the mere rights of a widow to dower before assignment, levied on and sold under a judgment against a subsequent husband, are not creditors, within the meaning of Dower Act 1845, § 31 (Rev. Code 1845, p. 435), or Dower Act 1855, § 38 (Rev. Code 1855, p. 676). "To sell the right of dower at public auction, and then have it assigned, the purchaser taking the risk whether it will be assigned or not, would generally cause a sacrifice of it. The creditor should have the dower actually assigned before it is sold." *Waller v. Mardus*, 29 Mo. 25, 27.

#### **Receiver.**

Acts 1870, c. 270, exempting an insurance policy on the life of the husband for the benefit of his wife and children from creditors of the husband, unless the amount on the



annual premium exceeds the sum of \$500, and providing that, where the amount is in excess of such sum, the lien of the creditor shall attach to the excess so paid, cannot be construed to include a receiver appointed in supplementary proceedings against the husband. *Masten v. Amerman*, 4 N. Y. Supp. 681, 682, 51 Hun, 244.

#### **Shareholder of insolvent building association.**

Within the meaning of a statute reciting that the securities of a building and loan association (a foreign corporation) shall be held by the Secretary of State in trust for the benefit of the creditors of such corporation within the state, the term "creditors" is not limited merely to officers or agents who have claims against the company for services rendered, or to dealers who have furnished stationery or coal or light for the company's office. It is admitted that, while a building and loan association is a going concern, no shareholder becomes a creditor until the maturity of his shares; but, when insolvency occurs, the rights and liabilities of the shareholders and borrowers are radically changed. The borrower becomes liable to pay his debt at once, and, upon the confirmation of the final account of the receiver, the shareholder becomes entitled to his distributive share. The right of the shareholder to this ascertained portion of such fund then becomes as secure as the right of a holder of matured shares. In both instances the shareholder becomes a creditor, within the meaning of the statute. *Irwin v. Granite State Provident Ass'n*, 38 Atl. 680, 682, 56 N. J. Eq. 244.

#### **State.**

The statute declaring that "the creditors of any person deceased shall make their claim within seven years after the death of such debtor, otherwise such creditors shall be forever barred," in its character, object, and effect, is wholly different from the ordinary statutes of limitation. The term "creditors," it may be remarked, properly includes artificial persons, as bodies politic or corporate, as much as natural persons, and a remarkable feature of the law is that it contains no exceptions or saving clause in favor of the rights of any person whatever. It must, therefore, upon the established principles of construction applicable to statutes of limitation, be taken to run against all persons—and artificial persons as well as natural—and to apply to a debt due to the state, as well as one due to an individual. *State v. Crutcher's Adm'r*, 32 Tenn. (2 Swan) 504, 511.

#### **Stockholder.**

See "Stockholder."

#### **Trustee or cestui que trust.**

A creditor is "one to whom money is due" (Webster's Dict.); and the mother of an illegitimate child, to whom an allowance has

been made in bastardy proceedings for the support of such child, is none the less a creditor of the father because the money must pass into her hands with a moral trust or obligation to apply it for the maintenance of the bastard. *State v. Parson*, 20 S. E. 511, 512, 115 N. C. 730.

Where the treasurer of a board of education deposited money—school funds—in a bank without authority, and the owner of the bank had knowledge of the character of the funds, the board of education does not thereby become a creditor of the bank, so as to file a claim therefor on the assignment of the bank for benefit of creditors; such money being a trust fund. *Myers v. Board of Education*, 32 Pac. 658, 663, 51 Kan. 87, 37 Am. St. Rep. 263.

#### **Wife.**

According to *Anderson's Law Dictionary*, a creditor is one who has a right by law to demand and recover of another a sum of money on any account whatever. In *Blabop v. Redmond*, 83 Ind. 157, a creditor is defined as one having a legal right to damages, capable of enforcement by judicial process. The wife is a present and continuous creditor of her husband, and is entitled, in an action for divorce, to attack a conveyance by him to his daughter as fraudulent and void. *De Ruiter v. De Ruiter*, 62 N. E. 100, 103, 23 Ind. App. 9, 91 Am. St. Rep. 107.

#### **Of corporation.**

The word "creditor," as used in Rev. St. § 2640, requiring corporations for profit to keep a stockbook, open to the inspection of any stockholder, member, or creditor, means a creditor of the corporation, not a private creditor of a stockholder. *Mapleton Bank v. Standrod* (Idaho) 71 Pac. 119, 121.

Creditors of a corporation who happen also to be stockholders and directors of the corporation are not precluded by reason of such relation from commencing proceedings in involuntary bankruptcy against the corporation. In *re Rollins Gold & Silver Min. Co.* (U. S.) 102 Fed. 982, 985, 4 Am. Bankr. R. 327.

The term "creditor," in P. L. 1823, p. 53, entitled "An act to prevent fraud by incorporated companies," and authorizing creditors of such companies to institute proceedings to enjoin them from exercising their franchises, is not to be construed in a narrow and technical sense, but is used in a broad sense, so that where a corporation, by pledging its stocks and securities to a trust company, procures the issuance of certificates based on its assets, and agrees to pay a sum semiannually to the trust company for distribution among certificate holders, such holders are creditors, within the meaning of the statute. In this case it is held, in general terms, that if a party is so related to the corporation and its assets as to be entitled to a share of what is

divided among creditors—in other words, if the party can come into the proceedings as a claimant, and prove his claim, so as to be entitled to a dividend—he is a creditor. *Gallagher v. Asphalt Co. of America* (N. J.) 55 Atl. 259, 260.

### CREDITOR AT LARGE.

A simple-contract creditor, or "creditor at large," is one who has not established his debt by a judgment rendered, or has not an acknowledged debt, with an interest in the property of the debtor, or a lien thereon created by contract or by some distinct legal proceeding. *United States v. Ingate* (U. S.) 48 Fed. 251, 254.

A creditor at large is one who has not procured a lien on the property by some legal process as distinguished from a creditor who has obtained some process by which the property may be lawfully seized, and by which it is made liable either immediately or ultimately to be appropriated in satisfaction of his debt. *Wolcott v. Ashenfelter*, 23 Pac. 780, 784, 5 N. M. 442, 8 L. R. A. 691.

### CREDITOR HAVING A LIEN.

Within the meaning of Gen. St. c. 81, § 16, providing that if there is no redemption from a foreclosure sale by advertisement by the mortgagor, etc., the senior "creditor having a lien," legal or equitable, on the real estate, or some part thereof, subsequent to the mortgage, may redeem, etc., a second mortgagee is a "creditor having a lien," and may redeem on complying with the statute. *Nopson v. Horton*, 20 Minn. 268, 270 (Gil. 239, 242).

The term "creditor having a lien," as used in Gen. St. 1878, c. 66, § 323, and chapter 81, § 16, relative to the redemption of real estate, and giving a creditor having a lien a right to redeem, means a creditor having a provisional and inchoate lien, like that of an attachment on mesne process, and is not limited to liens fixed and definite, either by judicial determination, or by the contract of the party. *Atwater v. Manchester Sav. Bank*, 48 N. W. 187, 188, 45 Minn. 341, 12 L. R. A. 741.

Gen. St. 1878, c. 81, § 16, allowing redemption from a mortgage by a creditor having a lien, should not be construed in the limited sense of a personal creditor, but embraces one having the right of recourse to the land for the satisfaction of his claim or demand, though he may have no personal claim against the mortgagor. *Buchanan v. Reid*, 45 N. W. 11, 12, 43 Minn. 172.

### CREDITORS' BILL.

It has long been the practice for a creditor who has exhausted his remedies at law by procuring a personal judgment and an un-

availing execution to file what has always been called a "creditors' bill," to obtain from his debtor a discovery of his assets, and for the subjection thereof to the payment of the judgment. The relief thus sought can be obtained by compelling the debtor to surrender to the court such of his property as he has in his possession or under his control, and, if necessary, by the appointment of a receiver to sue for and collect any demands or choses in action that may be due to the judgment debtor. *Hudson v. Wood* (U. S.) 119 Fed. 764, 775.

A creditors' bill, properly speaking, is either a bill filed for an account of a decedent's assets and a settlement of the estate, or else it is a bill filed to set aside a fraudulent conveyance. *Yates v. Seitz*, 7 D. C. 11, 27.

A creditors' bill, in American practice, is a proceeding to enforce the security of a judgment creditor against the property or interest of his debtor. The action proceeds upon the theory that the judgment is in the nature of a lien such as may be enforced in equity, or by means of which a party seeks to remove a fraudulent conveyance out of the way of his execution. *Huneke v. Dold*, 32 Pac. 45, 47, 7 N. M. 5.

A creditors' bill is usually in the nature of a bill of discovery, and is intended not only to reach property described therein, but also every other species of assets; and even debts due the debtor, of which the creditor knows nothing, may be reached and applied to the claim. *Fink v. Patterson* (U. S.) 21 Fed. 602, 608.

A creditors' bill is a bill by which the creditor seeks to satisfy his debt out of some equitable estate of the defendant which is not liable to a levy and sale under execution at law, and not a naked bill to remove a fraudulent conveyance out of the way of his execution. *Newman v. Willetts*, 52 Ill. 98, 101.

A creditors' bill is a bill for relief against fraudulent transfers of property. A bill by a surety against a co-surety to compel contribution, and to set aside certain conveyances, and subject the property conveyed to the satisfaction of such liability, is not a creditors' bill. *Moore v. Baker* (U. S.) 34 Fed. 1, 3.

In the case of *Gould v. Torrance* (N. Y.) 19 How. Prac. 560, the court, in defining "creditors' bills," says that they are in the nature of additional or equitable executions, and are not in any sense a new suit. By these proceedings a summary mode is instituted for ascertaining what, if any, property a judgment debtor may have under his control or in his possession, subject to execution, and if any persons are owing him, and to what extent. *Feldenheimer v. Tressel*, 43 N. W. 94, 96, 6 Dak. 265.

The term "creditors' bill" was originally applied to those bills which were filed by creditors of the estate of a decedent against his personal representatives for the marshaling of the assets and for the demands of the creditors, according to their priority. They were, strictly speaking, bills to administer the estate of the decedent. At the same time, all bills brought by creditors for the purpose of securing their debts are creditors' bills. *Mallory v. Kirkpatrick*, 38 Atl. 205, 207, 54 N. J. Eq. 50.

A creditors' bill is an equitable proceeding quasi in rem, and may be conducted to a decree with only the constructive notice upon, and presence of, the debtor. It is directed rather against the thing than the person. *Cunningham v. City of Cleveland* (U. S.) 98 Fed. 657, 665, 89 C. C. A. 211.

A "creditors' bill," as used in Chancery Code, §§ 36, 37, is a bill by which a creditor seeks to satisfy his debt out of some equitable estate of the defendant which is not liable to levy and sale under an execution at law; but there is a creditors' bill of a different sort, very nearly allied to the former, by means of which a party seeks to remove a fraudulent conveyance out of the way of his execution. This he may file so soon as he obtains his judgment, and he is not required to show that he could not obtain satisfaction out of the other property of the defendant. To maintain a bill of the first character, the creditor must have exhausted his remedy at law by obtaining a judgment and getting an execution returned nulla bona. A naked bill to set aside a fraudulent conveyance, which seeks no discovery of any property belonging to the defendant, and which ought to be subjected to the payment of his judgment, is not a creditors' bill. *Newman v. Willetts*, 52 Ill. 98, 101.

#### CREDITORS' SUIT.

A creditors' suit is a proceeding by creditors to subject equitable assets to the payment of their debts. It may be maintained wherever the creditor has exhausted his remedies at law by failure to recover the amount of his debt by execution or other legal process, and there are equitable assets belonging to the debtor on which the judgment of the creditor is not a lien which the creditor desires to have subjected to the payment of the judgment. *McCartney v. Bostwick*, 32 N. Y. 53, 57.

A creditors' suit, strictly so called, is where the creditor seeks to satisfy his judgment out of the equitable assets of the debtor which cannot be reached on execution. Generally an action of this kind cannot be brought until the creditor has exhausted his remedy at law by the issue of an execution, and its return unsatisfied. The second class is where property legally liable to execution

has been fraudulently conveyed or incumbered by the debtor, and the creditor brings the action to set aside the conveyance as an obstruction to the enforcement of his lien. *State Bank of Ceresco v. Belk* (Neb.) 94 N. W. 617, 618.

#### CREDITS.

See "Solvent Credits."

Goods, effects, and credits, see "Goods."

The term "credit," when used in the chapter of the Code relating to taxation, includes every claim and demand for money, labor, merchandise, or other valuable thing, and money and property of any kind secured by deed of trust, mortgage, or otherwise. *Civ. Code Ala.* 1806, § 3906, subd. 4.

The term "credits," as used in the revenue act, means those solvent debts, not secured by mortgage or trust deed, owing to the person, firm, corporation, or association assessed. *Pol. Code Cal.* 1903, § 3617, subd. 6; *Pol. Code Idaho* 1901, § 1313, subd. 6; *Pol. Code Mont.* 1895, § 3680, subd. 6; *Rev. St. Utah* 1898, § 2505.

The term "credit," as used in the chapter relating to the revenue, includes every claim and demand for money, labor, or other valuable thing, and every annuity or sum of money receivable at stated periods; but pensions from the United States, and salaries or payments expected from services to be rendered, are not included in the above term. *Mills' Ann. St. Colo.* 1891, § 3782, cl. 5; *Comp. Laws N. M.* 1897, § 4019.

The word "credits," when used in the revenue act, shall be construed to include every claim or demand for money, labor, interest, or other valuable thing due or to become due, not including money on deposit. *Hurd's Rev. St. Ill.* 1901, p. 1493, c. 120, § 292, subd. 6.

The term "credit," as used in the chapter relating to the assessment of taxes, includes every claim or demand due or to become due for money, labor, or other valuable thing, every annuity or sum of money receivable at stated periods, and all money or property of any kind secured by deed, title bond, mortgage, or otherwise; but pensions of the United States, or any of them, or salaries or payments expected for services to be rendered, are not included in the above term. *Code Iowa* 1897, § 1309; *Manning v. Spry*, 96 N. W. 873, 874, 121 Iowa, 191.

The term "credits," whenever used in the revenue act, shall be held to mean the excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or services due or to become due to the person liable to pay taxes thereon, including deposits in banks or with persons in or out of the state, when added together

(estimating every such claim or demand at its true value in money), from and above the sum of legal, bona fide debts owing by such person. In making up the sum of such debts owing, there shall be taken into account no obligation to any mutual insurance company; nor any unpaid subscription to the capital stock of any joint stock company; nor any subscription for any religious, scientific, literary, or charitable purpose; nor any acknowledgment of any indebtedness, unless founded on some consideration actually received, and believed at the time of making such acknowledgment to be the full consideration therefor; nor any acknowledgment of debt made for the purpose of diminishing the amount of credits to be listed for taxation; nor any greater amount or portion of any liability as surety than the person required to make the statement of such credits believes that such surety is in equity bound and will be compelled to pay or contribute. Ann. St. Ind. T. 1899, § 4900.

The term "credits," whenever used in the act relating to taxation, shall be held to mean and include every claim and demand for money or other valuable thing, and every annuity or sum of money receivable at stated periods, due and to become due, and all claims and demands secured by deed or mortgage, due or to become due. Gen. St. Minn. 1894, § 1511; Rev. Codes N. D. 1899, § 1176; Rev. St. Tex. 1895, art. 5064. See, also, *State v. Moffett*, 67 N. W. 68, 69, 64 Minn. 292; *State v. Rand*, 40 N. W. 835, 836, 39 Minn. 502.

The term "credits," whenever used in the chapter relating to the revenue, shall be held to mean and include every deposit which the person owning, holding in trust, or having the beneficial interest therein, is entitled to withdraw in money on demand, and every claim or demand for money, interest, or other valuable thing due or to become due, or every annuity or sum of money receivable at stated periods, including pay and salaries accrued or due for any purpose whatever, and all income or interest accruing from government bonds, and all money loaned or invested, and all indebtedness secured by deed, contract, mortgage, or pledge of property of whatsoever kind: provided, that pensions due and to be received from the United States shall not be held to be annuities, within the meaning of the chapter. Rev. St. Mo. 1899, § 9123.

The word "credit" includes every demand for money, labor, or other valuable thing, whether due or to become due. *Cobbe's Ann. St. Neb.* 1903, § 10,404; *State v. Georgia Co.*, 112 N. C. 34, 38, 17 S. E. 10, 19 L. R. A. 485; *Sellers v. Barrett*, 57 N. E. 422, 424, 185 Ill. 466.

As used in the title relating to taxation, the term "credits" shall be held to mean the

excess of the sum of all legal claims and demands, whether for money or other valuable thing, or for labor or services due or to become due to the person liable to pay taxes thereon, including deposits in banks, or with persons in or out of the state, other than such as are held to be money, when added together (estimating every such claim or demand at its true value in money), over and above the sum of legal, bona fide debts owing by such person; but, in making up the sum of such debts owing, there shall be taken into account no obligation to any mutual insurance company, nor any unpaid subscription to the capital stock of any joint-stock company, nor any subscription for any religious, scientific, literary, or charitable purpose; nor any acknowledgment of any indebtedness, unless founded on some consideration actually received, and believed at the time of making such acknowledgment to be a full consideration therefor; nor any acknowledgment made for the purpose of diminishing the amount of credits to be listed for taxation; nor any greater amount or portion of any liability as surety than the person required to make the statement of such credits believes that such surety is in equity bound and will be compelled to pay or to contribute in case there be no securities: provided, that pensions receivable from the United States shall not be held to be credits; and no person shall be required to take into account, in making up the amount of credits, a greater portion of any credits than he believes will be received or can be collected, or any greater portion of any obligation given to secure the payment of rent than the amount that shall have accrued on any lease and remain unpaid. *Bates' Ann. St. Ohio* 1904, § 2730; *Payne v. Watterson*, 37 Ohio St. 121, 123; *Chapman v. First Nat. Bank*, 47 N. E. 54, 56, 56 Ohio St. 310; *Treasurer Fayette County v. People's & Drovers' Bank*, 25 N. E. 697, 701, 47 Ohio St. 503, 10 L. R. A. 196; *Payne v. Watterson*, 37 Ohio St. 121, 123; *Collett v. Springfield Sav. Soc.*, 7 Ohio Cir. Dec. 146, 154. This definition of "credits" applies equally to all persons and corporations, foreign or domestic. So that, where a duty is enjoined upon either to list for taxation its credits, the term "credits" implies the balance remaining after all bona fide debts are deducted from its legal claims and demands. *Hubbard v. Brush*, 55 N. E. 829, 831, 61 Ohio St. 252.

The term "credits" shall be held to mean the remainder due or to become due to a party after deducting from the amount of all legal debts, claims, and demands in his favor the amount of all legal debts and demands against him, whether such demands be payable in money, labor, or other valuable thing. But in ascertaining such remainder, no deduction shall be made for any obligation to any mutual insurance company, given for insurance, nor any subscription to the capital

stock of any joint-stock company, nor of any taxes assessed against the party, nor of any subscription to any religious, scientific, literary, or charitable purpose, nor of any acknowledgment of a liability not founded on a legal and valuable consideration, nor any more of any joint liability with others than the party honestly believes he will be compelled to pay, nor of any acknowledgment of debt or liability made for the purpose of diminishing the amount of credit to be returned for taxation. Civ. Code S. C. 1902, § 285.

The word "credits," as used in the laws for the assessment and collection of taxes, shall be construed to mean all solvent debts, claims, or demands owing or coming to any person, whether the evidence of such debts, claims, or demands be in writing or not, and shall be construed to embrace all moneys and credits constituting a capital employed in business out of this state, by himself, his agent, or other person for him, to his credit with a bank, firm, or person. Code Va. 1887, § 489.

The word "credits," as used in the chapter relating to the assessment of taxes, includes all claims and demands, whether owing upon bond, note, certificate, book account, or otherwise, and whether due or not, whether payable in money, property, labor, or services, except only such demands as are included in the term "money," as defined. Code W. Va. 1899, p. 199, c. 29, § 47.

The term "credits," as used in the chapter relating to taxation and revenue, includes every claim and demand for money, labor, or other valuable thing; and every annuity or sum of money receivable at stated periods, and all money in property of any kind, and secured by deed, mortgage, or otherwise; but pensions from the United States, or any state, and salaries or payments expected for services to be rendered, are not included in the above term. Rev. St. Wyo. 1899, § 1775.

The words "credits," in Rev. St. § 6336, is defined as whatever is due to the party from any other person, company, or corporation in the shape of labor, property, or money. It includes notes, mortgages, judgments, amounts due for goods or lands sold, for material furnished, for work and labor, and for professional services, but does not include money on hand or on deposit or call loans. Wasson v. First Nat. Bank, 8 N. E. 97, 99, 107 Ind. 206.

#### As assets.

The word "credits," as used by a testator in devising to a devisee a half "of any stock, notes, bonds, or other credits" of which he might die seised, was employed in the sense of "assets"—that is, something belonging to him, but of an intangible nature—and does not mean merely a balance of book accounts in favor of the credit side, or a

trust given or received from one to another; and an interest in an insurance business passed under the term "credits." Brandon v. Yeakle, 50 S. W. 1004, 1005, 66 Ark. 377.

#### Cash or money.

"Credits" is a generic term, and embraces that species of personal property known in law as "choses in action" and "contract rights." In commercial circles the term is applied to incorporeal personal property, as contradistinguished from chattels, and is applied alike to bonds, shares of stock in corporations, bills, notes, mortgages, and open accounts, in all their multifarious forms, and is so used in Laws 1895, p. 506, relating to taxation of credits other than bank stock, and will not be held to include money. Pullman State Bank v. Manning, 51 Pac. 464, 465, 18 Wash. 250.

The term "credits or rights," in a statute authorizing the charging of a person as trustee who has in his hands credits or rights of the principal debtor, means cash in the hands of the trustee, or debts due from him, belonging to the principal debtor. Sargeant v. Leland, 2 Vt. 277, 280.

#### Choses in action and notes.

Choses in action are not credits, within the statutes relating to trustee process. Perry v. Cotes, 9 Mass. 537; Lupton v. Cutter, 25 Mass. (8 Pick.) 298, 300.

"Credits," as used in a will providing for the payment of legacies out of book accounts and other credits, should not be restricted to such as are the proper subjects of book account, but include, at least, all moneys due the estate by promissory notes or bonds. Webster v. Wiggin, 34 Atl. 990, 19 R. I. 466.

A promissory note in possession of a bank as collateral security for a debt of the defendant in attachment is a credit, within the rule that all debts and credits of a defendant in the possession of another are attachable by garnishment. Deering & Co. v. Richardson-Kimball Co., 41 Pac. 801, 804, 106 Cal. 73.

Promissory notes were credits, within Rev. St. 1881, §§ 6332, 6333, 6336, from which the bona fide indebtedness of the taxpayer might be deducted, so as to reduce the amount for taxation. Moore v. Hewitt, 46 N. E. 905, 147 Ind. 464.

#### Contract for sale of land.

"Credit," defined in Comp. Laws 1885, p. 945, to mean and include every demand for money, labor, or other valuable thing, whether due or to become due, but not secured by lien on real estate, would not include an agreement executed to sell real estate on condition precedent; no payment being made, and no title transferred. Branner v. Thomas, 15 Pac. 211, 213, 37 Kan. 232.

The term "credit," as it is used in the statutes which provide for the assessment of property for taxation, is defined by section 802 of the Code as including every claim and demand for money, labor, or other valuable thing. A verbal agreement to sell a farm and deliver a conveyance therefor on the coming day creates a credit, within the meaning of the statute. *Perrine v. Jacobs*, 19 N. W. 861, 862, 64 Iowa, 79.

Claims and demands arising under contracts for the sale of land, in which title is retained by the seller, to be transferred on the completion of the payments therein provided, are a species of property denominated "credits," and are taxable under Act March 30, 1872 (Hurd's Rev. St. 1899, pp. 1393, 1394), defining credits as every claim or demand for money, interest, or other valuable thing, due or to become due. *Griffin v. People*, 56 N. E. 397, 398, 184 Ill. 275.

Credits, under 1 Comp. Laws 1897, § 3831; subd. 6, making taxable all credits of every kind belonging to inhabitants of the state, includes balances due under contracts for the sale of land and timber, the property to remain with the vendor until such balances were paid; the obligations resembling, not agreements to pay future rent or salaries, or promises to buy merchandise to be delivered in the future, but credits secured by mortgage. *City of Marquette v. Michigan Iron & Land Co. (Mich.)* 92 N. W. 934.

#### As debts.

"Credits" and "debts," as used in the bankruptcy act, authorizing mutual debts or credits between parties to be set-off, are correlative. What is a debt on one side is a credit on the other, so that the term "credits" can have no broader meaning than the term "debts." *Libbey v. Hopkins*, 104 U. S. 303, 309, 26 L. Ed. 769.

As used in Revenue Law, § 27, authorizing individual taxpayers, except banks, to deduct the bona fide debts owing by them from the gross amount of their credits, and prohibiting any deduction from the value of any other item of property for taxation than credits, the word "credits" was not intended to include notes, securities, accounts due, or other credits which are the assets of any bank, banker, broker, or stockjobber, but was intended to cover debts due the taxpayers, growing out of other ordinary business transactions. *Bressler v. Wayne County*, 49 N. W. 787, 789, 32 Neb. 834, 13 L. R. A. 614.

The term "credits," as used in Code Civ. Proc. § 544, providing that any person owing debts to the defendant, or having in his possession or under his control any credits or other personal property belonging to the defendant, may be required to attend before the court, etc., was intended to mean something belonging to the defendant, but in the possession and control of the garnishee, like

promissory notes or other evidences of indebtedness of third persons, which may be delivered up or transferred to the sheriff, and will be treated as separate and distinct from the word "debts," which are moneys owing by the garnishee to the defendant, which may be paid over to the sheriff. Hence an attachment of certain credits belonging to the defendant does not give the attaching creditor a lien on or right to a debt owing to the defendant by the party served with the writ. *Gow v. Marshall*, 27 Pac. 422, 423, 90 Cal. 565.

The word "credits," as used in Rev. Laws, c. 189, § 19, providing for trustee process against the "goods, effects, or credits" of the principal defendant, is the correlative of "debts"; and the use of that word in describing what choses in action can be trusted means that liquidated demands alone can be reached. *Wilke v. Mahaney*, 67 N. E. 337, 338, 183 Mass. 455, 62 L. R. A. 813 (citing *Hugg v. Booth*, 24 N. C. 282).

"Credits," as used in Revenue Law, § 18, providing that, when a person is doing business in more than one county, the property and credits existing in any of the counties are to be listed, and taxes in that county and credits not existing in or pertaining especially to the business in any one county are to be listed and taxed in that county where his principal place of business may be, includes debts which are due. *Jones v. Seward County*, 4 N. W. 946, 949, 10 Neb. 154.

#### Execution.

An execution in the hands of a sheriff for service is not "goods, effects, or credits" of the execution creditor, within the meaning of the statute empowering a creditor to attach the goods, effects, and credits of his debtor in the hands of a third person where they may be found, and who for this purpose is considered as a trustee of the defendant. *Sharp v. Clark*, 2 Mass. 91, 93.

#### Judgment debts.

Within the meaning of Pub. St. c. 245, § 19, providing for the garnishment of credits, the word "credit" is the correlative of "debt," so that the existence of a debt on the one part constitutes a credit on the other; and the general rule being that, where one person is indebted to another, he may be charged as the trustee of his creditor, the nature of the indebtedness, barring exemptions, is immaterial, and the statute is applicable to judgment debts as well as others, both in reason and equity. *Isabelle v. Le Blanc*, 89 Atl. 436, 437, 68 N. H. 409.

#### Land fraudulently conveyed.

Under a statute authorizing the institution of trustee process to reach goods, effects, and credits of the debtor, it is held that land fraudulently conveyed is neither goods,

effects, nor credits, within the statute. *Hunter v. Case*, 20 Vt. 195, 196.

#### **Legacies in hands of executor.**

Pecuniary legacies in the hands of an executor in no proper sense can be denominated "credits," so as to be subject to trustee process. Without the relation of creditor and debtor, there can be no such thing as a credit; but a legatee can in no proper sense be said to be the creditor of the testator, nor a testator, merely as such, the debtor of a legatee. *Barnes v. Treat*, 7 Mass. 271, 274.

"Credits," as used in the term "effects and credits," in trustee writs, authorizes the attachment of a legacy in the hands of a trustee. *Cummings v. Garvin*, 65 Me. 301, 302.

#### **Liability of stockholders.**

The double liability of the stockholders of a bank is not a right or credit of the bank, which Rev. St. 1894, § 2908 (Rev. St. 1881, § 2671), authorizes the assignees for the benefit of creditors to collect, but is enforceable only by the creditors. *Runner v. Dwiggins*, 46 N. E. 580, 581, 147 Ind. 238, 36 L. R. A. 645.

#### **Mortgage loan.**

"Credits," as used in Rev. St. § 2731, providing that all money, credits, investments in bonds, stocks, or otherwise, of persons residing in the state, should be subject to taxation, should be construed to include a loan of money secured by mortgage in any form; it being a legal claim for money not included in the definition of "money." *Myers v. Seaberger*, 12 N. E. 796, 797, 45 Ohio St. 232.

#### **As offsets.**

The word "credits," in its most comprehensive signification, as contradistinguished from "debts," might possibly be held to embrace all that is necessary in a provision for the presentation of claims against a decedent, requiring an affidavit that all notes, legal offsets, payments, and credits have been allowed. But it has another and more restricted meaning, which would narrow it down to a signification nearly synonymous with "payments," which clearly would not fill the requirements of the statute, as in this sense it certainly does not include offsets. *Walters v. Prestidge*, 30 Tex. 65, 73.

#### **As property.**

See "Personal Property"; "Property."

#### **Right of redemption.**

In construing a statute providing that persons garnished are required to appear and answer such interrogatories as shall be propounded touching goods, chattels, rights, and

credits of the judgment debtor, the courts say that it would seem that the words here used—particularly "rights and credits"—concerning which such garnishee must make disclosure, are sufficiently comprehensive to include the right of redemption in mortgaged or pledged personal property. *Burnham v. Doolittle*, 15 N. W. 606, 608, 14 Neb. 214.

#### **Shares of stock.**

Stocks are not credits, and credits are not stocks, within the meaning of the revenue act of the state, and the law does not authorize the deduction of the debts of the individual shareholder in a bank from his shares of stock. *Commercial Nat. Bank v. Chambers*, 61 Pac. 560, 561, 21 Utah, 324, 56 L. R. A. 346.

The word "credit," used in the chapter of the statute providing for the assessing and collecting of taxes, and defined in Gen. St. 1889, par. 6847, as meaning and including every demand for money, labor, or other valuable thing, whether due or to become due, but not secured by lien on real estate, does not include shares of stock in a national bank or other corporation. It is a strained construction of the word "credit" or the word "demand" to hold it to include stocks in a corporation. Shares of stock are rather certificates of an interest in the enterprise and in the property, of every description, subject to the liabilities of the corporation, rather than a demand for anything. *Dutton v. Citizens Nat. Bank*, 36 Pac. 719, 720, 53 Kan. 440.

The term "credits," within the meaning of Rev. St. §§ 2730, 2731, in reference to taxation, does not include national bank stock. *Niles v. Shaw*, 34 N. E. 162, 163, 50 Ohio St. 370.

Under the Louisiana laws, stock in an incorporated company is property, not a credit, and is therefore transferable and salable by actual contract and a delivery of the certificate, and can be pledged in the same manner. *New Orleans Nat. Banking Ass'n v. Wiltz* (U. S.) 10 Fed. 330, 332.

In Comp. Laws, c. 77, § 27, providing that a taxpayer, in listing his credits for assessment, may deduct the amount of all bona fide debts owing by him, the term "credits" includes investments in shares of national bank stock. *Bressler v. Wayne County*, 41 N. W. 356, 357, 25 Neb. 468.

Credits are property, by the Constitution of California. They are property in which other money capital is invested than such as is invested in national bank shares; and accordingly where by law debts owed by a private person were deducted from his credits before the assessment of such credits, and no such deduction was made in assessing national bank shares, there was a discrimination against the bank. *Miller v. Heilbron*, 58 Cal. 133, 138.

**Tangible property.**

"As ordinarily used in trade and business, the word 'credit' suggests nothing more than a chose in action. In bookkeeping it is the side of an account on which payment is entered; opposed to debit, as this article is carried to one's credit, and that to one's debit." Cent. Dict. As used in bookkeeping, Worcester gives this definition: "That side of a personal account on which everything is entered that answers as an offset to a debt, as to carry money, goods or notes to the credit of A. B.; that which is entered in an account as an offset to a debt, or for which the party in whose favor the entry is made becomes the creditor of another, as the credits exceed the debts." The word "credit" in Laws 1885, c. 334, providing that, when common territory is detached from one school district and annexed to another, such latter district shall be liable for its just share of liabilities and indebtedness, and shall receive its just share of the credits from the district from which such territory was detached, includes the value of the school sites, schoolhouse, furniture, and fixtures thereof, as well as the school tax levy, the county school tax, and cash in the treasury, less the debts and liabilities of the school district, as it is the universal rule, requiring no citation of authorities, that the statute is to be interpreted not only by its exact words, but also by its apparent general purpose. A thing which is within the intention of the makers of the statute is as much within the statute as if it were within the letter. Board of School Directors of Town of Pelican v. Board of School Directors of Town of Rock Falls, 51 N. W. 871, 873, 81 Wis. 428.

"Credits," as used in Laws 1885, c. 334, § 2, providing that, when any territory is detached from one school district and annexed to another, such latter shall receive its share of the credits, does not include school sites, schoolhouses, and furniture and fixtures, or the value thereof, or any tangible property whatever. (Per Pinney, J., dissenting.) School Directors of Town of Pelican v. School Directors of Town of Rock Falls, 81 Wis. 428, 52 N. W. 1049.

**Trusts.**

"Credits," and "debts," as used in the bankruptcy act, authorizing mutual debts or credits between parties to be set off, are correlative. What is a debt on one side is a credit on the other, so that the term "credits" can have no broader meaning than the term "debts." We find no warrant in the act for extending the term "credits," so as to include trusts. Generally we know that "credit" and "trust" are not synonymous terms. They have distinct and well-settled meanings, and there is no reason why they should be confounded in interpreting the

bankruptcy act. *Libbey v. Hopkins*, 104 U. S. 303, 309, 28 L. Ed. 769.

The term "credits and debts" in the bankruptcy act, authorizing set-offs in proof of claims, is more comprehensive than the term "mutual debts" in the statute of set-offs. The term "credit" is synonymous with "trust," and the trust or credit need not be of money on both sides, but, if one party intrusts the other with goods or value, it will be a case of mutual credit. *Catlin v. Foster* (U. S.) 5 Fed. Cas. 803, 805.

"Credits," as used in a statute providing that every person having any goods, effects, or credits of the principal defendant intrusted in his hands after the service of the writ in trustee process may be summoned as a trustee, does not include every cause of action ex contractu, but extends only to such class of debts as are the ordinary result of a contract, either express or implied, creating a fiduciary relation. It is the *fidel-commissarius* of the civil law, and the factor of the common law. *Barker v. Esty*, 19 Vt. 131, 135.

**Uncollected insurance premium.**

The plain meaning of the word "credits," employed in the revenue law, includes the uncollected premiums of an insurance company. Its language is general. "All rights, credits and open accounts and other obligations." They are broad enough to cover the uncollected premiums of the company. *State v. Board of Assessors*, 18 South. 462, 470, 47 La. Ann. 1498.

**CREED.**

A "religious creed" is the common belief of a religious sect. "Each sect has a creed which necessarily excludes all others. Different creeds constitute the different sects. Each sect has a particular name, and that makes it a denomination. What makes it a 'creed' is the fact that it is the common belief of the sect; not its length, or its brevity. It would be impossible to have a sect or denomination unless there were at least some one ground on which they believed, and, so far as there was a common belief, just so far they must have a creed or covenant; and the case is not changed whether the creed contains one article of faith, or thirty-nine. A man's 'creed' is what he believes. Trinitarians believe in the Trinity, or the tri-unity of God; that so far is their creed. Unitarians believe in the unity of God." *Hale v. Everett*, 53 N. H. 9, 92, 16 Am. Rep. 82.

**CREEK.**

"Creek" signifies a small bay, inlet, or cove, according to Webster; but more gen-



erally, in this country, it is employed to mean a small river, and does not cease to be such merely because its course may be opposed by some obstruction, natural or artificial, since it will still flow. *French v. Carhart*, 1 N. Y. (1 Comst.) 96, 107.

"Creek" imports a recess, cove, bay, or inlet in the shore of a river, and not a separate or independent stream, though sometimes used in the latter meaning; and a creek which is merely a channel of a river between an island and the mainland is still a part of the river. *Shermerhorn v. Hudson River R. Co.*, 38 N. Y. 103, 104.

Under the act of Congress of March 3, 1811, providing that every person who owns a tract of land bordering on any river, creek, bayou, or water course in the territory of Orleans, and not exceeding in depth 40 arpents, shall be entitled to a preference on becoming a purchaser of any vacant tract of land adjacent thereto, the words "river, creek, bayou, or water course" mean a navigable stream. *Surgett v. Laprice*, 49 U. S. (8 How.) 48, 69, 12 L. Ed. 982.

The terms "rivers," "haven," "creek," "basin," "bay," or "arm of the sea," in Rev. St. § 5346 [U. S. Comp. St. 1901, p. 3630], providing that an assault committed with a dangerous weapon, or with intent to perpetrate a felony, on board of any vessel belonging in whole or in part to the United States, while in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular state, are limited to the high seas and other waters connected with them, and do not include the rivers connecting the Great Lakes. *Ex parte Byers* (U. S.) 82 Fed. 404, 405.

#### As boundary.

The use of the word "creek," in a deed which fixes one boundary of land conveyed at a tide-water creek, carries the boundary to the center of the creek, unless limited by special words, even though the tide wholly ebbs at low water. *City of Boston v. Richardson*, 95 Mass. (13 Allen) 146, 155.

Where a creek flowing into a lake, and maintaining the same level as the lake, is used to designate the boundary of land which is also bounded on the lake, which is navigable, the boundary will only extend to low-water mark on the creek. *Fletcher v. Phelps*, 28 Vt. 257, 261.

A conveyance giving one call of the land conveyed as being down the "creek," with the several meanders thereof, refers to the water in the bed of the creek, and not the top of the bank, and therefore the boundary is fixed at low-water mark. *McCulloch's Lessee v. Aten*, 2 Ohio, 307, 309.

#### CREEK CLAIM.

A "creek claim," in mining law, is a tract of 100 yards square, one side of which abuts on the creek, or, rather, extends to the middle thread of it. *Chapman v. Toy Long* (U. S.) 5 Fed. Cas. 497, 498.

#### CREOLE.

The word "Creole" implies a person of mixed African and European blood, though the term is used in various other senses. *Parker v. State*, 23 South. 664, 118 Ala. 655.

#### CREOSOTE.

See "Soluble Creosote."

While creosote may be termed an "oil," still it is not known as a "distilled oil." In *re Southern Pac. Co.* (U. S.) 82 Fed. 311, 313

#### CRESYLIC.

The word "cresylic," when applied to distinguish an ointment made of soap and the article known in commerce as "cresylic acid," is descriptive of the nature and quality of the compound. *Carbolic Soap Co. v. Thompson* (U. S.) 25 Fed. 625, 626.

#### CREVICE.

In 2 Mills' Ann. St. § 3152, providing that a discovery shaft shall disclose a well-defined crevice at the depth of at least 10 feet from the lowest part of the rim of such shaft, clearly the term "crevice" means a mineral-bearing vein. *Beals v. Cone*, 62 Pac. 948, 958, 27 Colo. 473, 83 Am. St. Rep. 92 (citing *Bryan v. McCalig*, 10 Colo. 309, 15 Pac. 413; *Van Zandt v. Argentine Min. Co.* [U. S.] 8 Fed. 725; *Terrible Min. Co. v. Argentine Min. Co.* [U. S.] 89 Fed. 583; *Cheesman v. Shreeve* [U. S.] 40 Fed. 787).

#### CREW.

"The word 'crew' has several well-known significations. In its general and popular sense it is equivalent to 'company.' Thus, for example, we find the most general definition laid down in Johnson's Dictionary to be a company of people associated for any purpose. The general sense of the word 'crew,' then, is equivalent to 'ship's company.'" *United States v. Winn* (U. S.) 28 Fed. Cas. 733, 734.

"Crew," as used in articles of agreement between master and seamen for employment during a voyage, providing, among other things, "the crew, if required, to be transferred to any other ship in the same employ," did not necessarily mean the crew

as a whole, but would apply to a transfer of less than the whole. *Frazer v. Hatton*, 2 C. B. (N. S.) 512, 526.

Seamen become obligated to merchant vessels as a part of the crew from the time they sign the shipping articles, and from that time they may incur the penalties of desertion; they do not have to actually go upon board the vessel or enter upon performance of their duties. *Tucker v. Alexandroff*, 22 Sup. Ct. 185, 202, 183 U. S. 699, 46 L. Ed. 396.

#### Cook.

"Crews of vessels," used in the treaty of July 4, 1827, between the United States and the kingdom of Norway and Sweden, article 13, providing that all differences arising between the captains and "crews of vessels" belonging to the kingdom shall be settled by the consuls thereof without the interference of the local authorities, should be construed as including all of the ship's company—all the seamen, and all officers except the captain. "The crew of a vessel—the ship's company—in a general sense, comprises all persons who, in pursuance of some contract or arrangement with the owner or master, are on board the same, aiding in the navigation thereof; and it matters not whether the contract is verbal or in writing, or for a long or short voyage or period"; and hence one who shipped as cook on a Norwegian steamship is a member of the crew of such ship, and any difference between him and the captain should be settled by the Norwegian consul. *The Mario* (U. S.) 41 Fed. 286, 287.

#### Master and officers.

The term "crews" as clearly includes the master and officers of a vessel as it does the sailors. *Millaudon v. Martin* (La.) 6 Rob. 534, 540.

"Crew," as used in Rev. St. § 5359 [U. S. Comp. St. 1901, p. 3639], punishing any one of the crew of a vessel for making revolt, includes the mate and all other officers inferior to the master. *United States v. Huff* (U. S.) 13 Fed. 630, 637.

Johnson's Dictionary says that the "crew of a ship," or "ship's crew," means the company of the ship, illustrating it by a verse from Dryden's translation of the *Æneid*: "The anchor dropped, his crew the vessel moor." Falconer, in his *Marine Dictionary*, says: "The crew of a ship comprehends the officers, sailors, seamen, marines, ordinary men, servants, and boys;" adding, "but exclusive of the captains and lieutenants in the French service." As used in 4 Stat. 776, authorizing the punishment of the master or other officer of a vessel for beating, wounding, or imprisoning any of the crew without justifiable cause, it is equivalent to "ship's company," and includes the officers.

*United States v. Winn* (U. S.) 23 Fed. Cas. 733, 734.

#### Passenger.

A passenger on a ship has not been included, from the time of the Laws of Oleron down to the present day, as composing a part of the "crew" or the ship's company, and therefore he is not within a statute making certain acts on the part of a member of the crew or ship's company criminal. *United States v. Libby* (U. S.) 26 Fed. Cas. 928, 931.

#### CRIB.

The word "crib" has various definitions, as the manger in a stable, a bin, a frame for a child's bed, a small habitation; and is used in the latter sense by Shakespeare. Nowhere else do we find it used in the sense of a building. *Wood v. State*, 18 Fla. 967, 969.

A crib, according to Webster, means, in the United States, a small building, raised on posts, for storing Indian corn. We are not aware that it has ever been used in that sense in England, nor has it been used in any of the acts of the Assembly of the state; so that it seems that a "barn" and a "crib" are houses of a different kind, and used ordinarily for different purposes, and they are so known throughout the greater part of the state. The burning of a "crib with corn in it" is, then, a different offense from burning a "barn with corn in it," and a prisoner charged with the latter cannot be convicted on proof of his having committed the former. *State v. Laughlin*, 53 N. C. 455, 458.

#### Of corn.

A "crib of corn," used in a receipt binding the receiptor to return out of the next year's crop and hold the same subject to order, denotes an indefinite quantity, not merely because the capacity of the crib is not stated, but because the expression in common usage does not necessarily denote a crib full of corn; and hence the language of the instrument should be construed to mean that the receiptor received and would return a quantity of corn which was in a certain crib, and it was error for the court to allow plaintiff to prove the dimensions of the crib and the quantity of corn which a crib of such dimensions would hold, and to refuse to allow defendant to show the actual quantity of corn which was in the crib. *Masterson v. Goodlett*, 46 Tex. 402, 408.

#### CRIBS.

The word "cribs," used in the meat trade, means "clear ribs." *Pepper v. Western Union Tel. Co.*, 11 S. W. 783, 87 Tenn. (3 Pickle) 534, 4 L. R. A. 660, 10 Am. St. Rep. 699.

## CRIM. CON.

The abbreviation "crim. con.," as used in a newspaper article stating that a city was enjoying one of the "juiciest crim. con. scandals of the day," are usually understood as an abbreviation for "criminal conversation," and these words have of themselves acquired a fixed and universal significance. *Gibson v. Cincinnati Inquirer* (U. S.) 10 Fed. Cas. 311, 312.

## CRIME.

See "Capital Crime or Offense"; "Commission (Of Crime)"; "Common-Law Crimes"; "Constructive Crime"; "Continuous Crime"; "Induced Crime"; "Infamous Crime"; "Instantaneous Crime."

Any crime, see "Any."

Crime against wife, see "Against."

Like crime, see "Like."

Other crime, see "Other."

See, also, "Criminal Offense."

A "crime" is defined to be "an act committed or omitted in violation of a public law either forbidding or commanding it." *Pounder v. Ashe*, 54 N. W. 847, 848, 36 Neb. 564 (citing 4 Bl. Comm. 5); *Wilkins v. United States* (U. S.) 96 Fed. 837, 841, 37 C. C. A. 588; *State v. City of Savannah* (Ga.) R. M. Charit. 250, 255, 257; *Campbell v. Supreme Conclave Improved Order Heptasophs*, 49 Atl. 550, 553, 66 N. J. Law, 274, 54 L. R. A. 576; *State v. Brazier*, 37 Ohio St. 78, 79; *Slaughter v. People* (Mich.) 2 Doug. 334, 335, note; *State v. Bishop*, 7 Conn. 181, 185; *City of Breeley v. Hamman*, 20 Pac. 1, 12 Colo. 94; *City of Helena v. Gray*, 17 Pac. 564, 7 Mont. 486; *Moundville v. Fountain*, 27 W. Va. 182, 199; *City of Kansas v. Clark*, 68 Mo. 588, 589; *State v. Peterson*, 41 Vt. 504, 511. By this is meant a wrong of which the law takes cognizance as injurious to the public, and punishes in what is called a "criminal proceeding," prosecuted by the state in its own name, or the people of the sovereign. In *re Bergin*, 81 Wis. 383, 386 (citing 1 Bish. Cr. Law, § 32); *Pounder v. Ashe*, 36 Neb. 564, 571, 54 N. W. 847; *State v. Thibodeaux*, 19 South. 680, 681, 48 La. Ann. 600; *State v. McConnell*, 46 Atl. 458, 459, 70 N. H. 158. It is otherwise defined as "an act of omission or commission, punishable as an offense against the state." *Campbell v. Supreme Conclave Improved Order Heptasophs*, 49 Atl. 550, 553, 66 N. J. Law, 274, 54 L. R. A. 576; *Bohner v. Bohner*, 64 N. W. 700, 701, 46 Neb. 204; *State v. Ostwalt*, 24 S. E. 660, 661, 118 N. C. 1208, 32 L. R. A. 396.

A "crime" or "public offense" is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the

following punishments: (1) Death; (2) imprisonment; (3) fine; (4) removal from office; (5) disqualification to hold or enjoy any office of honor, trust, or profit under this state; (6) other penal discipline. Rev. Codes N. D. 1899, §§ 6802, 7741; Pen. Code S. D. 1903, § 3; Rev. St. Utah 1898, § 4061; Rev. St. Okl. 1903, §§ 1924, 5138; Comp. Laws N. M. 1897, § 1041; Ann. Codes & St. Or. 1901, § 1228; Pen. Code Cal. 1903, § 15; Gen. St. Minn. 1894, § 6287; Comp. Laws Nev. 1900, § 3986; Pen. Code N. Y. 1903, § 3; *People v. McNulty*, 29 Pac. 61, 63, 93 Cal. 427; *People v. Homes*, 50 Pac. 675, 680, 118 Cal. 444; *State v. Hogan*, 78 N. W. 1051, 1052, 8 N. D. 301, 45 L. R. A. 166, 73 Am. St. Rep. 759; *People v. Markell*, 45 N. Y. Supp. 904, 907, 20 Misc. Rep. 149; *Wheeler v. Donnell*, 110 Cal. 655, 656, 43 Pac. 1.

A "crime" is a wrong which the government notices as injurious to the public. *United States v. Lee Huen* (U. S.) 118 Fed. 442, 445.

"Crimes and misdemeanors" are offenses against statutes, which involve the punishment prescribed therein. *State v. Brazier*, 37 Ohio St. 78, 79.

A "crime" is an offense against the sovereignty, and can only be taken notice of and punished by the sovereignty offended, and others have no concern in it, and must treat it as a matter of indifference. *People v. Williams*, 24 Mich. 156, 163, 9 Am. Rep. 119; *People v. Martin*, 76 N. Y. Supp. 953, 955, 38 Misc. Rep. 67.

All violations of penal statutes are, in popular language, "criminal," and are "crimes." In *re Howard*, 26 Vt. 205, 206.

"A crime is a voluntary act proceeding from a wicked motive." In *re Eaves* (U. S.) 30 Fed. 21, 26.

The definition of a "crime" is that which the law declares to be the offense, and which you are to take and apply to the evidence to see whether the evidence makes out such a state of case as the law says shall be established to make out the crime. *United States v. Howell* (U. S.) 56 Fed. 21, 23.

An offense made indictable by statute is a "crime," within the meaning of the Constitution and law of Congress on the subject of habeas corpus. In *re Clark* (N. Y.) 9 Wend. 212, 222.

## Classification.

All "crimes," it is contended, are divided into three classes: Treasons, felonies, and misdemeanors. All the crimes known to our law that have been classified at all by any of our statutes are misdemeanors and high misdemeanors. *Johnson v. State*, 29 N. J. Law (3 Dutch.) 453, 464.

**Act and intention, or criminal negligence, necessary.**

A "crime" or "misdemeanor" shall consist in the violation of public law, in the commission of which there shall be a union or joint operation of the act and intention, or criminal negligence. Pen. Code Ga. 1895, § 31; *Kent v. People*, 9 Pac. 852, 857, 8 Colo. 563; *People v. White*, 34 Cal. 183, 187; *Yoes v. State*, 9 Ark. (4 Eng.) 42, 43; *State v. Parkersburg Brewing Co.*, 45 S. E. 924, 925, 53 W. Va. 591. See, also, Gen. St. Colo. § 689; *City of Greeley v. Hamman*, 20 Pac. 1, 12 Colo. 94. The mere fact of going to a place with the intention of doing an unlawful act will not of itself subject the party to the punishment denounced against such act, unless he also carries his intention into effect. *Yoes v. State*, 9 Ark. 42, 43.

To constitute a "crime" against human laws, there must be, first, a vicious will, and, secondly, an unlawful act consequent on such vicious will. *People v. McCann*, 16 N. Y. 58, 68, 69 Am. Dec. 642.

"Crimes" are offenses against the public. They are those acts or attempts which tend to the prejudice of the whole community, and as a general rule the criminal intent and the act charged to be criminal must concur to constitute a "crime." *Gorman v. Budlong*, 49 Atl. 704, 706, 23 R. I. 169, 55 L. R. A. 118, 91 Am. St. Rep. 629.

To constitute a "crime," there must in all cases be a criminal intent. *People v. Stark*, 12 N. Y. Supp. 688, 690, 59 Hun. 51; *Walker v. State*, 45 S. E. 608, 609, 118 Ga. 757.

**All grades of offenses included.**

"The word 'crime' has always been considered as embracing every species of indictable offense." *In re Voorhees*, 32 N. J. Law (3 Vroom) 141, 147.

The term "crime," when used in any statute, shall mean any violation of law liable to punishment by criminal prosecution. Code Miss. 1892, § 1502.

Any offense against the public good and the first principles of justice and common honesty is a crime; and that the violation of a statute law made for the universal protection of the community, and inflicting a penalty for the fraudulent privation of property, is of this description, there exists no doubt. *State v. Bishop*, 7 Conn. 181, 185 (citing 2 Hawk. P. C. c. 26).

"Crime," in its general sense, means any indictable offense, but in common usage it denotes such offenses as are of a deeper and more atrocious dye, as distinguished from smaller offenses, which are denominated "misdemeanors." *Lehigh County v. Schock*, 7 Atl. 52, 53, 113 Pa. 373; *Callan v. Wilson*, 8 Sup. Ct. 1301, 1303, 127 U. S. 540, 32 L. Ed. 223; *Lord v. State*, 23 N. W. 507,

509, 17 Neb. 526; *Slaughter v. People* (Mich.) 2 Doug. 334, 335, note; *Van Meter v. People*, 60 Ill. 168, 170; *Commonwealth v. Curren* (Pa.) 2 Chest. Co. Rep. 893, 895, 897; *Price v. Lancaster County*, 24 Pa. Co. Ct. R. 225, 231; *In re Bergin*, 81 Wis. 383, 386; *Pounder v. Ashe*, 36 Neb. 564, 571, 54 N. W. 847; *State v. Peterson*, 41 Vt. 504, 511; *In re Hughes*, 61 N. C. 57, 64.

"Crime" is synonymous with "misdemeanor," and includes every offense below felony punished by indictment, as an offense against the public. *Kentucky v. Dennison*, 65 U. S. (24 How.) 66, 76, 16 L. Ed. 717; *State v. Thibodeaux*, 19 South. 680, 681, 48 La. Ann. 600; *In re Clark* (N. Y.) 9 Wend. 212, 222.

The term "crime" shall be construed to mean every offense, as well misdemeanor as felony, for which any punishment by imprisonment or fine, or both, may by law be inflicted. Gen. St. Kan. 1901, § 2311; Rev. St. Mo. 1890, § 2396; *State v. Blitz*, 71 S. W. 1027, 1030, 171 Mo. 530; *State v. Linthicum*, 68 Mo. 66, 68.

Offenses in this state are distinguishable into what may be termed "crimes" and "misdemeanors," the former punishable capitally, or by confinement in the state prison, and the latter by fine, or imprisonment in the county jail. On the trial of these cases there is no difference in the mode of trial or the right of the respondent, and no reason exists in this state why one indicted for that which would be a felony at common law may not be convicted of a misdemeanor; the conviction would bar a subsequent prosecution, as well as a conviction for theft, under an indictment for burglary or robbery. *State v. Scott*, 24 Vt. 127, 130.

Crimes are punished capitally, or by confinement in the state prison, while misdemeanors are punished by fine, or imprisonment in the county jail. *Corbett v. Sullivan*, 54 Vt. 619, 622.

The word "crime," in the provision of the federal Constitution that a person charged in any state with treason, felony, or other crime, who shall flee from justice and be found in any other state, shall, on demand by the executive authority of the state from which he fled, be delivered up and be removed to the state having jurisdiction of the crime, "embraces every act forbidden and made punishable by the law of the state." *People v. Brady*, 56 N. Y. 182, 188; *Kentucky v. Dennison*, 65 U. S. (24 How.) 66, 76, 16 L. Ed. 717; *In re Burke* (U. S.) 4 Fed. Cas. 732, 734; *In re Hughes*, 61 N. C. 57, 64; *In re Leary* (U. S.) 15 Fed. Cas. 106, 110. It means every offense, from the highest to the lowest in grade, and embraces those which are called "misdemeanors," as well as treason and felony. *State v. Stewart*, 19 N. W. 429, 432, 60 Wis. 587, 50 Am. Rep. 388; *Ex parte Reggel*, 5 Sup. Ct. 1148, 1152, 114 U. S. 612, 29 L.

Ed. 250; *Morton v. Skinner*, 48 Ind. 123, 124; *State v. Peterson*, 41 Vt. 504, 511. See, also, *Hyatt v. New York*, 23 Sup. Ct. 456, 461, 188 U. S. 691, 47 L. Ed. 657. The word "crime," being used without qualification in 2 Gen. St. p. 1397, § 1, providing that no person offered as a witness in any action or proceeding of a civil or criminal nature shall be excluded by reason of his having been convicted of crime, must be held to be used in its general sense to include any crime. *State v. Henson*, 50 Atl. 468, 469, 66 N. J. Law, 601.

"Crimes," as used in Pen. Code, § 531, declaring that the conviction of a witness of any crime may be proved either by a record, or cross-examination of the witness, means both felonies and misdemeanors. *State v. Sauer*, 44 N. W. 115, 116, 42 Minn. 258.

#### **Author of offense essential.**

A necessary part of the definition of every crime is the designation of the author of the offense upon whom the penalty is to be inflicted. When a statute designates an act of the corporation as a "crime," and prescribes punishment therefor, it creates a criminal offense which would not otherwise exist, and can only be committed by a corporation, and the designation of the corporation enters into the definition of the crime. *Paragon Paper Co. v. State*, 49 N. E. 600, 603, 19 Ind. App. 314.

#### **Bastardy.**

Bastardy, being punished by a fine, is a crime. *State v. Ostwalt*, 24 S. E. 660, 661, 118 N. C. 1208, 32 L. R. A. 396.

#### **Charges and specifications against clergyman.**

The word "crime" has a generally accepted, clear legal meaning, and, where individual rights or interests in property hinge upon the definition of this word, such meaning must prevail, and charges and specifications on which the clergyman of a church is tried when rights of property are involved is not a crime. *Pounder v. Ashe*, 36 Neb. 564, 571, 54 N. W. 847.

#### **Disturbing religious meeting.**

The term "crime" is not broad enough to include petty offenses subject to summary convictions by a magistrate, such as disturbing religious meetings. Thus in the Code the crimes are divided into "felonies" and "misdemeanors," and no provision is found for a trial of either before a magistrate as such; yet the Code at length prescribes the form and method of procedure in the cases of bastardy, proceedings under the poor laws, and proceedings against vagrants and disorderly persons. These are termed in the Code, not "prosecutions for crimes," but "special proceedings of a criminal nature." Proceedings against vagrants, and in certain cases against disorderly persons, are as essentially

punitive as any sentence imposed for crime. It is therefore apparent that too broad a significance should not be given to the term "crime" as used in the Code. *Steinert v. Sobey*, 44 N. Y. Supp. 146, 148, 14 App. Div. 506.

#### **Drunkenness or intoxication.**

Laws 1896, c. 112, § 40, providing that any person intoxicated in a public place is a disorderly person, and shall be punished by fine or imprisonment, or both, makes such intoxication a crime. *People v. Markell*, 45 N. Y. Supp. 904, 907, 20 Misc. Rep. 149.

Revision, p. 491, providing that if a tavern keeper shall be convicted of being drunk in his own tavern, besides the penalty consequent on the "crime" of drunkenness, his license shall become void, does not declare drunkenness to be an indictable crime. The word "crime" is used in the sense of offense. *State v. Locker*, 14 Atl. 749, 50 N. J. Law (21 Vroom) 512.

Where there is a statutory provision that the term "crime" shall be construed to mean any offense for which any criminal punishment may be by law inflicted, a person who has been found guilty of drunkenness under a statute making drunkenness an offense has been guilty of a crime. *People v. Police Com'rs of City of New York* (N. Y.) 39 Hun, 507, 510.

"Crime," as used in Consolidation Act, § 268 (Laws 1882, c. 410), providing that no person shall be appointed to membership in the police force who shall have been convicted of any crime, should be construed to include public intoxication, under the excise act of 1857 declaring that the "offense" of intoxication is an offense against the provisions of the act, and punishable, and that it should be the duty of an officer to arrest all persons found intoxicated, for "offense" is synonymous with "crime." It possesses all the elements of a crime, for public intoxication is offensive to public decency and dangerous to the good order and well-being of society. *People v. French*, 7 N. E. 913, 102 N. Y. 583.

Under an act providing that a person found intoxicated in any public place shall be tried for such offense, and upon conviction fined not less than \$3 nor more than \$10, it is held that intoxication in a public place is a "crime," within the meaning of the statute making persons who have been convicted of crime ineligible to hold the position of police officer. *People v. Police Com'rs*, 4 N. Y. Cr. R. 300, 302.

#### **Expulsion or deportation of alien.**

Congress may make it a crime for an alien to come into this country in violation of our laws, or, being herein, to remain in violation of such laws after being ordered to depart; and should this be done, and a punishment prescribed for the violation of

such law, the trial would be by the judicial, and not by the executive, branch of the government, and the constitutional right of trial by jury would inure to the benefit of the offender. Proceedings for the exclusion or deportation of Chinese under the exclusion act are not criminal in character. *United States v. Lee Huen* (U. S.) 118 Fed. 442, 445.

#### **Failure to pay per capita road tax.**

Under Acts 1898, No. 135, § 1, providing that jurors shall be disqualified if charged or convicted of any "crime or offense," a person charged by information with having willfully neglected to pay a per capita road tax levied by an ordinance of the police jury of a parish is not a competent juror. *State v. Nicholas*, 83 South. 92, 93, 109 La. 84.

#### **Libel and slander.**

See "Libel."

Verbal slander, though a tort, is not a "crime" under our statutes, so as to permit a wife to testify against her husband in an action for slander. *Bohner v. Bohner*, 64 N. W. 700, 701, 46 Neb. 204.

#### **As local offense.**

"A 'crime' is essentially local, and is the creature of the law which defends or prohibits it." Thus a defendant indicted in New York for perjury cannot be convicted on proof of false swearing in New York to a certificate in reference to business in a sister state, and required by the laws of the latter, which would have been perjury in the latter state, but is not perjury by the laws of New York. *People v. Martin*, 76 N. Y. Supp. 953, 955, 88 Misc. Rep. 67.

#### **Navigation of vessel without pilot or engineer.**

A "crime" is an act committed or omitted in violation of a public law forbidding or commanding it. If such law is supplemented by a provision imposing some punishment or penalty for its violation, the idea of the public offense is complete, though there are different degrees of crime, some being felonies and some misdemeanors. Under Rev. St. § 4426 [U. S. Comp. St. 1901, p. 3029], requiring inspection of hulls and boilers of vessels, and its amendment, Act Jan. 18, 1897, c. 61, 29 Stat. 489 [U. S. Comp. St. 1901, p. 3029], requiring engineers and pilots, the violation of the statute by navigating a vessel without an engineer or pilot comes within the definition of the word "crime," as being an omission to do what a public law has commanded. *United States v. Nash* (U. S.) 111 Fed. 525, 528.

#### **Offense, criminal offense, and felonious offense synonymous.**

The words "offense" and "crime" are synonymous when applied to convictions for violations of statutes of a public nature. Whenever a person does an act which is pro-

hibited by law, which act is punishable by fine, penalty, forfeiture, or imprisonment, he commits a "crime." *People v. Hanrahan*, 42 N. W. 1124, 1127, 75 Mich. 611, 4 L. R. A. 751; *State v. Thibodeaux*, 19 South. 680, 681, 48 La. Ann. 600.

The terms "crime," "offense," and "criminal offense" are all synonymous, and are ordinarily used interchangeably, and include any breach of law established for the protection of the public, as distinguished from an enforcement of mere private rights for which a penalty is imposed or punishment inflicted in any judicial proceeding. *State v. West*, 43 N. W. 845, 847, 42 Minn. 147.

The word "crimes" is said to mean, technically, "felonious offenses." *United States v. Coppersmith* (U. S.) 4 Fed. 198, 201 (citing *McGinnis v. State*, 28 Tenn. [9 Humph.] 43, 49 Am. Dec. 697).

#### **Public offense synonymous.**

The word "crime" may be used interchangeably with the term "public offense." *West v. Territory* (Ariz.) 36 Pac. 207, 208.

"Public wrongs" are a breach and violation of public rights and duties, which affect the whole community considered as a community, and are distinguished by the harsher appellation of "crimes" and "misdemeanors." *Cullinan v. Burkhard*, 84 N. Y. Supp. 825, 827, 41 Misc. Rep. 321.

#### **Punishment essential.**

Punishment is as necessary to constitute a crime as a definition. Without either there is no crime, and the repeal of either leaves no crime. *People v. McNulty*, 29 Pac. 61, 63, 93 Cal. 427.

#### **Sending threatening letter.**

Under Wag. St. p. 256, § 24, it is an offense to send a letter threatening to accuse one of any crime, a misdemeanor as well as felony. The word "crime," as there used, has the signification fixed by said statute (page 516, § 36), and is not to be taken as limited or explained by the words "or felony," used in connection with it. *State v. Linthicum*, 68 Mo. 66, 68.

#### **Suicide.**

It is truly said that intentional suicide while sane was a felony at common law. It was punished by forfeiture of goods, but as we do not inflict such punishments it is now little more than the shadow of a crime. Technically, it is still a crime in this state, because we have retained the common law so far as it is not inconsistent with our laws and general situations; but it is not a "crime," within the ordinary meaning of the term, or any usual definition, because we have no statute punishing either suicide or attempted suicide. Mr. Bishop's definition of a "crime" (1 Bish. New Cr. Law, § 32) is:

"Any wrong which the government deems injurious to the public at large, and punishes through a judicial proceeding in its own name." This was approved by this court in *Re Bergin*, 31 Wis. 383. Such is undoubtedly the general conception of a criminal offense, namely, a violation of law for which there is a punishment. *Patterson v. Natural Premium Mut. Life Ins. Co.*, 100 Wis. 118, 126, 75 N. W. 980, 983, 42 L. R. A. 253, 69 Am. St. Rep. 899.

#### **Violation of license laws.**

A violation of Rev. St. § 3124, forbidding any agent to act for any insurance company in transacting the business of insurance without procuring a certificate of authority, is a "crime," it being punishable by a fine. *State v. Hogan*, 78 N. W. 1051, 1052, 8 N. D. 301, 45 L. R. A. 166, 73 Am. St. Rep. 759.

Under an ordinance making it an offense to transact express business without the payment of a license fee, such offense is not a "crime" within the power of equity to stay criminal proceedings. A license imposed for revenue is the exercise of the taxing, not the police, power, and prosecutions before the corporate tribunal for doing business without a license are quasi penal only at most. In substance and legal effect they are civil proceedings. *Southern Exp. Co. v. City of Ensley* (U. S.) 116 Fed. 756-759 (citing *Royall v. Virginia*, 116 U. S. 572, 6 Sup. Ct. 510, 29 L. Ed. 735).

#### **Violation of municipal ordinances.**

A "crime" is an act committed in violation of public law, a law extensive with the boundaries of the state which enacts it. Consequently, it is held that a conviction for the violation of a city ordinance is not a conviction of crime. *Ex parte Hollwedell*, 74 Mo. 395, 401. See, also, *City of Kansas v. Clark*, 68 Mo. 588, 589, and *Moundsville v. Fountain*, 27 W. Va. 182, 199.

A "crime" or "misdemeanor" consists in a violation of a public law, in the commission of which there shall be a union or joint operation of acts and intention, or criminal negligence. Gen. St. § 689. A municipal ordinance is not, in a constitutional sense, a public law, but a mere local rule or by-law—a police or domestic regulation; hence a violation of an ordinance does not necessarily constitute a "crime." *McInerney v. City of Denver*, 29 Pac. 516, 519, 17 Colo. 302; *City of Greeley v. Hamman*, 20 Pac. 1, 12 Colo. 94.

Violations of municipal police regulations are not "crimes." *Delaney v. Police Court of Kansas City*, 67 S. W. 589, 591, 167 Mo. 667.

In an action to recover costs against a city on an acquittal in a prosecution under a city ordinance, the question arose as to whether the violation of the city ordinance

constituted a "crime" or not, and it was said the legal definition of "crime" at common law was a capital offense; all other offenses were misdemeanors. It is now sought to limit the definition, not alone to capital offenses, but to such offenses as are declared to be criminal by positive legislative enactment, known as "felonies" and "misdemeanors," excluding therefrom offenses against the ordinances of a municipality, although imposed by legislative authority. The true definition of the word "criminal," as distinguished from the word "civil," as recognized by the laws of the state, is a violation of any law or ordinance of man, subjecting the offender to public punishment, including fine or imprisonment, and excluding redress for private injury, punitive or compensatory. The criminal character of the offense is not converted into a demand of a civil nature, for the reason that the proceedings under the ordinance are to conform as near as practicable to the regulations respecting civil actions. *City of Charleston v. Beller*, 30 S. E. 152, 45 W. Va. 44.

An ordinance validly enacted, prohibiting certain acts under fines, penalties, or imprisonment, is, within the jurisdiction of the municipality enacting it, as much entitled to respectful obedience, and is as much the law of the land for that locality, as a law enacted by the Legislature, and a person violating it commits an offense, and in one sense a "crime," for which he may be sentenced to imprisonment at hard labor, if, under the authority of a statute, the ordinance so provides. *People v. Hanrahan*, 42 N. W. 1124, 1127, 75 Mich. 611, 4 L. R. A. 751.

#### **CRIME AGAINST LAW OF NATIONS**

"Crimes against the law of nations" are crimes which all nations agree to punish. *Commonwealth v. Kosloff* (Pa.) 5 Serg. & R. 545, 546.

#### **CRIME AGAINST NATURE**

In Louisiana a statute making punishable the "crime against nature" was adjudged to refer to sodomy, and to be sufficiently specific and definite. It is an infamous crime and a felony by the ancient common law. The crime of sodomy is carnal copulation by human beings with each other against nature, or with a beast. *State v. Vicknair*, 28 South. 273, 274, 52 La. Ann. 1921.

The "crime against nature" includes both sodomy and bestiality, and is any unnatural connection between one man and another man, or between a person and a beast of the opposite sex. *Ausman v. Veal*, 10 Ind. 353, 356, 71 Am. Dec. 331.

The "crime against nature," as used in Pen Code, § 950, prohibiting a crime so designated, is synonymous with and means the

offense of "sodomy" or "buggery."—*People v. Williams*, 59 Cal. 397, 398.

### CRIME UNDER REVENUE LAW.

Specific acts which are violations of the laws made to protect the revenue may be said to be "crimes arising under the revenue laws." But a conspiracy to defraud the government, though it may be directed to the revenue as its object, is punishable by the general law against all conspiracies, and can hardly be said in any just sense to arise under the revenue laws, such as a conspiracy to defraud the United States of the duties on certain imported goods.—*United States v. Hirsch*, 100 U. S. 33, 36, 25 L. Ed. 539.

### CRIMEN FALSI.

The term "crimen falsi" is borrowed from the civil law, where, as it implies, it included every species of fraud and deceit, or wrong involving falsehood. But according to the better opinion it does not include all offenses which involve a charge of untruthfulness, but only such as injuriously affect the administration of public justice, such as perjury, subornation of perjury, suppression of testimony by bribery or conspiracy, to procure the absence of a witness, or to accuse one wrongfully of a crime, or barratry, or the like. *Matzenbaugh v. People*, 62 N. E. 546-548, 194 Ill. 108, 88 Am. St. Rep. 134; *Little v. Gibson*, 39 N. H. 505, 510; *State v. Randolph*, 24 Conn. 363, 365; *Webb v. State*, 29 Ohio St. 351, 358; *United States v. Block* (U. S.) 24 Fed. Cas. 1174, 1175.

The test by which it may be determined whether or not an offense is of the "crimen falsi" is whether a conviction would render a party incompetent to testify. *United States v. Baugh* (U. S.) 1 Fed. 784, 787.

The technical signification of the term "crimen falsi" is understood to be forgery of any kind, perjury, dealing with false weights and measures, making false keys, and the like. *Johnston v. Riley*, 13 Ga. 97, 131 (citing *Bouv. Law Dict.*); 1 Greenl. Ev. § 373.

### CRIMINAL.

See "Quasi Criminal."

In an action against a city to recover costs on acquittal of a person accused of a violation of a city ordinance, it was contended that a prosecution for the violation of an ordinance was a civil and not a criminal proceeding. It was held that the true definition of the word "criminal," as distinguished from the word "civil" as recognized by the laws of the state, is a violation of any law or ordinance of man subjecting the offender to public punishment, including fine or imprisonment, and excluding redress for private injury, punitive or compensatory, so that such

proceeding is a criminal proceeding; and the fact that the method of procedure is to be conformed as far as practicable to the regulations respecting civil actions before justices does not convert the criminal character of the offense into a demand of a civil nature. *City of Charleston v. Beller*, 30 S. E. 152, 45 W. Va. 44.

The word "criminal" means punishable by law, human or divine, so that Code provision, § 35, providing that, when the issue of paternity shall be found against the putative father, he shall be fined by the justice not exceeding the sum of \$10, the fine being a punishment, such act will be construed an act of criminal nature. *State v. Burton*, 18 S. E. 657, 660, 113 N. C. 655.

In an action to recover a forfeiture provided by law in case a property owner shall "intentionally make a false statement in regard to his property," a verdict of "guilty not criminally but negligently" means that the defendant made the false statement, not intentionally, but negligently, and is equivalent to a verdict of "not guilty," since the statute declares no penalty for a negligent false statement. *State v. Wolfrum*, 60 N. W. 799, 800, 88 Wis. 481.

### Felonious synonyms.

The term "felonious," when used in the statute, shall be construed as synonymous in meaning with the word "criminal." *Comp. Laws Mich.* 1897, § 11,792.

### CRIMINAL ACTION.

See "Criminal Prosecution."

A "criminal action" is a prosecution in a competent court of justice, in the name of the government, for the punishment of a crime. *Landers v. Staten Island R. Co.* (N. Y.) 14 Abb. Prac. (N. S.) 346, 353. "An action is criminal when instituted on behalf of a sovereign or commonwealth, in order to vindicate the law by the punishment of a public offense." *State of Iowa v. Chicago, B. & Q. Ry. Co.* (U. S.) 37 Fed. 497-498, 3 L. R. A. 554 (quoting *Rap. & L. Law Dict.* p. 21). "Criminal actions" are those actions prosecuted in a court of justice, in the name of the government, against one or more individuals accused of crime. *State v. Schomber*, 63 Pac. 221, 222, 23 Wash. 573 (citing *Bouv. Law Dict.*).

A criminal action is one prosecuted by the state, as a party, against another person charged with a public offense, in order that punishment thereof may be meted out to said person after conviction. *Ames v. Kansas*, 4 Sup. Ct. 437, 442, 111 U. S. 449, 28 L. Ed. 482.

The proceeding by which a party charged with a public offense is accused and brought to trial and punishment, is known as a "criminal action." *Rev. Codes N. D.* 1899, § 7746;



Code Crim. Proc. S. D. 1903, § 4; Crim. Code N. Y. 1903, § 5; Comp. Laws Nev. 1900, § 3992; Pen. Code Idaho 1901, § 5131; Rev. St. Utah 1898, § 4510; Ann. Codes & St. Or. 1901, § 1233; Pen. Code Cal. 1903, § 683. In speaking of this definition, the court says that, though this definition is statutory, it gives correctly the general meaning of "criminal action." There cannot, of course, be a criminal case or action until an indictment has been found. *United States v. Lee* (U. S.) 84 Fed. 628, 630. So, also, Code Cr. Proc. § 5, *People v. Olmstead*, 55 N. Y. Supp. 472-474, 25 Misc. Rep. 346.

A "criminal action" is one prosecuted by the state, as a party, against a person charged with a public offense, for the punishment thereof. Every other is a civil action. Rev. Codes N. D. 1899, §§ 5159, 5160; Code Civ. Proc. S. D. 1903, §§ 15, 16; Rev. St. Okl. 1903, §§ 4205, 4206; Code Civ. Proc. N. Y. 1899, § 3336; Rev. St. Wis. 1898, §§ 2598, 2599; Code Civ. Proc. S. C. 1902, §§ 5, 6; Gen. St. Kan. 1901, § 4435; Clark's Code N. C. 1900, § 120.

A "criminal action" is an action prosecuted by the state, at the expense of an individual, to prevent an apprehended crime against his person or property. Every other is a civil action. Clark's Code N. C. 1900, § 130.

A "criminal action" means the whole or any part of the procedure which the law provides for bringing offenders to justice.—Pen. Code Tex. 1895, art. 28.

Const. amend. 5, declaring that no person shall be compelled in any criminal action to be a witness against himself, applies only to evidence in suits or proceedings instituted against the witness himself. *United States v. McCarthy* (U. S.) 18 Fed. 87, 89.

#### Action for penalty.

Under Act April 5, 1888, § 27, declaring that any railroad corporation guilty of extortion shall forfeit and pay the state not less than \$1,000, nor more than \$5,000, to be recovered in a civil action by ordinary proceedings instituted in the name of the state, an action for such penalty brought by the state is a criminal action. *State of Iowa v. Chicago, B. & Q. R. R. Co.* (U. S.) 37 Fed. 497, 498, 3 L. R. A. 554.

#### Action for violation of municipal ordinance.

Actions for the violation of city ordinances are not criminal actions. *City of Madison v. Horner*, 89 N. W. 474, 15 S. D. 359.

A "criminal action" is the whole or any part of a procedure in a court of justice which the law provides for bringing an offender to justice, and therefore comprises a prosecution in the recorder's court of the city for repairing a wooden building in violation of the city ordinance, though prosecuted in

the name of the city, and not in the name of the state. *Bautsch v. State*, 11 S. W. 414, 415, 27 Tex. App. 342.

A proceeding to collect a fine imposed for the violation of a city ordinance is not a criminal action, but a civil suit in form, and quasi criminal in its character. *Kansas City v. Neal*, 26 S. W. 695, 696, 122 Mo. 232.

#### Action to recover price paid for liquors.

An action to recover the price paid for intoxicating liquors while in the nature of an action for a penalty, is not of a criminal character. *Woodward v. Squires*, 39 Iowa, 435, 438.

#### Appeal.

A "criminal action or proceeding" is one instituted and prosecuted by the state for the punishment of crime. In such a proceeding the state is actor, plaintiff, and dominus litis, and one of the immediate purposes of the proceeding is to secure the conviction of the criminal in order to punish him for his crime. In an appeal from a conviction the person so convicted may, if he sees fit, bring the record of the criminal proceeding before the appellate court, to the end that any error at law shown by the record may be corrected. In this subsequent proceeding the defendant in the criminal action becomes actor, plaintiff, and dominus litis. It is instituted and prosecuted by him, at his pleasure, for the correction of a private wrong which he alleges was done to him in the trial of a criminal action or proceeding, within the provision of the Code providing that an attorney shall not become recognized or give any bond in any criminal action or proceeding in which he shall be interested as an attorney. *State v. Costello*, 23 Atl. 868, 869, 61 Conn. 497.

#### Disbarment proceedings.

A proceeding to disbar an attorney is a "criminal action," within the meaning of Comp. Laws, 258, § 151, providing for change of venue in criminal actions. *In re Peyton*, 12 Kan. 398, 405.

#### Synonymous terms.

The terms "prosecution," "criminal prosecution," "accusation," and "criminal accusation" are used in the same sense. Pen. Code Tex. 1895, art. 26; *Childers v. State*, 16 S. W. 903, 905, 30 Tex. App. 160.

The terms "criminal actions," "offenses," and "petty offenses" are, in the main, interchangeable and synonymous terms, and any distinction sought to be drawn between them is hypercritical. *Bautsch v. State*, 11 S. W. 414, 415, 27 Tex. App. 342.

#### CRIMINAL BUSINESS.

The term "criminal business," in Const. art. 8, § 5, providing that all civil and crim-

inal business arising in any county must be tried in such county, unless a change of venue be taken in such cases as may be provided by law, means criminal acts constituting the crime (*Condon v. Leipsiger*, 55 Pac. 82, 17 Utah, 498), or such conduct, attended with such intent, as amounts to a crime as the law defines "crime" (*Mosby v. Gisborn*, 54 Pac. 121, 126, 17 Utah, 257).

### CRIMINAL CASE OR CAUSE.

Any criminal case, see "Any."

A "criminal case" is one which involves a wrong or injury done to the republic, for the punishment of which the founder is prosecuted in the name of the whole people. *Grimball v. Ross* (Ga.) T. U. P. Charlt. 175, 181.

A "criminal case," as usually understood under the common law, is a proceeding by the sovereign of a realm, in his own court, against one subjected to his authority on a violation of his laws. The United States is such a sovereign, and proceeds in such manner in the courts of the United States clothed with criminal jurisdiction. *State v. Smalls*, 11 S. C. 262, 279.

"A 'criminal case' is a public prosecution for a crime or misdemeanor." In *re Shultz's Lessee v. Moore* (Ohio) Wright, 280, 281.

A "criminal cause" is one where the proceeding against the defendant is by indictment. *Mitchell v. State*, 11 N. W. 848, 12 Neb. 538.

14 Stat. 27, § 3, giving the District Court of the United States concurrent jurisdiction with the Circuit Court of all "causes, civil and criminal," affecting persons who are denied or cannot enforce the rights secured by such statute in the state courts, means "causes of criminal prosecution." *United States v. Rhodes* (U. S.) 27 Fed. Cas. 785, 786.

The expression "criminal cases," as used in Act March 8, 1809, providing that thereafter in all criminal cases recognizances shall be taken to and in the name of the commonwealth, is used in contradistinction to "civil cases." The most general classification of cases is "criminal" and "civil." Whatever case does not come within one description, seems properly to belong to the other. *Adams v. Ashby*, 5 Ky. (2 Bibb) 96, 97; *Montee v. Commonwealth*, 26 Ky. (3 J. J. Marsh.) 132, 142; *Applegate v. Commonwealth*, 46 Ky. (7 B. Mon.) 12. And in this sense all prosecutions by indictments may be denominated "criminal cases." *Montee v. Commonwealth*, 26 Ky. (3 J. J. Marsh.) 132, 142.

#### Action for forfeiture or penalty.

A suit by the state of Texas for the recovery of penalties for violation of the anti-trust law of 1890 was not a "criminal case," within the constitutional restriction of juris-

isdiction of a court of civil appeals. *State v. Waters-Pierce Oil Co.* (Tex.) 67 S. W. 1057, 1058.

The words "criminal case," as used in the constitutional provision that no person shall be compelled in any criminal case to be a witness against himself, mean a case in which punishment of crime is sought to be visited upon the person of the offender in ordinary courts of criminal prosecution, in contradistinction to a "proceeding in rem" to effect a forfeiture of the thing to which the offense primarily attaches. When the judgment of forfeiture of property necessarily carries with it and as a part of it a conviction and judgment against the person for the crime, the case is of a criminal character; but when the forfeiture does not necessarily involve personal conviction and judgment for the offense, but such conviction and judgment must be obtained, if at all, in another and independent proceeding, the remedy by way of forfeiture is of civil, and not criminal, nature. Consequently it is constitutional to apply a statute requiring compulsory process for the production of books and papers of a claimant or defendant in any proceeding other than criminal, arising under laws relating to revenue, to a judicial proceeding consisting of an action against property for the enforcement of a forfeiture on the grounds of alleged violation of the revenue laws, the proceeding being in rem, and no punishment by fine or imprisonment being authorized. *United States v. Three Tons of Coal* (U. S.) 28 Fed. Cas. 149, 154.

The words "criminal cases," used in the state and federal Constitutions, have been construed by the courts to extend to and include imprisonment, fines, forfeiture, and penalty, whether to be recovered in a criminal or civil proceeding; and when an immunity statute is couched in the same language as the constitution, the language of the statute will receive the same construction as that of the Constitution, and be held to grant immunity from imprisonment, fine, forfeiture, or penalty. *People v. Butler St. Foundry & Iron Co.*, 66 N. E. 349, 355, 201 Ill. 236 (citing *Coffey v. United States*, 116 U. S. 436, 6 Sup. Ct. 437, 29 L. Ed. 684).

#### As after conviction.

Acts 1873, c. 157, giving a right of appeal in habeas corpus, but providing that the act shall not apply to parties held in custody in criminal cases, means only held on a criminal charge against whom there is a pending case; and one in custody on a judgment of conviction is not held in custody in a "criminal case," within the meaning of the proviso. In *re Vanvabry*, 12 S. W. 786, 787, 88 Tenn. (4 Pickle) 334.

#### Appeals.

"Criminal cases," as used in Act No. 30 of 1878, which requires appeals in criminal

cases to be made returnable within 10 days after granting the order of appeal, includes appeals from judgments on forfeited bonds. *State v. Balize*, 38 La. Ann. 542, 543.

#### **Contempt proceeding.**

A "criminal case" is defined to be an action, suit, or cause instituted to secure conviction and punishment for a crime, or to punish an infraction of the criminal law. A contempt proceeding is not a criminal case. *Taylor v. Goodrich*, 40 S. W. 515, 524, 25 Tex. Civ. App. 109.

St. 1869, p. 96, 2 Comp. Laws, § 3288 (the act in relation to fines), provides, among other things, that the court, in entering "a judgment that the defendant in a criminal case pay a fine, \* \* \* shall, by such judgment, direct that if the judgment or any part thereof is not paid, the defendant be imprisoned one day for each \$2.00 of the judgment not paid," and applies to all criminal cases, of every kind and character not otherwise especially provided for; to cases of contempt, when criminal, as well as to other misdemeanors. *Ex parte Sweeney*, 1 Pac. 379, 380, 18 Nev. 74.

A proceeding for contempt is a distinct and independent matter as much as a new suit, and requires a distinct notice of proceedings to be given. After an attachment issues, the proceedings are to be regarded and entitled as of a criminal character. *State v. Matthews*, 37 N. H. 450, 454.

#### **As controversy.**

See "Controversy."

#### **As criminal offense.**

"Criminal Case," as used in Const. 1846, art. 1, § 6, providing that no person shall be compelled in any criminal case to be a witness against himself, means a "criminal offense." *Counselman v. Hitchcock*, 12 Sup. Ct. 195, 201, 142 U. S. 547, 35 L. Ed. 1110.

#### **As criminal proceedings or prosecution.**

See "Criminal Prosecution"; "Criminal Proceeding."

#### **Disbarment proceedings.**

A "criminal case" is defined to be an action, suit, or cause instituted to secure conviction and punishment for crime; and hence a proceeding to disbar an attorney is not a criminal case, even though it is required to be in the name of the state, and remedy is provided if the attorney be found guilty. *Scott v. State*, 24 S. W. 789, 86 Tex. 321.

#### **Forfeiture of intoxicating liquors.**

The proceeding under St. 1869, c. 415, for the forfeiture of intoxicating liquors illegally kept and intended for sale, is of a criminal nature. The intent to sell contrary to law, in which the criminality of the keeping

consists, must be proved beyond reasonable doubt, according to the ordinary rules of criminal actions, or a decree of forfeiture cannot be had. *Commonwealth v. Certain Intoxicating Liquors*, 115 Mass. 142, 143.

#### **Proceeding against prosecutor for costs.**

No proceeding, even though it was instituted in the name of the state, has ever been held to be a "criminal case" unless the judgment rendered might in some contingency result in loss of liberty to the person against whom the proceeding is had. A ruling that a proceeding in the name of the state, which at most could never result in anything but the property of the citizen being seized and sold for the payment of a debt due the state, was a criminal case, would indeed be an anomaly; so that a proceeding against a prosecutor for costs in a criminal proceeding which he had dismissed is not a criminal case. *State v. Steele*, 37 S. E. 174, 175, 112 Ga. 39.

#### **Proceeding before grand jury.**

A proceeding before a grand jury is a "criminal case," within the meaning of the constitutional provision that a person shall not be compelled in any criminal case to be a witness against himself. *United States v. Rosenthal* (U. S.) 121 Fed. 862, 866 (citing *Councilman v. Hitchcock*, 142 U. S. 547, 12 Sup. Ct. 195, 35 L. Ed. 1110).

#### **Prosecution for violation of municipal ordinance.**

"Criminal cases," as used in Const. art. 3, § 1, guarantying trial by jury in criminal cases means acts of remission which are in violation of the public laws of the state, and not violation of local by-laws or police regulations of town and city corporations. *Williams v. City Council of Augusta*, 4 Ga. 509, 513.

"Criminal," as designating cases in which, under the Illinois Constitution, the criminal court of Cook county has jurisdiction, includes all offenses not crimes or misdemeanors, but in the nature of crimes, and which are punished, not by indictment, but by forfeitures and penalties. It includes all qui tam actions, prosecutions for bastardy, informations in the nature of a quo warranto, and suits for the violation of ordinances. *Wiggins v. City of Chicago*, 68 Ill. 372, 373.

The term "criminal cases," as used in the statutes, means prosecutions under the laws of the state, and does not embrace offenses against city ordinances. *People v. Manistee County Sup'rs*, 26 Mich. 422, 424.

Const. art. 6, § 24, gives the General Assembly power to create a criminal court having concurrent jurisdiction with the district court in all "criminal cases." Within the meaning of such provision, one brought for an offense committed against the laws of the

state, and not against the ordinances of a municipal corporation within the state, is meant. *Garland v. City of Denver*, 19 Pac. 460, 11 Colo. 534.

A prosecution for crime, in the name of the state, for a violation of its criminal laws, is a "criminal case." It has been held that a prosecution for the violation of a municipal ordinance, although instituted in the name of the municipality, is to be treated for some purposes as a criminal case (*City of Macon v. Wood*, 109 Ga. 149, 34 S. E. 322; *Barnett v. City of Atlanta*, 109 Ga. 166, 34 S. E. 322), although such a prosecution is not always embraced within the term "criminal case," as that term is used in the statutes of this state. *Holliman v. City of Hawkinsville*, 109 Ga. 107, 34 S. E. 214.

"Criminal cases," as used in Const. art. 3, § 1, providing that the superior courts shall have exclusive jurisdiction in all criminal cases, means violations of public laws of the state, and not the local by-laws or police regulations of the town or city not embraced in the elemental definitions of "crimes" as recognized in the penal laws. *Floyd v. Town of Eatonton Com'rs*, 14 Ga. 354, 356.

#### Recognizance to keep peace and scire facias.

The words "criminal cases" in 1 St. 199, requiring all processes on recognizances in criminal cases to conclude against the peace and dignity of the commonwealth, means "not civil," and in its most comprehensive meaning may be regarded as including all cases for the violation of the penal laws, and includes a scire facias on a recognizance to keep the peace. *Applegate v. Commonwealth*, 46 Ky. (7 B. Mon.) 12. So, also, a prosecution for binding a man to keep the peace is a criminal proceeding or case. *Adams v. Ashby*, 5 Ky. (2 Bibb) 96, 97.

#### CRIMINAL CHARGE.

"Criminal charge," as used in Bill of Rights, § 14, declaring that no man shall be put to answer any criminal charge but by presentment, indictment, or impeachment, should be construed to include assaults, affrays, and assault and battery. *Eason v. State*, 11 Ark. (6 Eng.) 481, 482.

A "criminal charge," strictly speaking, exists only when a formal written complaint has been made against accused and a prosecution initiated. It is true the popular understanding of the term is "accusation," and it is freely used with reference to all accusations, whether oral, in the newspapers, or otherwise. But in legal phraseology it is properly limited to such accusations as have taken shape in a prosecution. In the eyes of the law a person is "charged with crime" only when he is called upon in a legal pro-

ceeding to answer to such a charge. Mere investigation by prosecuting officers, or even the inquiry and consideration by examining magistrates of the propriety of initiating a prosecution, do not of themselves create a "criminal charge"; and such is the meaning of the word as used in Rev. St. § 827, giving per diem fees to United States commissioners for hearing and deciding criminal charges, being restricted to formal written complaints which have been legally preferred, and it does not include the examination of complaining witnesses to determine whether a warrant shall issue. *United States v. Patterson*, 14 Sup. Ct. 20, 21, 150 U. S. 65, 37 L. Ed. 999.

"Deciding and hearing any criminal charges," within the meaning of Rev. St. U. S. § 847, allowing a United States commissioner \$5 a day for the time necessarily employed in hearing and deciding any criminal charges, includes hearing and deciding motions on bail, and the sufficiency thereof, and motions for continuance. *United States v. Jones*, 10 Sup. Ct. 615, 616, 134 U. S. 483, 33 L. Ed. 1007.

#### CRIMINAL CODE.

The term "Criminal Code" means the Code of Criminal Procedure. *Laws N. Y. 1892, c. 677, § 29.*

#### CRIMINAL CONSPIRACY.

A "criminal conspiracy" is a corrupt combination of two or more persons, by concerted action, to commit a criminal or unlawful act, or an act, not in itself unlawful or criminal, by criminal or unlawful means (*Ætna Ins. Co. v. Commonwealth*, 21 Ky. Law Rep. 503, 507, 51 S. W. 624, 627, 106 Ky. 864, 45 L. R. A. 355); "or an act which would tend to prejudice the public in general, to subvert justice, disturb the peace, injure public trade, affect public health, or violate public policy; or any act, however innocent, by means neither criminal nor unlawful, where the tendency of the object sought would be to wrongfully coerce or oppress either the public or an individual. It is the corrupt agreeing together of two or more persons to do, by concerted action, something unlawful, either as a means or an end, that constitutes a criminal conspiracy. The unlawful thing must either be such as would be indictable if performed by one alone, or of a nature particularly adapted to injure the public or some individual by reason of the combination. It is not necessary, in order to constitute a conspiracy, that the acts agreed to be done should be acts which, if done, would be criminal. It is enough that they are wrongful; that is, amount to a civil wrong. Every conspiracy to do an unlawful act, or to do a lawful act for an illegal, fraudulent, malicious, or corrupt purpose, or for a purpose

which has a tendency to prejudice the public in general, is an indictable offense, regardless of the means whereby it is to be accomplished." 2 Bish. Cr. Law, § 172, is to substantially the same effect. A combination for the purpose of maintaining rates of insurance is not an indictable offense as a conspiracy. *Ætna Ins. Co. v. Commonwealth*, 51 S. W. 624, 627, 106 Ky. 864, 21 Ky. Law Rep. 503, 45 L. R. A. 355. Overt acts are not necessary to the consummation of the offense. *Commonwealth v. Ward*, 92 Ky. 158, 161, 13 Ky. Law Rep. 422, 423, 17 S. W. 283.

A "criminal conspiracy" is a combination of two or more persons to commit some crime. Whether the crime to be committed is the object of the conspiracy, or the means for the accomplishment of some other object, is immaterial. A combination to unlawfully inflict upon another some injury, dependent for its successful accomplishment on the force of combination, may also in certain instances be a criminal conspiracy, though no act to be done in its execution or consummation of its object would be a crime if done independently of the combination, by any one of the conspirators. A combination to commit a crime is something more than an intent, though nothing may be done in pursuance of the combination. There must be an act of endeavor adapted to effectuate the purpose. The fact of combination is an act of endeavor, by each one combining, intended and adapted to effect the criminal intent and purpose common to all. Conspiracy, therefore, is closely akin to an attempt to commit a crime. It differs from the common-law attempt in that it is not merged in the crime intended, if that crime was actually committed. Two elements, therefore, enter into the crime of conspiracy; that of wrongful combination and that of criminal intent. *State v. Gannon*, 52 Atl. 727, 729, 75 Conn. 206.

By Pen. Code, § 168, subd. 5, one of the definitions of "criminal conspiracy" is as follows: "If two or more persons conspire (5) to prevent another from exercising a lawful trade or calling or doing any other lawful act, by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements or property belonging to or used by another, or with the use or employment thereof." Again, in *Buffalo Lubricating Oil Co. v. Everest* (N. Y.) 30 Hun, 586, 588, it is said "a conspiracy consists in the unlawful combination or agreement of two or more persons to do an act unlawful in itself, or to do a lawful act by unlawful means." *Park & Sons Co. v. National Wholesale Druggists' Ass'n*, 30 App. Div. 508, 514, 52 N. Y. Supp. 475; *Spies v. People*, 122 Ill. 1, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320; *Callan v. Wilson*, 127 U. S. 540-555, 8 Sup. Ct. 1301, 32 L. Ed. 223; *Pettibone v. United States*, 148 U. S. 197-203, 13 Sup. Ct. 542, 37 L. Ed. 419. Within such definition a boycott constitutes a "conspiracy." *Matthews v.*

*Shankland*, 56 N. Y. Supp. 123, 129, 25 Misc. Rep. 604.

Where two or more persons corruptly or wrongfully agree with each other that trains carrying the mails and interstate commerce shall be forcibly arrested, obstructed, and restrained, such conduct clearly constitutes "conspiracy." Or if two or more persons corruptly or wrongfully agree with each other that the employes of the several railroads carrying the mails and interstate commerce should quit, and that their successors should, by threats, intimidation, or violence, be prevented from taking their places, such acts would constitute a "conspiracy." In re Charge to Grand Jury (U. S.) 62 Fed. 823, 831.

In Jacob's Law Dictionary the essential elements of a "criminal conspiracy" are thus stated: "Confederacy (confederatio) is when two or more combine together to do damage or injury to another, or to do an unlawful act. A false confederacy between divers persons shall be punished, though nothing be put in execution. But this confederacy punishable by law, before it is executed, ought to have these incidents: First, it must be declared by some matter of prosecution, as by making of bonds or promises the one to the other; secondly, it must be malicious, as for unjust revenge; thirdly, it ought to be false against an innocent; and, lastly, it is to be out of court, voluntarily." *State v. Crowley*, 41 Wis. 271, 284, 22 Am. Rep. 719 (quoting *Termes de la Ley*, 158).

Criminal conspiracy "may be said to consist in an artful contrivance and combination to produce the injuries consequent on other crimes, in a manner calculated to elude the provisions and restraints of criminal law. The forms in which it appears are as various as the ingenuity of man is unbounded." *Lambert v. People* (N. Y.) 9 Cow. 578, 601.

Under St. § 3915, declaring that any corporation or association of persons who shall combine with others "for the purpose of regulating or controlling or fixing the price of any merchandise, manufactured article, or property of any kind shall be guilty of a criminal conspiracy," it is not an offense to combine for the purpose of maintaining rates of insurance, as the rule of ejusdem generis applies in determining the meaning of the word "property." *Ætna Ins. Co. v. Commonwealth*, 21 Ky. Law Rep. 503, 507, 51 S. W. 624, 627, 106 Ky. 864, 45 L. R. A. 355.

#### Civil conspiracy distinguished.

The terms "criminal" and "civil" are used respectively to designate a conspiracy which is indictable, or a conspiracy which will furnish ground for a civil action. To render a conspiracy indictable at common law, no overt acts in carrying out the design of the conspirators were necessary. But if, in carrying out the design of the conspira-

tors, overt acts were done causing legal damage, the person damaged has a right of action. Hence arose the dictum that the gist of criminal conspiracy is the combination, and the gist of civil conspiracy is the injury or damage. So far as rights and remedies are concerned, all criminal conspiracies are embraced within civil conspiracies. *Brown v. Jacobs' Pharmacy Co.*, 41 S. E. 553, 554, 115 Ga. 429, 57 L. R. A. 547, 90 Am. St. Rep. 126.

### CRIMINAL CONTEMPT.

"Criminal contempts" are all acts committed against the majesty of the law, or against the court as an agency of the government, and in which, therefore, the whole people are concerned. In criminal contempts the proceeding is punitive, and the punishment operates in terrorem, and has a tendency to prevent the repetition of the offense. *State v. Shepherd*, 76 S. W. 79, 86, 177 Mo. 205.

"Criminal contempts" are all those acts in disrespect of the court or of its process, or which obstruct the administration of justice, or tend to bring the court into disrepute, etc. *Ex parte Robertson*, 27 Tex. App. 628, 631, 11 S. W. 669, 670, 11 Am. St. Rep. 207 (citing *Rap. Contempt*, § 21).

Code Civ. Proc. § 8, subd 1, defines "criminal contempt" as disorderly, contemptuous, or insolent behavior committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority. In *re Teitelbaum*, 82 N. Y. Supp. 887, 889, 84 App. Div. 351.

"'Criminal' contempts are those committed in the immediate view and presence of the court, such as insulting language or acts of violence which interrupt the regular proceedings in court. This class of contempts may and should be punished summarily by the order of the presiding judge, or by the court, after such hearing, at once, as the court may deem just and necessary." *Androscoggin & K. R. Co. v. Androscoggin R. Co.*, 49 Me. 392, 400.

The term "criminal contempt" is defined by Mr. Rapalje in his work on Contempts, § 21, as "all those in disrespect of the court or its process, or which obstruct the administration of justice, or tend to bring court into disrespect." *Wyatt v. People*, 28 Pac. 961, 963, 17 Colo. 252.

The term "criminal contempt," when applied to the disobedience of the orders of a court, means a willful disobedience thereof. *People v. Dwyer* (N. Y.) 2 Civ. Proc. R. 379, 883.

A "criminal" contempt is one where contemptuous conduct is directed against the

dignity and authority of the court. *Welch v. Barber*, 52 Conn. 147, 156, 52 Am. Rep. 567.

"Criminal contempt" involves no element of personal injury. It is of public character and indictable. It consists in the violation of the rights of the public as represented under their judicial tribunals. An element of willfulness exists in them, and they are published in the interest of public justice, not in the interest of individual litigation. The willful disobedience of a preliminary injunction is a criminal contempt. *People v. McKane*, 28 N. Y. Supp. 981, 985, 78 Hun, 154.

A court of record has power to punish for a "criminal contempt" a person guilty of either of the following acts, and no others: (1) Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due its authority. (2) Breach of the peace, noise, or other disturbance directly tending to interrupt its proceedings. (3) Willful disobedience to its lawful mandate. (4) Resistance willfully offered to its lawful mandate. (5) Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory. (6) Publication of a false or grossly inaccurate report of its proceedings. But a court cannot punish as a contempt the publication of a true, full, and fair report of a trial, argument, decision, or other proceeding therein. Code Civ. Proc. N. Y. 1892, § 8. Such contempt may be divided into two classes: (1) That which is committed in the immediate view and presence of the court, and (2) that which is committed out of court. When the contempt is committed in the view and presence of the court, it may be punished summarily. When not so committed, the party charged must be notified of the accusation, and have a reasonable time to make a defense. Code Civ. Proc. § 10. The publication of a false and grossly inaccurate report of a proceeding in court belongs to the latter class. *People v. Court of Sessions of Albany County*, 41 N. E. 700, 701, 147 N. Y. 290.

Refusal to obey a venire, while a "contempt" within the common-law definition of that term, given in Bouvier's Law Dictionary, is not a "criminal contempt," as defined in 2 Rev. St. 273, 274, authorizing a justice of the peace to punish as for a criminal contempt persons guilty of the following acts: Disorderly, contemptuous, or insolent behavior towards such justice while engaged in a trial of a cause, or in the rendering of any judgment, or in any judicial proceedings, which shall tend to interrupt such proceedings, or to impair the respect due to his authority; second, any breach of the peace, noise, or other disturbance tending to interrupt the official proceedings of a justice; third, resistance willfully offered by any per-

son, in the presence of the justice, to the execution of any lawful order or process made or issued by him. *Robbins v. Gorham*, 25 N. Y. 588, 594.

#### **Civil contempt distinguished.**

The sole difference between a criminal contempt and a contempt in a civil case is that the former is a willful disobedience of an order of court, while the latter is a mere disobedience by which the right of a party to an action is defeated or hindered. *People v. Dwyer*, 90 N. Y. 402, 406.

There seems to be a well-defined distinction between contempts which are merely criminal or punitive and those which are termed "civil contempts," the latter applying to such as are remedial in character. The two classes of contempts are often distinguished as "direct" and "constructive" or "consequential." "Civil contempts" are those quasi contempts which consist in failing to do something which the contemner is ordered by the court to do for the benefit or advantage of another party to the prosecution before the court, while "criminal contempts" are those in disrespect of the court or its processes, or which obstruct the administration of justice, or tend to bring the court into disrespect. "Criminal contempts" are those committed in the immediate presence and view of the court, such as insulting language and acts of violence which interrupt the regular proceedings of the court. This class of contempts may and shall be punished summarily. *Laramie Nat. Bank v. Steinhoff*, 53 Pac. 299, 300, 7 Wyo. 464. This classification is not affected by the fact that the procedure is in most instances substantially the same whether the contempt be civil or criminal, nor is the character of the contempt in this regard controlled by the character of the court in which it occurs. *State v. Downing*, 66 Pac. 917, 921, 40 Or. 309.

#### **Newspaper publications.**

A "criminal contempt" at common law may generally be defined as any act which tends either to obstruct the course of justice, or to prejudice the trial in any action or proceeding then pending in court; but where a judge is a candidate for re-election, the publication in a newspaper of articles charging him with having been intentionally partial and corrupt in the trial of certain cases in his court, already disposed of and not then pending, and the circulation of such papers among the jurors and officers of the court, is not a criminal contempt. *State v. Circuit Court for Eau Claire County*, 72 N. W. 193, 194, 97 Wis. 1, 38 L. R. A. 554, 65 Am. St. Rep. 90.

The publication of an article in a newspaper which is printed and circulated in the place where the trial is had, pending the tri-

al, and which concerns the cause on trial, which is calculated to prejudice the jury and prevent a fair trial, often has been held a criminal contempt of the court trying the cause. Citing *O'Shea v. O'Shea*, 15 Prob. Div. 59; *Ex parte Green*, 7 Times L. Rep. 411; *Daw v. Eley*, L. R. 7 Eq. 55; *Ramsbotham v. Senior*, L. R. 8 Eq. 575; *People v. Wilson*, 64 Ill. 195, 16 Am. Rep. 528; *In re Sturrock*, 48 N. H. 428, 97 Am. Dec. 626; *In re Cheeseman*, 49 N. J. Law (20 Vroom) 115, 137, 6 Atl. 513, 60 Am. Rep. 596; *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257; *Oswald*, Contempt (2d Ed.) p. 58 et seq.; 7 Am. & Eng. Enc. Law (2d Ed.) tit. "Contempt," p. 59. Where a corporation engaged in the publication of a newspaper publishes an article concerning a pending trial in the place where the trial is had, which is calculated to prejudice the jury and prevent a fair trial, it is guilty of a criminal contempt, though there was no fraudulent intent in such publication. *Telegram Newspaper Co. v. Commonwealth*, 52 N. E. 445, 446, 172 Mass. 294, 44 L. R. A. 159, 70 Am. St. Rep. 280.

#### **Refusal to testify.**

Under Pen. Code, § 143, subd. 6, providing that contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal or proper interrogatory, shall be a "criminal contempt," the refusal to testify before a grand jury is a contempt committed in the presence of the court on which the grand jury is attending. *In re Taylor*, 28 N. Y. Supp. 500, 502, 8 Misc. Rep. 159.

#### **CRIMINAL CONVERSATION.**

See "Crim. Con."

"Criminal conversation" means adultery. *Prettyman v. Williamson* (Del.) 39 Atl. 731, 732, 1 Pennewill, 224.

The basis of the action of criminal conversation is trespass *vi et armis*, on the theory that the wife is not a free agent or separate person, and that therefore her consent is immaterial, so that the adulterer is pursued as a mere trespasser. *Crocker v. Crocker* (U. S.) 98 Fed. 702, 708.

#### **CRIMINAL INFORMATION.**

"Criminal informations" are in the name of the state, and only the allegations of the state attorney who exhibits them, and they are said by Mr. Chitty to be analogous to declarations for the redress of a personal injury, except that the latter are at the suit of the subject for the satisfaction of private wrong, and the former are for the punishment of offenses affecting the interest of the public. An "information," says Lord Co-myn, is a declaration of the charge or offense against one at the suit of the King.

And in *Rex v. Wilkes*, 4 Burr. 2553, Lord Mansfield says: "An information for a misdemeanor is the King's suit. The title of the cause is the King against the defendant." *State v. Barrell*, 54 Atl. 183, 184, 75 Vt. 202.

Lord Coleridge says that a "criminal information" is a criminal cause or matter, only differing in mere form from an indictment, the King's coroner referring the information, instead of the jurors presenting the bill; but to all intents and purposes the one being as much a criminal matter as the other. The refusal of a defendant to plead to a criminal information will not defeat the jurisdiction of a circuit court. *United States v. Borger* (U. S.) 7 Fed. 193, 196, 197.

### CRIMINAL INTENT.

"Criminal intent," when used in penal statutes, is an intent to deprive or defraud the true owner of his property. *People v. Moore*, 3 N. Y. Cr. Rep. 458, 460, 469.

### CRIMINAL JUDGMENTS.

"Criminal judgments are divided into two kinds: (1) By express sentence to the punishment proper for the crime. (2) Judgments without any such sentence. Of the latter there are two kinds: (1) Outlawry; (2) abjuration. Judgment of outlawry in England is given by the coroner, and is in these words: 'Therefore, the said A. B., by the judgment of the coroner of our Lord the King, of the county aforesaid, is outlawed.' " *Respublica v. Doan* (Pa.) 1 Dall. 86, 91, 1 L. Ed. 47.

### CRIMINAL JURISDICTION.

"Jurisdiction" is the authority by which judicial officers take cognizance of and decide cases; the power to hear and determine a cause. If the law confers the power to render a judgment or decree, then the court has jurisdiction. "Criminal jurisdiction" is that which exists for the punishment of a crime. *Ellison v. State*, 125 Ind. 492, 496, 24 N. E. 739. See, also, *Landers v. Staten Island R. Co.*, 53 N. Y. 450, 457.

The term "criminal," when applied to and used with reference to the jurisdiction of a court of a judicial proceeding, generally has relation to the nature and form of the remedy and cause of action or occasion for instituting legal proceedings, and has respect to the object of the jurisdiction of the court, and not to the presence of suitors. In *re City of Buffalo*, 34 N. E. 1103, 1104, 139 N. Y. 422.

### CRIMINAL LAW.

"Blackstone speaks of 'criminal law' as that branch of jurisprudence which teaches

of the nature, extent, and degrees of every crime, and adjusts to it its adequate and necessary penalty." *United States v. Reisinger*, 9 Sup. Ct. 99, 101, 128 U. S. 398, 32 L. Ed. 480.

### CRIMINAL LIBEL.

As an infamous crime, see "Infamous Crime."

"Whatever, if made the subject of civil action, would be considered libelous without laying special damages, is indictable." 2 Whart. Cr. Law (9th Ed.) 1598. Any representation in writing, or by pictures, effigies, or the like, calculated to create disturbances of the peace, to corrupt the public morals, or to lead to any act which, when done, is indictable. 2 Bish. Cr. Law (7th Ed.) § 907. Any publication which has a tendency to disturb the public peace or good order of society is a libel by the common law, and is indictable. *Moody v. State*, 10 South. 670, 94 Ala. 42 (citing *Newell*, Defam. 987).

A "criminal libel" is a malicious defamation, expressed in printing or writing, or by signs or pictures, tending either to blacken the memory of one who is dead or the reputation of one who is living, and thereby expose him to public hatred, contempt, and ridicule. Malice is the essence of the offense, and is the wrongful doing of an act with the intention to do harm. Where the libel imputes crime, malice is implied, and the mere charge carries with it the element of malice. *State v. Shaffner* (Del.) 44 Atl. 620, 621, 2 Pennewill, 171.

A "criminal libel" is committed by any writing calculated to create disturbances of the peace, corrupt the public morals, or lead to any act which, when done, is indictable. *Provident Sav. Life Assur. Soc. v. Johnson* (Ky.) 72 S. W. 754, 755 (citing 2 Bish. Cr. Law, 907).

A "criminal libel" is prosecuted in the name of the people, not for the purpose of redressing an injury done to an individual, but is so prosecuted to punish as a crime, for the reason that it tends to provoke animosity and violence and disturb the public peace and repose. *People v. Stokes*, 24 N. Y. Supp. 727, 728, 30 Abb. N. C. 200.

### CRIMINAL MATTERS.

The expression "criminal matters," as used in the Constitution, providing that sheriffs shall receive a certain compensation from the parish for their services in criminal matters, except the keeping of prisoners, conveying convicts to the penitentiary and insane persons to asylum, and service of process from another parish, was not used in its strict legal significance as synonymous with "criminal cases" and "criminal proceedings," but conveys the meaning of what



ever pertained to sheriffs' services in criminal matters of every kind, and means some not strictly included in that designation. *Lake v. Parish of Caddo*, 37 La. 788, 791.

### CRIMINAL NEGLIGENCE.

"Criminal negligence," as the term is used in the statute requiring as a defense to an action for injuries that the person injured should have been guilty of criminal negligence, means such negligence as amounts to a flagrant and reckless disregard of one's own safety, and a willful indifference to the injury liable to follow. *Omaha & R. V. R. Co. v. Chollette*, 49 N. W. 1114, 1115, 33 Neb. 143; *Chicago, B. & Q. R. Co. v. Landauer*, 54 N. W. 976, 981, 36 Neb. 642; *Union Pac. Ry. Co. v. Porter*, 38 Neb. 226, 235, 56 N. W. 808, 810; *Chicago, B. & Q. R. Co. v. Hague*, 66 N. W. 1000, 48 Neb. 97; *Same v. Hyatt*, 67 N. W. 8, 10, 48 Neb. 161; *Same v. Martelle (Neb.)* 91 N. W. 364, 367; *Same v. Winfrey (Neb.)* 93 N. W. 526, 530. It is such negligence as would amount to a flagrant and reckless disregard of his own safety, and amount to a willful indifference to the injury liable to follow. *Omaha & R. V. R. Co. v. Chollette*, 33 Neb. 143, 49 N. W. 1114; *Missouri Pac. Ry. Co. v. Baier*, 37 Neb. 235, 55 N. W. 913. Gross negligence is "criminal" negligence, as the word is used in the statute. Recklessness that is without thought or care, disregard of one's own safety, or a willful indifference or intentional disregard of the consequences likely to follow, is criminal negligence when accompanying the intentional doing of an act incompatible with a proper regard for one's own life. *Union Pac. R. Co. v. Roeser (Neb.)* 95 N. W. 68, 70. The purpose of the statute was not to fasten upon a common carrier of passengers a liability as insurer, but it was rather intended to authorize a presumption from an injury to a passenger that the damages inflicted were entirely attributed to the negligence of the railroad company; and to avoid liability it devolves upon the company to show that the injury was imputable to the criminal negligence of the party injured. *Omaha & R. V. R. Co. v. Chollette*, 33 Neb. 143, 146, 49 N. W. 1114; *Missouri Pac. Ry. Co. v. Baier*, 37 Neb. 235, 255, 55 N. W. 913; *Clark v. Zarniko (U. S.)* 106 Fed. 607, 608, 45 C. C. A. 494.

Criminal negligence cannot be imputed to a transportation company which hired a stevedore to load a ship, and furnished the gangway used for such purpose, when the accident occurred by reason of the alleged negligence of the stevedore or his agent in rolling resin barrels down the gangway so rapidly that the deceased was unable to manage the same, and in consequence was thrown into the river and drowned. If it plainly appeared, however, that the rapid handling of the barrels so as to cause the death was brought about under the orders

and directions of the stevedore, such conduct on his part would amount to criminal negligence; but where it did not clearly appear from the declaration whether it was the stevedore or his agents who caused such rapid handling of the barrels, the stevedore cannot be held liable for the same under the rule of respondeat superior. *Rankin v. Merchants' & Miners' Transp. Co.*, 73 Ga. 229, 230.

If any person employed in any capacity by any railroad company doing business in the state shall, in the course of such employment, be guilty of negligence, either by omission of duty, or any act of commission in regard to the matters intrusted to him, or about which he is employed, from which negligence serious bodily injury, but not death, occurs to another, he is guilty of criminal negligence. Pen. Code Ga. 1895, § 115.

Code, § 4586, provides that any person employed in any capacity by any railroad company doing business in the state who shall be guilty of negligence, either by omission of duty, or by any act or commission in relation to the matter intrusted to him, by which any person is injured, shall be guilty of a penal offense. Held that, since by this section any neglect which caused serious injury to any person by an agent, servant, or employé of a railroad company was a crime, a waiver and release by which an employé released a railroad company from liability "which may result from the carelessness, negligence or misconduct of himself or any other person or employé connected with the road or in the service of said company, or from any other cause," was void as being a stipulation to waive criminal neglect. *Cook v. Western & A. R. Co.*, 72 Ga. 48, 50.

### CRIMINAL NEWS.

"Criminal news," as used in Pub. Acts 1885, p. 433, providing for the punishment of any person who shall sell any book, magazine, pamphlet, or paper devoted wholly or principally to the publication of criminal news, should be construed in its wide significance of information of wicked and immoral acts of recent occurrence or discovery. *State v. McKee*, 46 A. 409, 412, 73 Conn. 18, 49 L. R. A. 542, 84 Am. St. Rep. 124.

### CRIMINAL OFFENSE.

A "criminal offense" consists in a violation of a public law, in the commission of which there shall be a union or joint operation of act and intention or criminal negligence (*Hurd's Rev. St. Ill.* 1901, p. 645, c. 38, § 280; *Spalding v. People*, 49 N. E. 993, 997, 172 Ill. 40), and the intention is manifested by the circumstances connected with the perpetration of the offense, and the sound

mind and discretion of the person accused. *Howard v. People*, 61 N. E. 1016, 193 Ill. 615.

"A criminal offense consists in a violation of a public law, in the commission of which there shall be a union or joint operation of act and intention, or criminal negligence." (Statutory definition.) Under this statute a nonresident landowner cannot be held criminally liable because a stray thistle here and there growing on his land was overlooked and went to seed, when he had in good faith done all that could be reasonably expected of him to prevent it, although Rev. St. c. 18, § 5, makes it the duty of the commissioners of Canada thistles to prosecute any person who might violate the law on the subject of Canada thistles. *Story v. People*, 79 Ill. App. 562, 565.

#### As all grades of crime.

The terms "crime," "offense," and "criminal offense," when used in any statute, shall be construed to mean every offense, as well misdemeanor as felony, for which any punishment by imprisonment or fine, or both, may by law be inflicted. Gen. St. Kan. 1901, § 2311; Rev. St. Mo. 1899, § 2396; *State v. Blitz* (Mo.) 71 S. W. 1027, 1030.

The expression "criminal offense," as used in Const. art. 1, § 11, providing that no person shall be held to answer for a criminal offense unless on the presentment or indictment of a grand jury, except, etc., is to be construed in its most comprehensive sense, as including both felonies and misdemeanors. *Slaughter v. People* (Mich.) 2 Doug. 334, 335.

A misdemeanor is defined by the statute to be a criminal offense. *State v. Thornhill*, 74 S. W. 832, 833, 174 Mo. 364.

#### Assault and battery.

Assault and battery is a "criminal offense" within the meaning of the article of the Constitution which declares that no man shall be put to answer any criminal offense but by presentment, indictment, or impeachment. *Durr v. Howard*, 6 Ark. (1 Eng.) 461, 463.

#### Contempts.

Contempt of court is a specific "criminal offense." But what class of "criminal offenses" contempt belongs to is nowhere defined. It may be punished by a fine or imprisonment at the discretion of the court and there is no limit placed to the extent of either. So that a contempt incurred by violating an order of court prohibiting any one from interfering with the receivers of a railway, with its operation, is a criminal offense. In re *Acker* (U. S.) 68 Fed. 290, 292; *McClatchy v. Superior Court of Sacramento County*, 51 Pac. 696, 698, 119 Cal. 419; In re *Reese* (U. S.) 107 Fed. 942, 947, 47 O. C. A. 87; *Van Zandt v. Argentine Min. Co.* (U. S.) 48 Fed. 770, 771. It is punished sometimes

by indictment, and sometimes in a summary proceeding. In either mode of trial the adjudication against the offender is a conviction, and the commitment in consequence is execution. In re *Williamson*, 26 Pa. 9, 19, 67 Am. Dec. 374.

A contempt of court is an offense against the state, and not against the judge personally. *State ex rel. Van Orden v. Sauvinet*, 24 La. Ann. 119, 121, 13 Am. Rep. 115; *Yates v. Lansing* (N. Y.) 9 Johns. 395, 417, 6 Am. Dec. 290; *Sharp v. State* (Tenn.) 49 S. W. 752, 753, 43 L. R. A. 788, 73 Am. St. Rep. 851.

#### Crime and offense synonymous.

See "Crime"; "Offense."

#### Duress as fraud.

See "Duress"; "Fraud."

#### Violation of city ordinances.

The violation of a city ordinance is not a criminal offense. *Kansas City v. Neal*, 26 S. W. 695, 696, 122 Mo. 232.

The violation of a city ordinance is not a "criminal offense" within the meaning of Const. 1875, art. 2, § 12, providing that criminal offenses shall be prosecuted by indictments or information. *Ex parte Hollwedell*, 74 Mo. 395, 401.

The term "criminal offense" includes any punishable violation of law, the doing of which a penal law forbids, or omitting to do what it commands, and hence includes all violations of municipal ordinances punishable by fine or imprisonment. *State v. West*, 42 Minn. 147, 43 N. W. 845, 847.

#### CRIMINAL OPERATION.

In a complaint charging that defendants entered into a collusion with defendant K. to cause a criminal operation to be performed upon the body of plaintiff, and to have said K. perform an abortion upon her body, the words "criminal operation" are used synonymously with "abortion." *Miller v. Bayer*, 68 N. W. 869, 870, 94 Wis. 123.

#### CRIMINAL ORGANIZATION.

"'Criminal organizations' include all orders, organizations, associations, or by whatever name called, which teach, advise, counsel, encourage, or practice a commission of crimes forbidden by law." *Woolley v. Watkins*, 22 Pac. 102, 2 Idaho (Hasb.) 590.

#### CRIMINAL PROCEEDING.

A "criminal proceeding" is the manner in which the government, in its own name, punishes a person guilty of crime. *United States v. Lee Huen* (U. S.) 118 Fed. 442, 455.

Criminal proceedings cannot be said to be brought or instituted until a formal

charge is openly made against the accused, either by indictment presented or information filed in court, or at least by complaint before a magistrate. The submission of a bill or indictment by the attorney for the government to the grand jury, and the examination of witnesses before them, are both in secret, and are no part of the criminal proceedings against the accused, but are merely to assist the grand jury in determining whether such proceedings shall be commenced. The grand jury may ignore the bill and decline to file any indictment, and it cannot be known whether any proceedings will be instituted against an accused until an indictment against him is presented in open court. *Post v. United States*, 16 Sup. Ct. 611, 613, 161 U. S. 583, 40 L. Ed. 816.

Wherever a punishment is prescribed by law for an offense committed, it cannot be inflicted by Const. art. 11, § 14, but by indictment; yet it does not follow that, for the sake of inflicting it, a proceeding directed by the Legislature, which they intended to be a civil proceeding, shall therefore be converted into a criminal one by indictment. There will be a conflict between the punishment and the civil proceeding directed by the Legislature, and, as this civil proceeding cannot be converted into an indictment, therefore the punishment will be deemed impracticable, and the civil proceeding will remain, as it was intended by the Legislature. *Sevier v. Justices of Washington County*, 7 Tenn. (Peck) 334, 339.

Whether a proceeding is deemed "civil" or "criminal" depends upon the form permitted, not upon the question whether the penalty described is denominated a "fine" or "forfeiture." *State v. McConnell*, 46 Atl. 458, 459, 70 N. H. 158.

The words "criminal proceedings," as used in St. 1845, p. 188, relating to the reduction of town and county expenses (section 26), embrace proceedings against beggars and vagrants to prevent the commission of crime, against disorderly persons, and search warrants and proceedings thereon. *People v. Ontario County Sup'rs* (N. Y.) 4 Denio, 260, 261.

#### **Bastardy proceedings.**

A prosecution under the statute for the support of bastard children is not a civil proceeding, but a criminal proceeding, and cannot be tried at a term of the court which is restricted to the transaction of civil business only. *Hyde v. Chapin*, 56 Mass. (2 Cush.) 77, 79.

A proceeding under the bastardy act is a civil, and not a criminal, proceeding. Though in form criminal, it is essentially of the nature of a civil action, the object being not the imposition of a penalty, but merely to compel the putative father to contribute to the support of his illegitimate child. There-

fore such a proceeding is not embraced within Laws 1879, § 88, providing that in all criminal cases below the grade of felony the appeal from the county court shall be taken directly to the Appellate Court. *Rawlings v. People*, 102 Ill. 475, 478.

#### **Contempt proceedings.**

See "Contempt."

#### **Criminal case distinguished.**

The terms "criminal case" and "criminal proceeding" are not equivalent, though the latter presupposes the existence of the former. "Criminal proceeding" means any step taken in the progress of a criminal action, but does not include criminal conduct on the part of a citizen against whom no charge has been legally preferred. Therefore an indictment charging a police officer with failing to disperse a mob could not be based upon *Burns' Rev. St. 1894, § 2127*, providing that any ministerial officer refusing to perform any duty he is required by law to perform in any "criminal case or proceeding" shall be fined, etc. *Hopewell v. State*, 54 N. E. 127, 129, 22 Ind. App. 489.

#### **Divorce for adultery.**

A libel for divorce for adultery partakes of the nature of a criminal proceeding, since, if the same be proved, the defendant suffers injury, not only to his good name, but he may also be deprived of his property. *O'Bryan v. O'Bryan*, 13 Mo. 16, 21, 53 Am. Dec. 128.

#### **Habeas corpus and quo warranto.**

See "Habeas Corpus"; "Quo Warranto."

#### **Information in rem.**

Proceedings on an information in rem are civil, and not criminal, proceedings. *Anonymous* (U. S.) 1 Fed. Cas. 996, 997.

#### **Proceeding on application for bankrupt's discharge.**

The proceedings on a bankrupt's application for discharge are not criminal proceedings, or even criminal in their nature, like an action to recover a penalty or to enforce a forfeiture, but simply a civil proceeding instituted and prosecuted by the bankrupt for a discharge from his debts; and testimony given by the bankrupt is not excluded by Bankr. Act, § 7a, subd. 1, providing that no testimony given by the bankrupt shall be offered in evidence against him in a criminal proceeding. A criminal proceeding is an action instituted and prosecuted by the state against a person who is accused of crime, to punish him therefor. Criminal cases are those which involve a wrong or injury done to the republic, for the punishment of which the offender is prosecuted in the name of the whole people. *In re Lealie* (U. S.) 119 Fed. 406, 409.

**Prosecution for penalty.**

Prosecutions to recover penalties for the violation of a city ordinance are not criminal proceedings, but are civil suits. *City of St. Louis v. Knox*, 74 Mo. 79, 81.

A proceeding under a statute to enforce a penalty for illegally keeping billiard tables, etc., is criminal in character, the judgment provided for being both a fine and security for good behavior. *Pardee v. Smith*, 27 Mich. 33, 43.

**CRIMINAL PROCESS.**

The term "criminal process" is intended to signify any capias, warrant, citation, attachment, or other written order issued in a criminal proceeding, whether the same be to arrest, commit to jail, collect money, or for whatever other purpose used. *Pen. Code Tex.* 1896, art. 28.

Criminal process issues to compel a person to answer for a crime or misdemeanor, where punishment of some kind or other must be the consequence of conviction. *Ward v. Lewis* (Ala.) 1 Stew. 26, 27.

**CRIMINAL PROSECUTION.**

"Criminal prosecutions" involve public wrongs—a breach and violation of public rights and duties which affect the whole community, considered as a community, in its social and aggregate capacity. The end they have in view is the prevention of similar offenses, not atonement or expiation for crime committed. *Cancemi v. People*, 18 N. Y. 128, 136 (quoting 3 Bl. Comm. 2, 4, 5, 11).

"A 'criminal prosecution' is defined to be a prosecution in a court of justice, in the name of the government, against one or more individuals accused of a crime. The issue is between the government and the prisoner on a question of the guilt or innocence of the latter. It is not a question of property. A criminal prosecution, although instituted by an individual, is not in any sense an action between the person instituting it and the prisoner. It is not an action at all. That is defined to be the legal demand of one's rights, or the form given by law for the recovery of that which is due." *Harger v. Thomas*, 44 Pa. (8 Wright) 128, 130, 84 Am. Dec. 422.

The term "criminal prosecution," as used in Const. art. 10, § 10, providing that in all criminal prosecutions the accused has the right to be heard by himself and counsel, etc., means any prosecution carried on in the name of the commonwealth for any offense or crime against society. The word "criminal" is used as the opposite to "civil" suits or actions. The one includes all suits of the government, the end and design of which is the punishment of the accused; the other em-

braces all actions for individual redress. *Ely v. Thompson*, 10 Ky. (3 A. K. Marsh.) 70, 74.

**Action for forfeiture or penalty.**

An action to recover a penalty for selling intoxicating liquors in violation of Comp. Laws 1871, § 2138, is a civil suit, and not a "criminal prosecution." *People v. Bartow*, 27 Mich. 68, 69.

The term "criminal prosecution," as used in St. 1864, c. 121, providing that in all criminal prosecutions in which the defendant relies for his justification on any license, appointment, or authority he shall prove the same, should be construed to include a proceeding under St. 1876, c. 162, for the forfeiture of intoxicating liquors illegally kept and intended for sale. *Commonwealth v. Certain Intoxicating Liquors*, 122 Mass. 8, 11.

Under a complaint and search warrant under St. 1855, c. 215, § 25, for intoxicating liquors unlawfully kept for sale, liquors were seized, and subsequently the proceedings were quashed for informality, and the liquors ordered to be returned to the claimant, who moved for costs. The court were of the opinion that this was not a civil suit or proceeding in which the claimant could recover costs of the commonwealth. The process on which the liquors were seized was a criminal process, and the proceedings after the seizure were proceedings in a criminal prosecution. *Commonwealth v. Certain Intoxicating Liquors*, 80 Mass. (14 Gray) 375, 376.

**As an action, suit, etc.**

See "Action"; "Suit."

Civil action, etc., distinguished, see "Civil Action—Case—Suit—Etc."

Criminal action, prosecution, accusation, and criminal accusation synonymous, see "Criminal Action."

**Contempt proceedings.**

A proceeding to show cause why a defendant should not be adjudged guilty and punished for contempt in refusing to obey an order directing him to pay temporary alimony and suit money is in the nature of a criminal prosecution, entitling defendant to an appeal to the Supreme Court, under Cr. Code, § 281, authorizing an appeal to the Supreme Court by defendant, as a matter of right, from any judgment against him. *State v. Dent*, 29 Kan. 416, 418.

**Inquiries by grand jury.**

"Criminal prosecutions," as used in the Constitution, declaring that in all criminal prosecutions the accused shall have a right to be heard by himself and by counsel and to be confronted by witnesses, did not include inquiries before a grand jury. *State v. Wolcott*, 21 Conn. 271, 279.

**Preliminary examination.**

A preliminary examination of one charged with a felony is a "criminal prosecution." It is carried on in the name of the state to detect crime and the criminal, but the direct effect of it may be to deprive the accused of his liberty, and is within the provision of Rev. St. 1889, § 4174, providing for changes of venue in criminal prosecutions. *Ex parte Bedard*, 106 Mo. 616, 622, 17 S. W. 693.

**Proceedings for violation of city ordinance.**

Only prosecutions in the name of the state for the violation of a statute are to be regarded as "criminal prosecutions," and a proceeding under a city charter for a violation of some provision thereof is a penal action on the part of the city, and not a criminal prosecution. *Cooper v. People*, 2 N. W. 51, 41 Mich. 403.

"Criminal prosecutions" embrace all prosecutions under the general penal statutes of the state, even though such statute may have been re-enacted in the form of a city ordinance. "If the prosecution be under the statute, and in a court deriving its jurisdiction of the offense not from the city charter, but from the Constitution or statutes of the state, it is a criminal prosecution, and not a proceeding by a municipality to recover a penalty." *People v. Controller of the City of Detroit*, 18 Mich. 445, 454.

Const. art. 1, § 6, guarantying the right of trial by jury in all "criminal prosecutions," does not include offenses against ordinances enacted by a municipal corporation, in the exercise of its legitimate police authority, for the preservation of the peace, good order, health, or morals of a community, as they are not generally construed to be criminal cases. *City of Mankato v. Arnold*, 30 N. W. 305, 306, 36 Minn. 62.

Prosecutions to recover a penalty for a violation of a city ordinance are not criminal prosecutions. *Delaney v. Police Court of Kansas City*, 67 S. W. 589, 591, 167 Mo. 667.

The enforcement of a penalty for violating a city ordinance is not a "criminal prosecution," within the meaning of the constitutional provision relating to the right of trial by jury in criminal prosecutions. *Wong v. City of Astoria*, 11 Pac. 295, 297, 13 Or. 538.

Judge Dillon says: "If no imprisonment for the violation of a municipal regulation is authorized the prosecution is not criminal, and there is no constitutional right to a trial by jury; but if a limited imprisonment on default of paying a fine, or even as part of the punishment, is authorized by the Legislature, this does not necessarily make the case, if it be for a violation of a mere municipal regulation, one to which the right

of trial by jury extends." *In re Cox*, 89 N. W. 440, 129 Mich. 635.

**Synonymous terms.**

A "criminal action," as used in the Penal Code, means the whole or any part of the procedure which the law provides for bringing offenders to justice, and the terms "prosecution," "criminal prosecution," "accusation," and "criminal accusation" are used in the same sense. Pen. Code Tex. 1895, art. 26.

**CRIMINAL RESPONSIBILITY.**

The test of criminal responsibility is said to be whether, at the time the accused committed the act, he had the mental capacity to distinguish between right and wrong, and comprehend his relations to others, and to understand the nature and consequences of the particular act; that an act was morally wrong, or that he was conscious of doing wrong. This is called the "right and wrong test." *State v. Harrison*, 15 S. E. 982, 966, 36 W. Va. 729, 18 L. R. A. 224 (citing 1 Bish. Cr. Law, § 475).

**CRIMINAL VIOLENCE.**

The term "criminal violence," as used in Pen. Code, § 1322, providing that "except with the consent of both, or in case of criminal violence by one upon the other, neither husband nor wife is a competent witness for or against the other in a criminal action to which one or both are parties," does not include violence before marriage. The words mean what they say—criminal violence on the wife by the husband, or criminal violence on the husband by the wife. *People v. Curiale*, 70 Pac. 468-470, 137 Cal. 534, 59 L. R. A. 588.

**CRIMINALLY INCURRED.**

Under Practice Act, § 123, amended by St. 1887, p. 55, allowing an attachment where the liability was "criminally incurred," an attachment will lie where the execution arose out of a rape on plaintiff's daughter. "The liability was criminally incurred because incurred in the perpetration of a crime, to wit, a rape." *Kuehn v. Paroni*, 19 Pac. 273, 274, 20 Nev. 203.

**CRIMINATE.**

Chief Justice Marshall, in the trial of Aaron Burr, said that the true sense of the rule that no man is bound to criminate himself is that no witness is compellable to furnish any of the links in a chain of evidence against himself. *Kendrick v. Commonwealth*, 78 Va. 490, 497.

"Criminate," as used in the rule of evidence that a husband or wife cannot give testimony tending to criminate, means, in

effect, the charging of a crime. To be objectionable, however, the evidence of the wife must directly criminate the husband, and a mere tendency to criminate is not enough to justify its rejection. *Stewart v. Johnson*, 18 N. J. Law (3 Har.) 87, 94, 95.

### CRIMINATIVE CIRCUMSTANTIAL EVIDENCE.

"Criminative circumstantial evidence" is derived from the conduct of the party accused, and external objects or physical facts, with their appearances, as indicative of such conduct. As Mr. Burrill has remarked: "Where a case of suspected crime has become the subject of judicial investigation, and the general fact of the commission of a crime has been ascertained, and particularly where vigorous measures have been set on foot to trace out the perpetrator, the idea, now converted into prospect of discovery, and that becoming a more and more probable event as fact after fact is brought to light, naturally and almost necessarily fills the mind with alarm; particularly where the criminal finds his own person drawn, or likely to be drawn, within the sphere of investigation. Emotion and agitation exhibited under such circumstances, especially when no charge of guilt has yet been made, are regarded among the most convincing evidences of criminal agency that can be submitted to a human tribunal." *Noftzinger v. State*, 7 Tex. App. 301, 323 (citing Burrill on Cr. Ev. 466).

### CRINOLINE CLOTH.

Tariff Act March 2, 1872 (14 Stat. 561), relating to duties on women's dress goods, composed wholly or partly of wool, worsted, hair, alpaca, or other materials, imposed certain duties on hair cloth known as "crinoline cloth," and on all other manufactures of hair not otherwise provided for. Held, that the term "crinoline cloth," as there used, included goods composed of 80 per cent. goat's hair and 20 per cent. cotton, such as brillianlines, lusterines, alpacas, and mohairs. *Arthur's Ex'rs v. Butterfield*, 8 Sup. Ct. 714, 717, 125 U. S. 70, 81 L. Ed. 643.

### CRISP.

"Crisp," defined by Webster as "brittle or friable; in a condition to break with a short, sharp fracture"—adopted in discussion of qualities claimed for patented gunpowder. *Atlantic Dynamite Co. v. Climax Powder Mfg. Co.* (U. S.) 72 Fed. 925, 934.

### CRITICISM.

Criticism is a discussion or, as applicable in libel, a censure, of the conduct, character, or utterances of the person criticised. *Bel-*

*knap v. Ball*, 47 N. W. 674, 675, 83 Mich. 583, 11 L. R. A. 72, 21 Am. St. Rep. 622.

### CROP.

See "Agricultural Crops"; "Annual Crops"; "Entire Crop"; "Staple Crops"; "Way-Going Crop."

All crops, see "All."

The word "crop" is defined as "the top end or highest part of anything, especially of a plant; also that which is cropped, cut, or gathered from a single field, or of a single kind of grain or fruit, or in a single season, especially the valuable product of what is planted in the earth; fruit; harvest." The word also includes corn and other cultivated plants while growing. As applied to agriculture, the most general definition of "crop" seems to include that part of any agricultural product which is susceptible of being cropped for the uses of husbandry, whether already gathered or progressing toward maturity for that purpose. Where a policy of insurance against loss by fire or storm described the property insured under the general name of "crops," and the charter of the company authorized the insurance of hay, grain, or other agricultural products in barns, stacks, or otherwise, the term "crops" were sufficient to include crops growing in the field. *De Haven v. Mutual Ins. Co. (Pa.)* 1 Montg. Co. Law Rep'r, 98, 99; *Mutual Fire Ins. Co. v. De Haven (Pa.)* 5 Atl. 65, 67.

"A crop is primarily some product of the soil gathered during a single year, and when a man speaks of his crop he will ordinarily be understood to mean a crop raised by himself; and yet the words do not of themselves import this meaning, but may be taken to mean a crop that is a portion of the present year's growth of the article in question, which had become his by purchase as well as by production." As used in a contract for the sale of the seller's crop of flax, evidence is admissible to show the meaning of the term. *Goodrich v. Stevens (N. Y.)* 5 Lans. 230, 231.

The words "crops raised," as used in Code 1883, § 1754, giving a landlord a lien on all crops raised, means simply the crop grown or gathered during the year. The Legislature had in mind no distinction between fructus industriales and fructus naturales. The word "crop" covers both. Webster defines "crop" as "that which is cropped, cut, or gathered in a single season." In *Goodrich v. Stevens*, 5 Lans. 230, 231, the court says "a crop is primarily some product of the soil gathered during a single year." *State v. Crook*, 44 S. E. 32, 33, 132 N. C. 1053.

The word "crops" may mean either gathered or growing crops. The word "crops," in a will, will pass crops growing on a farm at the death of the testator, where there are

other words in the will by which the gathered crops would pass, such as "hay, fodder, produce, and provisions." *Dana v. Lewis*, 2 R. L. 492, 493.

#### **As chattels or land.**

See "Chattels"; "Land"; "Personal Property."

#### **Fruit and berries.**

"Crops," as used in Gen. St. c. 66, § 315, relating to levy of execution on growing crops, is equivalent to the common-law term "emblements," except that it possibly includes perennial grasses, but it does not include growing blackberries. *Sparrow v. Pond*, 52 N. W. 36, 37, 49 Minn. 412, 16 L. R. A. 103, 32 Am. St. Rep. 571.

"Crops," as used in the Political Code, prescribing the tests of lands which may be entered as agricultural as those which would produce ordinary agricultural crops, would include those suitable for the cultivation of the ordinary fruit and crops grown in the state. *Reeves v. Hyde*, 19 Pac. 685, 686, 77 Cal. 397.

#### **Straw and corn stalks.**

The term "crop," in a lease entitling the landlord to a share of the crop, includes straw. *Rank v. Rank*, 5 Pa. (5 Barr) 211, 213.

The term "crop," within the meaning of the rule that the rights of a mere cropper in rented premises terminate when the crop is gathered, includes the corn stalks remaining after the corn is gathered, as it is a well-known fact that they are of substantial use to farmers as feed for cattle. *Moser v. Lower*, 48 Mo. App. 85, 90.

#### **Trees.**

"Crop," as defined by Webster, is: "That which is gathered; the corn or fruits of the earth collected; harvest; the word which includes every species of fruit or product gathered for man or beast; corn or other cultivated plants, while growing (a popular use of the word); anything cut off or gathered. The etymology of the word 'crop' appears to be from the Saxon 'crop,' or 'cropp,' signifying the crop of a fowl, a cluster of ears of corn, grapes, ears of corn, and from the Welsh 'croplad,' a gathering or taking hold of." *Webst. verb.* "Crops." The definition given by Webster is even broader than the popular signification of the word. Under the former, as we see, not only is meant grain produced from annual vegetation, but also fruits from trees and perennial plants. But it is at least doubtful if, under the common and restrictive acceptation of the term, anything more would be understood than products from annual plants, as cereals, maize, etc., and the latter appears to be the sense in which the term is employed in tech-

nical legal parlance. "Crop," says Bouvier, "is nearly synonymous with emblements, and by this term is understood the crops growing upon the land. By crops is here meant the products of the earth which grow yearly, and are raised by the annual expense and labor, or great manurance and industry, such as grain, but not fruits which grow on trees, which are not to be planted yearly, or grasses and the like, though they are annual." *Bouv. Law Dict. verb.* "Emblements." As used in a clause of the Constitution exempting growing crops from taxation, it does not include fruit trees. *Cottle v. Spitzer*, 4 Pac. 435, 436, 65 Cal. 456, 52 Am. Rep. 305.

In Civ. Code, § 465, providing that standing crops, etc., shall be considered, for purposes of taxation, as part of the land to which they are attached, the word "crops" means only the actual products of the soil, resulting from planting and cultivation, and does not include trees growing in their natural state. *Globe Lumber Co. v. Lockett*, 30 South. 902, 904, 106 La. 414.

#### **CROP ENDS.**

The crop ends of a Bessemer steel rail are the imperfect ends of such rails, which are cut off to bring the remainder down to a solid rail of regular length. *Robertson v. Perkins*, 9 Sup. Ct. 279, 280, 129 U. S. 233, 32 L. Ed. 686.

#### **CROP TIME.**

"Crop time," as used in an agreement to a planter and his overseer, means that portion of the year which is occupied in making and gathering the crop. *Martin v. Chapman* (Ala.) 6 Port. 344, 351.

#### **CROP TO BE PLANTED.**

A "crop to be planted," as used in a mortgage, creates an equitable lien on the land on which the crop is to be grown in favor of the mortgagee. Such a crop is not the same as a growing crop, or one the seed for which is already planted, and a mortgage on the crop to be afterwards planted creates only an equitable lien, which will not support an action of detinue for a recovery of the crop after it has matured. *Wilkinson v. Ketler*, 69 Ala. 435.

#### **CROPPER.**

A cropper is a person hired by the owner of land to cultivate the land, receiving for his compensation a portion of the crops raised. Under a pure or unqualified cropping contract the entire legal ownership of the crop is in the owner of the land until division. A cropper has no estate in the land; so, though he has possession of the crop, it is only the possession of a servant, and is in law that of the landlord. *Wood v. Gar-*

rison (Ky.) 62 S. W. 728, 729; *Steel v. Frick*, 56 Pa. (6 P. F. Smith) 172, 175; *Fry v. Jones* (Pa.) 2 Rawle, 11, 12; *Adams v. McKesson's Ex'r*, 53 Pa. (8 P. F. Smith) 81, 83, 91 Am. Dec. 183.

A cropper is "one who, having no interest in the land, works it in consideration of receiving a portion of the crop for his labor. A contract to raise a crop on the shares does not create the relation of landlord and tenant even between the owner of the land and one who does the work." *Romero v. Dalton*, 11 Pac. 863, 864, 2 Ariz. 210.

The term "cropper," and not "tenant," characterizes one who raises a crop upon the land of another under contract to raise the crop for a particular party, and therefore such person has a lien upon the crop for whatever is due him from the landlord. *Burgle v. Davis*, 34 Ark. 179.

Persons who are to receive half of a crop for planting it, working it, taking care of it, and packing it, are croppers, and as such acquire no property in the crop before it is divided. *McCormick v. Skiles*, 30 Atl. 195, 163 Pa. 590.

#### As laborer.

See "Laborer."

#### Tenant distinguished.

The difference between a tenant and a cropper is clear. The tenant has an estate in the land for the term, and consequently he has a right of property in the crop. If he pays a share of the crop for rent, it is he that divides off to the landlord his share, and until such division right of property and of possession in the whole is his. The landlord has no lien on the crop for rent, whether such lien be stipulated for or not. A cropper has no estate in the land. That remains in the landlord. Consequently, though he has in some sense the possession of the crop, it is only the possession of a servant, and is in law that of the landlord. The landlord must divide off to the cropper his share; in short, he is a laborer, receiving a share of the crop. *Harrison v. Ricks*, 71 N. C. 7, 10, 11 (quoted in *Strain v. Gardner*, 21 N. W. 35, 39, 61 Wis. 174).

In *Taylor v. Bradley*, 39 N. Y. 129, 100 Am. Dec. 415, it is said the true test to be applied to cases in which the rent is to be paid in shares is as follows: "On the other hand, if A. should demise, lease, and let the farm to B., to have and to hold for the term of one or five years, to be cultivated in a husbandlike manner, rendering and paying to A. an annual rent for the use of the farm, to wit, one-half of the crop raised, I see no reason why the parties should not be deemed to intend an actual and technical lease." Thus an agreement whereby the party of the first part does hereby lease her farm, etc., one-third of the grain, roots, and hay to be

delivered, where the tenant has all the buildings on the premises and is to keep them in repair, the term is that one year from December to December (a longer time than a cropping season merely), and there is no possession reserved to the landlord during the term, or any control over the premises, if it is under seal and made to bind heirs, executors and assigns, is a lease, and not a cropping contract. *Strain v. Gardner*, 21 N. W. 35, 39, 61 Wis. 174. See, also, *Kelly v. Rummerfeld*, 94 N. W. 649, 650, 117 Wis. 620.

#### CROSS.

"Cross," as used in the charter of a railroad company, declaring that, if the railroad should intersect or cross any highway, the company should restore such highway to its former condition of usefulness, meant the actual cutting in two of the highway by the railroad, and did not include a place where the railroad for some distance ran along the edge of the highway, so that in some places it was necessary to change the edge of the highway, but which did not traverse or intersect it. *State v. New Haven & N. R. Co.*, 45 Conn. 331, 344.

To cross means to pass from side to side of. Cent. Dict. And one railroad cannot be said to cross another unless the rails of one extend over that rail of the other which is furthest from the side of approach. *Atchison, T. & S. F. Ry. Co. v. Kansas City, M. & O. Ry. Co.*, 70 Pac. 939, 940, 67 Kan. 569.

The word "cross," as used in the articles of incorporation of a railroad company, giving it permission to build viaducts over navigable streams or bays, or water over which such railroad may cross, does not include the Delaware, because "cross" means to go over from bank to bank, on the theory that the Legislature could not confer the power to cross the Delaware, as, in order to cross such a navigable river, that the authorization from the state was not alone sufficient, as it had not exclusive jurisdiction, yet, as it possessed jurisdiction of some sort for the purpose of guarding the common highway, its permission was needed by whomsoever claimed the right to interfere at all with this public privilege. *Attorney General v. Delaware & B. B. R. Co.*, 27 N. J. Eq. (12 C. E. Green) 631, 646.

Pub. St. c. 112, § 160, requiring a guard at a cornice of a roof over a station platform, where some portion of such construction crosses the railroad, does not apply to a case where a cornice of a roof over a station platform is one foot five inches from the nearest line of the outside rail. *Quinn v. New York, N. H. & H. R. Co.*, 55 N. E. 891, 895, 175 Mass. 150.

Within the provision of the railroad law conferring on every steam railroad the right



to cross or unite its railroad with any other railroad before constructed, to any point on its road, and providing that every railroad corporation whose road is intersected by any new railroad shall unite with such road in forming necessary intersections and grant the requisite facilities, the word "cross" could hardly have been intended to apply to one kind of a railroad, and the word "unite" to another kind; and, as the legislature by the word "cross" intended to preserve the right of railroads of different kinds to cross each other, the word "connect" should also be construed to apply to different railroads, and hence the electric railroads are subject to the provisions of the statute. *Stillwater & M. St. Ry. Co. v. Boston & M. R. Co.*, 64 N. E. 511, 514, 171 N. Y. 589, 59 L. R. A. 489.

#### As cross on same level.

Though the word "cross," when used as a verb, may and does frequently mean to intersect, as to lay a body across another, as to cross a word in writing, and should, when used in some connections, receive that construction, it is equally true that it also means, as defined by lexicographers, as well as in ordinary parlance, to pass from side to side, to pass or move over, or to cross a road or river, which may be done by passing upon a bridge elevated upon the level of the road or river. As a preposition it means "over, from side to side." In ordinary and popular phrases, the word is used indifferently to express the passing from side to side of an object, whether the passage is affected by moving directly upon the object crossed, or by passing from it at an elevation. A bridge is said to cross a river. A man is said to have crossed a river who has passed over it upon a bridge, which does not come in contact with the river. As used in Gen. R. R. Act 1850, § 39, requiring locomotives to sound a bell or whistle at least 80 rods from the place where the railroad should cross any traveled road or street, it does not mean merely to cross at grade, but includes an overhead crossing. *People v. New York Cent. Ry. Co.* (N. Y.) 25 Barb. 199, 202 (affirmed in 13 N. Y. [3 Kern.] 78, 80).

Within Rev. St. art. 4232, requiring trains to give signals where the railroads cross any public road and to stop where two railroads cross, relates only to crossings at grade. *Missouri, K. & T. Ry. Co. v. Thomas*, 28 S. W. 343, 344, 87 Tex. 288.

#### CROSS-ACTION.

Set-off as, see "Set-Off."

#### CROSS-BILL.

A cross-bill, *ex vi termini*, implies a bill brought by defendant in a suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matters in question in

the original bill. A bill of this kind is usually brought either (1) to obtain a necessary discovery of the facts in aid of the defense to the original bill, or (2) to obtain full relief to all parties touching the matters in the original bill. *Mercantile Trust Co. v. Atlantic & P. R. Co.* (U. S.) 70 Fed. 518, 524 (citing Story, Eq. Pl. § 889); *Morgan's L. & T. R. & S. Co. v. Texas Cent. Ry. Co.*, 11 Sup. Ct. 61, 70, 137 U. S. 171, 34 L. Ed. 625; *Stonemetz Printers' Mach. Co. v. Brown Folding Mach. Co.* (U. S.) 46 Fed. 851, 852; *First Nat. Bank v. Salem Capital Flour Mills Co.* (U. S.) 31 Fed. 580, 584; *Shields v. Barrow*, 58 U. S. (17 How.) 130, 144, 15 L. Ed. 158; *Ayres v. Carver*, 58 U. S. (17 How.) 591, 595, 15 L. Ed. 179; *Thruston v. Big Stone Gap Imp. Co.* (U. S.) 86 Fed. 484, 485; *North British & Mercantile Ins. Co. v. Lathrop* (U. S.) 70 Fed. 429, 433, 17 C. C. A. 175; *Kemp v. Mitchell*, 36 Ind. 249, 256; *Summers v. Hutson*, 48 Ind. 228, 233; *Ladner v. Ogden*, 31 Miss. 332, 340; *Bishop v. Miller*, 48 Miss. 364, 369, 371; *McRae v. University of the South* (Tenn.) 52 S. W. 463, 466; *Griffin v. Griffin*, 70 N. W. 423, 424, 112 Mich. 87; *Hill v. Frink*, 40 Pac. 128, 129, 11 Wash. 562; *Boland v. Ross*, 25 S. W. 524, 525, 120 Mo. 208; *Kidder v. Barr*, 35 N. H. 235, 251; *West Virginia Oil & Oil Land Co. v. Vinal*, 14 W. Va. 637, 677-679; *State v. Nathans*, 49 S. O. 199, 218, 27 S. E. 52. If its purpose is different from this, it is not a cross-bill, though it may have a connection with the general subject of the original bill. *Armstrong v. Mayer* (Neb.) 95 N. W. 51, 54 (citing *Stuart v. Hayden*, 18 C. C. A. 618, 72 Fed. 402; *Krueger v. Ferry*, 41 N. J. Eq. (14 Stew.) 432, 5 Atl. 452, 453. Sometimes it is brought against the codefendants in such depending suit, where they have opposite claims which the court cannot determine on the bill already filed, and the determination of such clashing interests is still necessary to a complete decree on the subject-matter of the suit. *Krueger v. Ferry*, 5 Atl. 452, 455, 41 N. J. Eq. (14 Stew.) 432 (citing *Coop. Eq. Pl.* 85).

The object of a cross-bill is either (1) to bring before the court new matter in aid of the defense to the original bill, (2) to obtain a discovery of facts from the plaintiff or codefendant in aid of the defense of the original bill, (3) to obtain some affirmative relief as to the matters in issue in the original bill, or (4) to obtain full relief for all parties and a complete determination of all controversies which arise out of the matters charged in the original bill. *Blythe v. Hinckley* (U. S.) 84 Fed. 223, 234; *Perkins Oil Co. v. Eberhart*, 64 S. W. 760, 765, 107 Tenn. 409; *Springfield Milling Co. v. Barnard & Leas Mfg. Co.* (U. S.) 81 Fed. 261, 263, 26 C. C. A. 389; *Harrison v. Harrison*, 19 Atl. 126, 46 N. J. Eq. (1 Dick.) 75.

A cross-bill is a species of pleading in equity used for the purpose of obtaining dis-

covery necessary to the defense, or to obtain some relief founded on the collateral claims of the party defendant to the original suit. *Tison v. Tison*, 14 Ga. 167, 171.

A cross-bill is a proceeding to procure a complete determination of a matter in litigation. *Derbyshire v. Jones*, 94 Va. 140, 142, 26 S. E. 416.

A cross-bill is proper when the defendants, or any or either of them, have equities arising out of the subject-matter of the original suit which entitle them to affirmative relief which they cannot obtain in that suit. *Whittemore v. Paten* (U. S.) 84 Fed. 51, 56 (citing *Kingsbury v. Buckner*, 134 U. S. 650, 658, 10 Sup. Ct. 638, 33 L. Ed. 1047); *Quick v. Lemon*, 105 Ill. 578, 584; *Ayers v. Chicago*, 101 U. S. 184, 187, 25 L. Ed. 838; *Hooper v. Central Trust Co.*, 32 Atl. 505, 508, 81 Md. 559, 29 L. R. A. 262.

A cross-bill may be filed for relief whenever any question arises between the defendant and complainant, or between two defendants to the bill, that cannot be determined completely without a cross-bill or cross-bills, to bring any matter in dispute completely before the court, to be litigated by the proper parties and upon the proper proofs. In such cases it becomes necessary for some one or more of the defendants to the original bill to file a cross-bill against the complainant and one or more of the other defendants to that bill, and thus to bring the litigated points fully before the court. *Perkins Oil Co. v. Eberhart*, 64 S. W. 760, 765, 107 Tenn. 409.

A cross-bill, like all other bills, must contain within itself, if true, a distinct cause of equitable relief. *Nichol v. Dunn*, 25 Ark. 129, 131.

It must seek equitable relief; but, subject to this qualification, a claimant who has brought a defendant into a court of equity and subjected him to an adjudication of his rights in a certain subject-matter cannot be heard to say that there is no equity in a cross-bill which seeks an adjudication of all the rights of the parties to the original suit in the same subject-matter. *Springfield Milling Co. v. Barnard & Leas Mfg. Co.* (U. S.) 81 Fed. 261, 263, 28 C. C. A. 389.

#### **As counterclaim.**

See "Counterclaim."

#### **As a defense or auxiliary suit.**

A cross-bill is a mere auxiliary suit and a dependency of the original. *Joyce v. Growney*, 55 S. W. 466, 470, 154 Mo. 253; *Stonemetz Printers' Machinery Co. v. Brown Folding Mach. Co.* (U. S.) 46 Fed. 851, 852; *Blythe v. Hinckley* (U. S.) 84 Fed. 228, 234; *Meissner v. Buek* (U. S.) 28 Fed. 161, 162; *Port Royal & A. R. Co. v. South Carolina* (U. S.) 60 Fed. 552, 553; *Hooper v. Central*

*Trust Co.*, 32 Atl. 505, 508, 81 Md. 559, 29 L. R. A. 262; *Frear v. Bryan*, 12 Ind. 843; *Summers v. Hutson*, 48 Ind. 228, 233; *Tippecanoe County Com'rs v. Lafayette, M. & B. R. Co.*, 50 Ind. 85, 102; *State v. Nathana*, 49 S. C. 199, 218, 27 S. E. 52; *West Virginia, Oil & Oil Land Co. v. Vinal*, 14 W. Va. 637, 677, 678, 679; *Kidder v. Barr*, 35 N. H. 235, 251. So far that the equity between the codefendants is the result of complainant's litigation. *McRae v. University of the South* (Tenn.) 52 S. W. 463, 466 (quoting Judge Cooper in *Hergel v. Laitenberger*, 2 Tenn. Ch. 251, 254). And jurisdiction of the original bill includes the jurisdiction of the cross-bill. *First Nat. Bank v. Salem Capital Flour Mills Co.* (U. S.) 31 Fed. 580, 584; *Brooks v. Laurent* (U. S.) 98 Fed. 647, 652, 39 C. C. A. 206. It is a mere auxiliary proceeding, either for discovery in aid of the defense against the original bill, or to procure a more complete determination of the matter already in litigation in the court, or for both these purposes. Lord Hardwicke says that "both the original and the cross bill constitute but one suit, so intimately are they connected." *Johnson R. Signal Co. v. Union Switch & Signal Co.* (U. S.) 43 Fed. 331, 332; *Ayres v. Carver*, 58 U. S. (17 How.) 591, 595, 15 L. Ed. 179; *Hill v. Frink*, 40 Pac. 128, 129, 11 Wash. 562; *Chappel v. Chappel*, 39 Atl. 984, 989, 86 Md. 532. It is generally treated as a defense to the original bill, or as a mere auxiliary suit rendered necessary in order to fully present and have adjudicated the subject-matter already in litigation. *North British & Mercantile Ins. Co. v. Lathrop*, 70 Fed. 429, 433, 17 C. C. A. 175; *Ladner v. Ogden*, 81 Miss. 332, 340. A sovereign state cannot be forced into court against her consent; but a cross-bill presupposes that the plaintiff is already in court rightfully, and, when the state comes into court of her own accord and invokes its aid, "she is of course bound by all the rules established for the administration of justice between individuals." *State v. Pacific Guano Co.*, 22 S. C. 50, 74. And when a suit is instituted by a state, and a cross-bill is filed against it, it is proper to serve the state by making substituted service upon the Attorney General, by whom the bill was filed. *Port Royal & A. R. Co. v. South Carolina* (U. S.) 60 Fed. 552, 553. It is in the nature of defense, and it is obtained by way of affirmative relief, which is in avoidance of that sought by the original bill, and, like all new and distinct facts, must be proved.—*Richardson v. Lightcap*, 52 Miss. 508, 516. In its nature it is nothing more than an answer to the original bill, except that, inasmuch as it shows ground for a relief not prayed for in the original bill, it must itself annex to the answer a prayer for the relief which it seeks to obtain. *Meissner v. Buek* (U. S.) 28 Fed. 161, 162. It is considered and used as a matter of defense, and may answer the purpose of a plea *puls darrein continuance*,

where the matter of the defense arises after answer. *Neal v. Foster* (U. S.) 34 Fed. 496, 498. It is nothing more than an addition to the answer. It makes a part of the pleading which states the defense; the answer being the other part. *Canant v. Map-pin*, 20 Ga. 730, 731. It is a pleading in equity, which in its very nature is a mode of defense. A cross-bill, in seeking a discovery and making no defense which was not equally available by answer, is not sustainable. *McDaniel v. Callan*, 75 Ala. 327, 331 (citing *Story*, Eq. Pl. §§ 387, 393). It "is a bill brought by a defendant against a complainant or other parties in a former bill touching the matters in question in that bill, and it should be so formed that both causes may be heard together and one decree cover both." *McDougald v. Dougherty*, 14 Ga. 674, 679.

The cross-bill and original bill are distinct suits, which proceed side by side; the hearing of one being delayed until the hearing of the other. So a decree on a cross-bill is a final decree, that disposes of the whole case of such defendant and puts him out of court, and is such a final decree that an appeal therefrom will lie. *Nichol v. Dunn*, 25 Ark. 129, 131. To the contrary, see *Ex parte South & North Alabama R. Co.*, 95 U. S. 221, 225, 24 L. Ed. 355.

#### New matters and parties.

A cross-bill under the chancery practice can be sustained only on matter growing out of the original bill. 2 *Daniell*, Ch. Pl. & Prac. 1548n. A cross-bill is filed touching matters in the original bill. *Jewett Car Co. v. Kirkpatrick Const. Co.* (U. S.) 107 Fed. 622, 625; *West Virginia Oil & Oil Land Co. v. Vinal*, 14 W. Va. 637, 677-679; *Summers v. Hutson*, 48 Ind. 228, 233 (citing *Frear v. Bryan*, 12 Ind. 343); *Galatian v. Erwin* (N. Y.) *Hopk.* Ch. 48, 58; *Cunningham v. Erwin*, Id. It should not introduce new and distinct matter not embraced therein. The province and only legitimate use of a cross-bill is to aid in the defense of the original suit, and the matters of it cannot be more extensive than the defense to the original bill. *Hansford v. Coal Co.*, 22 W. Va. 70, 75.

A cross-bill is a mode of defense. The original bill and the cross-bill are but one cause. It must be confined to the subject-matter of the original bill, and cannot introduce new and distinct matter not embraced in the original suit. *Thruston v. Big Stone Gap Imp. Co.* (U. S.) 86 Fed. 484, 485; *Ayers v. Chicago*, 101 U. S. 184, 187, 25 L. Ed. 838; *Weathersbee v. American Freehold Land Mortg. Co.* (U. S.) 77 Fed. 523, 524; *Camfort v. McTeer*, 75 Tenn. (7 Lea) 652, 662.

Such cross-bill may set up new matter arising subsequently, but still it must constitute part of the same defense, or relate

to the same subject-matter in such a way as to be a defense to the original suit. *Ledwith v. City of Jacksonville*, 13 South. 454, 458, 32 Fla. 1.

It should not introduce new and distinct matters not embraced in the original bill, as they cannot properly be examined in that suit, but constitute the subject-matter of an original independent suit. *Ayres v. Carver*, 59 U. S. (17 How.) 591, 595, 15 L. Ed. 179; *Hill v. Frink*, 40 Pac. 128, 129, 11 Wash. 562.

A cross-bill is brought either to aid in a defense of an original suit or to obtain a complete determination of the controversies between the original complainant and the cross-complainant over the subject-matter of the original bill. If its purpose is different from this, it is not a cross-bill, although it may have a connection with the general subject of the original bill. It may not interpose new controversies between codefendants to the original bill, the decision of which is unnecessary to a complete determination of the controversies between the complainant and the defendants over the subject-matter of the original bill. If it does so, it becomes an original bill. *Stuart v. Hayden* (U. S.) 72 Fed. 402, 410, 18 C. C. A. 618. If new facts are introduced by it, they must be so closely connected with the cause of action set up in the original bill as to render the cross-suit a mere auxiliary of the original suit. It must not be the means of instituting a distinct suit in relation to other matters. *Harrison v. Harrison*, 19 Atl. 126, 46 N. J. Eq. (1 Dick.) 75 (citing *Kirkpatrick v. Corning*, 39 N. J. Eq. [12 Stew.] 136, affirmed on appeal 40 N. J. Eq. [13 Stew.] 343; *Krueger v. Ferry*, 41 N. J. Eq. [14 Stew.] 432, 5 Atl. 452, affirmed on appeal *Ferry v. Krueger*, 43 N. J. Eq. [16 Stew.] 295, 14 Atl. 811). See, also, *Springfield Milling Co. v. Barnard & Leas Mfg. Co.* (U. S.) 81 Fed. 261, 263, 26 C. C. A. 389.

It is not the office of a cross-bill to bring new parties before the court, and matters not germane to the subject-matter of the original bill cannot be set up in it. *Perca v. Harrison*, 41 Pac. 529, 530, 7 N. M. 668.

A cross-bill for relief must be strictly confined to the matters which are involved in the original bill, and is filed to enable the defendant in the original bill to fully avail himself of some defense by making his redress complete through a granting of affirmative relief, which could not be done under the original bill and answer; and thus, where the defendants' cross-bill shows that a matter in the original bill involves a new party, such new party may be brought in. *Griffin v. Griffin*, 70 N. W. 423, 424, 113 Mich. 87.

It is clear that none but a party to the original bill can be made a party to a cross-

bill. *Oswald v. Givens* (S. C.) Rich. Eq. Cas. 328, 351.

New parties cannot be introduced into a cause by a cross-bill. If the plaintiff desires to make them new parties, he amends his bill and makes them. *Shields v. Barrow*, 58 U. S. (17 How.) 130, 145, 15 L. Ed. 158. "Any defendant in a chancery suit may make his answer a cross-bill against the complainant, his codefendant or defendants, or all of them, and may introduce any new matter therein material to his defense, and may require the same to be answered, and in the same manner may require of his complainant, or any of the defendants, a discovery of any matter material to his defense; and he shall have process thereon against the defendants to such cross-bill, and the like proceedings therein as in other bills or cross-bills. Code 1871, § 1030. *Bishop v. Miller*, 48 Miss. 364, 369, 371.

A cross-bill may be filed only by a party to the suit, and may not introduce new matter or new parties. *Thruston v. Big Stone Gap Imp. Co.* (U. S.) 86 Fed. 484, 485.

A cross-bill may be brought by a defendant against the plaintiff in the same suit, or against the other defendants, or against both, but it must be touching the matters in question in the bill. *Cross v. De Valle*, 68 U. S. (1 Wall.) 5, 14, 17 L. Ed. 515; *Neal v. Foster* (U. S.) 34 Fed. 496, 498; *Ledwith v. City of Jacksonville*, 13 South. 454, 32 Fla. 1; *Kemp v. Mitchell*, 36 Ind. 249, 256; *Kopper v. Dyer*, 9 Atl. 4, 10, 59 Vt. 477, 59 Am. Rep. 742; *McMullen v. Eagan*, 21 W. Va. 233, 247.

There is, a well-defined distinction between a cross-bill merely defensive in character and one seeking affirmative relief; for example, the dismissal of an original bill carries with it a cross-bill of the former character, but not of the latter. *Price v. Stratton* (Fla.) 83 South. 644, 645.

#### CROSS-COMPLAINT.

See "Cross-Petition."

Complaint distinguished, see "Complaint."

Counterclaim distinguished, see "Counterclaim."

A cross-complaint is in the nature of an original action. When the defendant files a cross-complaint and seeks affirmative relief, he becomes the plaintiff and the plaintiff in the original action becomes the defendant in the cross-complaint. *Northwestern & P. Hypotheek Bank v. Riddpath*, 70 Pac. 139, 143, 29 Wash. 687.

"A cross-complaint is a pleading by defendant to an action which contains a statement of facts sufficient to constitute a cause of action against the plaintiff in reference to the transaction upon which the original

transaction is founded, or affecting property to which the original transaction relates." *Harrison v. McCormick*, 11 Pac. 456, 457, 69 Cal. 616.

What is now very commonly denominated a "cross complaint," is practically synonymous with a cross-bill in chancery practice, and is, under our present Code, technically a counterclaim. *Douthitt v. Smith*, 69 Ind. 463. Liberal as our decisions have been in giving to the counterclaim a comprehensive force and effect, they have firmly held to the cardinal principle that there must be some legal or equitable connection between the matters pleaded as a counterclaim and the matters alleged in the original complaint. *Shelly v. Vanarsdoll*, 23 Ind. 543. The term "counterclaim" is used to denote the matters constituting the ground of defense, as well as the pleading in which it is stated, and the term "cross-complaint" is very frequently used to designate the pleading, although it has been said that a "counterclaim" is the proper title of the pleading. Whatever term may be used to designate the pleading, whether "cross-complaint" or "counterclaim," it is only proper where it pleads a matter connected with the original subject of the action, which entitles the defendant to affirmative relief or mitigates the recovery. A matter constituting an entirely distinct cause of action, not connected with the matters stated in the complaint, cannot be pleaded as a counterclaim. *Standley v. Northwestern Mut. Life Ins. Co.*, 95 Ind. 254, 261, 262, 263.

#### CROSS-DEMAND.

A "cross-demand" is a statement of any new matter constituting any cause of action in favor of defendant, or all the defendants, if more than one, against the plaintiff, or all the plaintiffs, if more than one, and which the defendant or defendants might have brought when the suit was commenced, or which was then held, whether matured or not, if matured when pleaded. Rev. St. § 2891. *Musselman v. Galligher*, 32 Iowa, 383, 389.

#### CROSS-EXAMINATION.

The right of "cross-examination" is that of treating the witness as the witness of the adverse party and of examining him by leading questions. Precisely what subjects may be included in cross-examination seems to be a matter of some doubt. In England, when a competent witness is called and sworn, the other party will ordinarily and in strictness be entitled to cross-examination, though the party calling him does not choose to examine him in chief, unless he was sworn by mistake, or unless, an immaterial question having been put to him, his further examination in chief has been stopped by the judge. If

is held by the Supreme Court of the United States that a party has no right to cross-examine any witness, except as to facts and circumstances connected with the matters stated in his direct examination, and that, if he wishes to examine him in regard to other matters, he must do so by making the witness his own, and calling him as such in the subsequent progress of the cause. *Philadelphia & T. R. Co. v. Stimpson*, 39 U. S. (14 Pet.) 448, 10 L. Ed. 535; *Commonwealth v. Eastman*, 55 Mass. (1 Cush.) 189, 217, 48 Am. Dec. 596. This rule is undoubtedly sustained by the weight of American authority. 8 Enc. Pl. & Prac. pp. 101, 102; *Hobart v. Young*, 12 L. R. A. 693, and notes, 21 Atl. 612, 63 Vt. 363. In some of the states, as in New York, for instance, the scope of the cross-examination is left to the discretion of the trial judge, although the decisions of that state favor the American rule. "Under this doctrine, if the cross-examination extends beyond the grounds covered in the direct examination, the witness becomes the witness of the party cross-examining. The testimony brought out blinds him as though he had called the witness himself, and in bringing it out he is confined to the methods of the direct examination." *McKelvey*, Ev. § 246. One of the great difficulties in the practical application of this rule is in determining when a fact sought to be elicited in cross-examination is germane to the examination in chief. "According to the English rule, when a party produces a witness who is sworn and examined, the opposite party is not confined on his cross-examination to the matters upon which the witness was examined in chief. He may cross-examine him upon every issue in the case." 8 Enc. Pl. & Pr. 112; *Berwick, Mayor, etc., v. Murray*, 19 L. J. Ch. 281. "This rule has been adopted in a number of American jurisdictions, and the fact that the witness would be incompetent to testify, were he called by the cross-examining party, does not affect the rule. The party who would have the right to make such objection effectually waives it by calling the witness and examining him upon a single point, and the other party is then at liberty to cross-examine him generally." 8 Enc. Pl. & Prac. 102. The English rule seems to prevail in Alabama, Arizona, Georgia, Massachusetts, Michigan, Missouri, Mississippi, South Carolina, Vermont, and perhaps other jurisdictions. In Tennessee a defendant may cross-examine plaintiff's witness as to any matter in issue, though no inquiry was made in respect thereto on the direct examination. *Sands v. Southern Ry. Co.*, 64 S. W. 478, 479, 108 Tenn. 1. "Greenleaf says it is a well-settled rule that a witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence if he should deny it." *Seller v. Jenkins*, 97 Ind. 430, 438.

Cross-examination is not confined to the mere categorical review of the matters stated in the direct examination. It is a proper effort to test the truth of that evidence. *State v. Miller*, 56 S. W. 907, 910, 156 Mo. 76.

The examination of a witness by the party producing him is denominated the "direct examination"; the examination of the same witness upon the same matter, by the adverse party, the "cross-examination." The direct examination must be completed before the cross-examination begins, unless the court otherwise direct. *Ann. Codes & St. Or. 1901*, § 846.

### CROSS-PETITION.

A cross-petition, under Civ. Code, § 96, subd. 3, is the commencement of an action by defendant against a codefendant or a person who is not a party to the action, or both, or by a plaintiff against a coplaintiff, or a person who is not a party to the action, or both. By said section a defendant may have a cross-action against a common defendant alone, or a third person may be joined with the defendant, or against a third person alone, but he cannot have a cross-action against the plaintiff alone or jointly with a third person. *Grimes v. Grimes*, 88 Ky. 20, 22, 9 S. W. 840, 10 Ky. Law Rep. 658, 659.

Newman in his *Pleading and Practice* says: "A counterclaim, however, under the Code, is but another name for a cross-petition, and may be so styled without impropriety, especially in an action prosecuted by equitable proceedings." Pages 610-618. And see authorities cited in support of the text. This was written with reference to the old Code, which was somewhat different from the new Code in regard to the characterization of pleadings in the caption, but the same with reference to the substance of the pleadings. *Walker v. Symser's Ex'rs*, 4 Ky. Law Rep. 662, 670, 80 Ky. 620.

### CROSS-TIE.

A cross-tie is defined to be a sleeper connecting and supporting the parallel rails of a railroad: *Howser v. Cumberland & P. R. Co.*, 30 Atl. 906, 908, 80 Md. 146, 27 L. R. A. 154, 45 Am. St. Rep. 332 (citing *Stand. Dict.* 444).

### CROSS-WALK.

"A cross-walk lies in the street and is a part of it, and when it is out of repair the person or corporation, bound to repair the street is bound to repair the cross-walk, or, what is the same thing, the part of the street on which it lies must be made so that teams and persons may pass over it in safety." *Hines v. City of Lockport (N. Y.)* 60 Baro. 878, 381.

Cross-walks extend for the whole distance between the extended boundary lines of intersecting streets, where they meet the sidewalks. *O'Neill v. City of Detroit*, 15 N. W. 48, 49, 50 Mich. 138.

Cross-walks extend the entire distance across the street spanned by them. *O'Neill v. Detroit*, 50 Mich. 133, 15 N. W. 48. The fact that a township built a sluiceway under a cross-walk as originally constructed, using the boards of the walk as a covering for the sluice, did not deprive the walk of its distinctive character, under *Sess. Laws 1887, § 3*, providing that townships, villages, etc., shall keep in repair all public highways, cross-walks, etc. *Frery v. Allen Tp.*, 52 N. W. 78, 79, 91 Mich. 689.

#### Sidewalks not included.

As used in *Acts Mich. 1879, p. 223, No. 244*, creating a liability against a city in favor of persons sustaining bodily injury on any of the highways, streets, bridges, cross-walks, and culverts, etc., cross-walks do not include sidewalks, though it may be a part of the sidewalk which crosses a street or an alley; the intention of the statute being to distinguish between those portions of the street which the city itself constructs and keeps in repair and the other portion, namely, sidewalks, which it compels property owners to build and keep in repair; rendering the city liable in one case and not in the other. *Pequignot v. City of Detroit (U. S.)* 16 Fed. 211, 212.

#### CROSSING.

See "Grade Crossings"; "Private Crossings"; "Public Crossing"; "Railroad Crossing"; "Road Crossing"; "Street Crossing"; "Wagon Crossing."

All crossings, see "All."

Crossings, within the meaning of the law requiring railroads to maintain crossings, include street crossings in cities and towns, as well as crossings of public roads and private ways. *Western & A. R. Co. v. City of Atlanta*, 74 Ga. 774, 778.

The statute prohibiting the crossing of a lake within three miles of a toll bridge applies to any person crossing the lake on the ice in winter. *Cayuga Bridge Co. v. Stout (N. Y.)* 7 Cow. 33.

Under the amendment to the act incorporating the Cayuga Bridge Company, providing that it shall not be lawful for any person to cross a lake within three miles of the bridge without paying toll, embarking upon one side of the lake six miles from the bridge, and crossing in such a direction as to leave the lake within sixty rods of the bridge on the other side, is not such a crossing within the three miles as is contemplated

by the act. *Sprague v. Birdsall (N. Y.)* 2 Cow. 419.

#### As crossing on same level.

A statute authorizing a railroad in course of construction to construct crossings where it intercepted other lines meant one where the original use as exercised at the point of crossing might be continued in concurrence and co-operation with the new use, and would not permit the severing of the old roadbeds and rails, or the division of its route by a cut or fill, which can only be passed by raising or lowering its grade. *United New Jersey R. & Canal Co. v. National Docks & N. J. J. Connecting Ry. Co.*, 18 Atl. 574, 579, 52 N. J. Law (23 Vroom) 90.

"Crossings," as used in a statute requiring a railroad to construct "farm crossings" on lands traversed by it, includes a passage under the track as well as over it, and hence it is the duty of the company to construct a crossing under the tracks, when they traverse lands on an embankment elevated at a considerable distance above the grade. *Wheeler v. Rochester & S. Ry. Co. (N. Y.)* 12 Barb. 227, 232.

"Farm crossings," as used in the charter of the *St. Paul & Sioux City Railway Company (Sp. Laws 1864, c. 1, subc. 2, § 2)*, providing that the company shall construct and maintain all proper and necessary farm crossings over the line of the road, means crossings from one side to the other of the railroad track, whether by passing over it or under it. *St. Paul & S. C. R. Co. v. Murphy*, 19 Minn. 500, 522 (Gil. 433, 452).

#### Approaches included.

The term "crossing," as used in a statute requiring railroads to make and maintain safe crossings where they intersect a public highway, includes not only the actual traveled railroad across the highway, but the necessary embankment and approaches to the railway. The object of the law is to secure the public from the inconvenience and expense resulting from the destruction of highways when they are crossed by railroads. *Moberly v. Kansas City, St. J. & C. B. R. Co.*, 17 Mo. App. 518, 519.

The word "crossing," as applied to the intersection of a common highway and a railroad, and as used in the statutes relating to such crossings, means the entire structure, including the approaches, though a part of such structure may be outside the lines of the railroad's lands, or the place where the roads actually cross each other. *Town of Roxbury v. Central Vermont R. Co.*, 14 Atl. 92, 101, 60 Vt. 121.

Gen. St. §§ 3489, 3491, providing that, on petition of any railroad company and notice to the owners of "land adjoining the crossing," the railroad commissioners may

make alterations in the location of a highway or a railroad at the crossing of the two, to render the crossing less dangerous, should be construed to include land adjoining the approaches to the crossing, which are or may be altered by the order of the railroad commissioners. *Cullen v. New York, N. H. & H. R. Co.*, 83 Atl. 910, 912, 66 Conn. 211.

#### In reference to vessels.

"Crossing," as used in Act March 3, 1885, providing rules and regulations to be used by vessels crossing or overtaking each other for preventing collisions at sea, should be construed to include vessels which were on courses converging by at least three points. "Their difference in speed being not more than from 1.2 to 1.5 knots, and each bearing from two to three points forward of the other's beam, they were crossing, and not overtaking, vessels. A vessel may be crossing another's course, and at the same time overtaking her in a certain sense, or she may be overtaking another in a general or popular sense, or in reference to certain aspects, and clearly not be an overtaking vessel in the sense of the rules of navigation. A faster sailing vessel, sailing a racing voyage across the Atlantic and starting after her rival, might in a popular sense be said to overtake and pass the other whenever she got nearer to her destined port, though at no time sailing within sight of the other. So two vessels beating up stream against a head wind might be so navigated as to be always sailing on opposite tacks. The hinder vessel, if all the time gaining on the other, would in one sense be an overtaking vessel—that is, overtaking in reference to their general progress; but she could not be an overtaking vessel in the sense of the rules of navigation, so long as the two were running on opposite tacks. The vessels in that case would be crossing vessels, and the crossing rule would apply, though the one to leeward was gaining on the other. When beating and on the same tack, the faster vessel, if behind, would be overtaking in the sense of the rules, and the overtaking rule would apply." *The Aurania and The Republic* (U. S.) 29 Fed. 98, 104.

### CRUCIBLE.

A crucible is a chemist's melting pot, made of earth. *State v. Bowman*, 6 Vt. 594, 596.

### CRUDE.

The word "crude" is defined as "in its natural state; not cooked or prepared by fire or heat; undressed; not altered, refined, or prepared for use by any artificial process; raw." *Recknagel v. Murphy*, 102 U. S. 197, 198 (citing *Webst. Dict.*).

"Crude," as applied to sawlogs, means their natural state or condition after having been severed from the remainder of the trunk and other portions of the tree. It means that they have not been polished, dressed, altered, refined, or prepared for use by artificial process. *Buckl v. McKinnon*, 20 South. 540, 541, 37 Fla. 391.

### CRUDE BULLION.

"Crude or base silver bullion," as the term is understood in Montana, is silver in bars mixed to a greater or less extent with base materials. *Hope Min. Co. v. Kennon*, 8 Mont. 35, 44.

### CRUDE MINERAL.

"Crude mineral," as used in Tariff Act Oct. 1, 1890, Free List, par. 651, does not include so-called Mexican onyx, a mineral consisting chiefly of carbonate of lime and certain impurities, principally ferrous oxides, imparting to the material its beautiful and variegated colors, crystalline in structure, and belonging scientifically to the group of calcites, recognized by the leading dictionaries and encyclopedias as belonging to the general class of marble, used for the same general purposes in ornamental and interior decoration as marble, and being worked and finished by the same processes. *Mexican Onyx & Trading Co. v. United States* (U. S.) 66 Fed. 732.

### CRUEL.

In order that a homicide be committed in a cruel manner, there must be presence of the motive to inflict bodily or mental suffering, from the effect of which the injured person dies. *Territory v. Fewel*, 17 Pac. 569, 571, 4 N. M. (4 Johns.) 318 (quoting from *Territory v. Pridemore*, 13 Pac. 96, 4 N. M. [Johns.] 137, which held that an accidental homicide could not be said to be cruel).

"Cruelly," as used in a complaint under Pub. St. c. 207, § 53, for cruelly driving a horse when unfit for labor, alleging that defendant did cruelly drive, etc., exhausts the requirements of the statute with regard to the state of mind of the actor, and a further allegation that defendant knew the horse to be unfit for labor is unnecessary. *Commonwealth v. Porter*, 42 N. E. 97, 164 Mass. 576.

"Cruelly," as used in Code 1896, § 5093, providing for the punishment of any one cruelly killing any animal, is used to describe the manner of the killing, and limits prosecution for the offense to the taking of life by some cruel method, and does not authorize a prosecution merely for killing an animal. *Horton v. State*, 27 South. 463, 124 Ala. 80.

**CRUEL AND ABUSIVE TREATMENT.**

See "Cruelty."

**CRUEL AND BARBAROUS TREATMENT.**

See "Cruelty."

**CRUEL AND INHUMAN TREATMENT.**

See "Cruelty"; "Habitual Cruel and Inhuman Treatment."

**CRUEL AND UNUSUAL PUNISHMENT.**

See, also, "Unusual Punishment."

The phrase, as employed in the constitutional provision forbidding the infliction of cruel and unusual punishment, means such punishment as would amount to torture, or such as would shock the mind of every man possessed of common feeling, such, for instance, as drawing and quartering the culprit, burning him at the stake, cutting off his nose, ears, or limbs, starving him to death, or such as was inflicted by an act of Parliament as late as 22 Hen. VIII, authorizing one Rouse to be thrown into boiling water and boiled to death for the offense of poisoning the family of the bishop of Rochester. *State v. Williams*, 77 Mo. 310, 312. See, also, *Miller v. State*, 49 N. E. 894, 897, 149 Ind. 607, 40 L. R. A. 109; *Hobbs v. State*, 32 N. E. 1019, 1021, 133 Ind. 404, 18 L. R. A. 774; *Wilkerson v. Utah*, 99 U. S. 130, 134, 25 L. Ed. 345 (citing *Cooley Const. Lim.* [4th Ed.] 408).

"Cruel and unusual punishment" means some cruel or degrading punishment not known to the common law, or a punishment so disproportioned to the offense as to shock the sense of the community. An act inflicting a greater punishment for an offense when committed in one part of the state than when committed in another is not void as inflicting a cruel and unusual punishment. *In re Bayard* (N. Y.) 25 Hun, 546, 549.

The provision in the Constitution prohibiting cruel and unusual punishment is, as a part of the Constitution of the Union, a restriction upon the government of the Union; and, as a part of any state Constitution, it is a restriction upon the government of the state which has established it. *Barker v. People* (N. Y.) 3 Cow. 686, 702, 15 Am. Dec. 322.

Whatever is greater than has ever been described or known or inflicted must be cruel and unusual punishment. *State v. Driver*, 78 N. C. 423, 426.

Const. art. 6, § 23, in prohibiting the infliction of cruel and unusual punishments, meant those which are so excessive or so cruel as to meet the disapproval and condemnation of the conscience and reason

of men generally. *State v. Becker*, 51 N. W. 1018, 1022, 3 S. D. 29.

Any punishment declared by statute for an offense which was punishable in the same way at the common law cannot be regarded as cruel or unusual in the constitutional sense. *People v. Durston*, 7 N. Y. Supp. 145, 150, 7 N. Y. Cr. R. 350 (citing *Cooley, Const. Lim.* 329).

2 How. Ann. St. c. 304, authorizing the imprisonment of a debtor who has assigned or disposed of, or is about to dispose of, his property with intent to defraud his creditors, is not in conflict with Const. art. 6, § 31, prohibiting cruel and unusual punishments, as the act provides for the debtor's release on payment of the debt, or giving security for its payment, or security that he will apply for an assignment of all his property. *Dummer v. Nungesser*, 65 N. W. 564, 566, 107 Mich. 481.

**Death.**

On a conviction under Comp. Laws 1897, § 1151, inflicting the death penalty for assault upon a train with intent to commit robbery or other felony, it was contended that the infliction of the death penalty was a cruel and unusual punishment, within the eighth amendment to the Constitution of the United States forbidding such punishments, and it is said that much difficulty has been expressed by courts and text writers in attempting to define the scope of this constitutional provision. In *People v. Morris*, 80 Mich. 634, 638, 45 N. W. 591, 592, 8 L. R. A. 685, 686, it is said: "The difficulty in determining what is meant by cruel and unusual punishment, as used in our Constitution, is apparent. Counsel for defendants claim that, as properly understood, it means, as used in this connection, punishment out of proportion to the offense. If by this is meant the degree of punishment, we do not think the contention is correct. When, in England, concessions against cruel and unusual punishments were first wrested from the crown, slight offenses were visited with the most extreme punishment, and no protest was made against it." In *re Kemmler*, 136 U. S. 436, 10 Sup. Ct. 930, 34 L. Ed. 519, it is said punishments are cruel when they involve torture or lingering death. But the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of human life, and hence such provision of the Compiled Laws was not unconstitutional. *Territory v. Ketchum*, 65 Pac. 169, 170, 10 N. M. 718, 55 L. R. A. 90.

**Death by electricity.**

Cr. Code, § 505, directing the infliction of the death penalty by electricity, prescribed no new and unusual punishment, in the



sense of the constitutional inhibition against the infliction of cruel and unusual punishment. It only directs a new method of inflicting the usual punishment for a capital crime. *People v. Durston*, 24 N. E. 6, 7, 119 N. Y. 569, 7 L. R. A. 715, 16 Am. St. Rep. 859.

#### Disproportionate punishment.

A punishment for a crime done in a state prison is not cruel and unusual, where it is the same as if the crime had been committed elsewhere. Pub. Acts 1893, No. 118, §§ 64, 65. *People v. Huntley*, 71 N. W. 178, 181, 112 Mich. 569.

Ordinarily the term "cruel and unusual" implies something inhuman and barbarous in the nature of the punishment. But it is possible that imprisonment in the state prison for a long term of years might be so disproportionate to an offense as to constitute a cruel and unusual punishment. However that may be, it cannot be held that the punishment is cruel and unusual where a statute provides that one who has been convicted in this state of a felony committed here since it went into effect, or who twice before in this state, or another state, or both, has been sentenced and committed to prison for terms of not less than 3 years each, shall be punished by imprisonment in the state prison for 25 years. St. 1887, c. 435, providing that whoever has twice been convicted of crime and committed to prison for terms of not less than 3 years each, shall, on conviction for a felony committed after the passage of the act, be deemed an habitual criminal, and shall be punished by imprisonment for 25 years, does not impose a cruel and unusual punishment. *McDonald v. Commonwealth*, 53 N. E. 874, 875, 178 Mass. 322, 73 Am. St. Rep. 293.

Upon the Legislature alone is conferred the power to fix a minimum and maximum to the punishment for all crimes. It is true that cases might arise where the punishment imposed by an act is so cruel and unusual that the courts would interfere and protect the rights of the party, but in the present case the penalties fixed by the act (Pub. Acts 1889, No. 207, providing as a punishment for the first offense of selling liquors unlawfully a fine of not less than \$50 or more than \$200, and imprisonment in the county jail for not less than 20 days or more than six months, and for every subsequent offense a fine of not less than \$100 or more than \$500, and imprisonment in the state prison for not less than 6 months or more than 2 years) are such as the Legislature had the power to impose, and the act is not in conflict with Const. art. 6, § 31, as imposing excessive fines and unusual and cruel punishment. *People v. Whitney*, 63 N. W. 765, 766, 105 Mich. 622.

"The difficulty in determining what is meant by 'cruel and unusual punishments,'

as used in our Constitution, is apparent. Counsel for defendant claims that, as properly understood, it means, when used in this connection, punishment out of proportion to the offense. If by this is meant the degree of punishment, I do not think the contention correct. When, in England, concessions against cruel and unusual punishments were first wrested from the crown, slight offenses were visited with the most extreme punishment, and no protest was made against it. But our concern is to ascertain how this language is to be understood in the constitutional sense. \* \* \* Imprisonment for larceny is, and always has been, in this country and in all civilized countries, one of the methods of punishment. There may be circumstances surrounding the commission of larceny where 15 years would not be considered too severe a punishment. When punishment is commensurate with the depravity of the criminal, as shown in the commission of the act, justice is done. Under most of our criminal laws, cases may arise where the punishment inflicted might be considered cruel, but that does not condemn the law." How. Ann. St. § 9180, punishing horse stealing by imprisonment for not less than three nor more than fifteen years, unless for the first offense, when the court may sentence to two years in the House of Correction, is not unconstitutional, as imposing a cruel and unusual punishment, though the punishment under other statutes for larceny of property of the same value would be less. *People v. Morris*, 45 N. W. 591, 592, 80 Mich. 638, 8 L. R. A. 685.

The term "cruel and unusual punishment," within the meaning of a constitutional provision prohibiting such punishment, does not include a penitentiary sentence of two years for selling a paper devoted mainly to scandals, etc. *State v. Van Wye*, 37 S. W. 938, 136 Mo. 227, 58 Am. St. Rep. 627.

The term "cruel and unusual punishment," in the constitutional provision prohibiting such punishment, does not include the imposition of a fine of \$50 and a sentence of three months at hard labor in the House of Correction for selling intoxicating liquors contrary to law. *Pervear v. Commonwealth*, 72 U. S. (5 Wall.) 475, 480, 18 L. Ed. 606.

Where a husband cruelly whipped his wife without excuse, and inflicted a permanent injury upon her, and was sentenced to imprisonment for two years, it was not cruel or unusual. *State v. Pettie*, 80 N. C. 367, 368, 30 Am. Rep. 88.

#### Flogging.

Flogging is not cruel and unusual punishment, within the meaning of Act March 8, 1835, prohibiting cruel and unusual treatment of seamen. On the contrary, it was at the time of the passage of the act the then most usual and known to, and sanctioned

ed by, the law. *United States v. Collins* (U. S.) 25 Fed. Cas. 545.

"Cruel and unusual punishment," should not be read as "cruel or unusual punishment"; but, to be within the constitutional prohibition of cruel and unusual punishment it must be, not only cruel, but also unusual, so that, though the punishment of offenses by stripes is certainly odious, it is not unusual, and hence, is not cruel and unusual punishment. *Commonwealth v. Wyatt* (Va.) 8 Rand. 694, 701.

#### Forfeiture.

It would seem that a law providing that those who did not make certain improvements on lands held by them should forfeit such lands, unless they should agree to be bound by statutes held unconstitutional by the Supreme Court of the United States, is in violation of the provision of the Constitution, providing that excessive fines shall not be imposed nor cruel punishments inflicted. This appears more plainly when it is considered that the Constitution forbids the forfeiting of the estates of even attainted traitors and felons, except during life. *Gaines v. Buford*, 31 Ky (1 Dana) 481, 492.

Under the liquor law of June 28, 1889, providing that those having furnished bond and paid taxes in compliance therewith shall, upon any violation of the law, in addition to the penalties for such violation, forfeit their tax paid, which may be as high as \$800, and be unable to continue business or become surety on a bond under the act for one year, and providing, further, that druggists, upon failure to keep a public record of purchasers and purposes of purchase in any single instance, shall be subject to a fine of not less than \$100 and not more than \$500, and imprisonment for not less than ninety days or more than one year, and for a second offense a disability to sell liquor for any purpose for five years, the penalties, which are imperative, and not discretionary, must necessarily break up business, and are not measured by any standard of proportion or amount. The only measure of restraint is the value of the business broken up, and this may reach tens or hundreds of thousands of dollars. It is safe to say that throughout the United States any fine or forfeiture is unusual which has not some limitation of value, and any punishment is unusual which forfeits any civil rights. Dueling and conviction on an impeachment are the only two things in most states which involve civil incapacities of a public nature, and both of these are provided for by the Constitution. Disabilities to transact business are almost, or quite, unheard of in this country. The act is in violation of the constitutional prohibition against excessive fines and unusual punishments. *People v. Haug*, 37 N. W. 21, 26, 28, 68 Mich. 549.

#### Imprisonment at hard labor.

The term "cruel and unusual punishment," in the constitutional provision prohibiting cruel and unusual punishment, does not characterize imprisonment at hard labor, though such punishment may be severe. *State v. Hogan*, 58 N. E. 572, 575, 63 Ohio St. 202, 52 L. R. A. 863, 81 Am. St. Rep. 626.

#### Loss of suffrage.

Const. 1850, art. 13, § 17, prohibiting cruel punishments, does not include the disqualification from exercising the right of suffrage, and from holding any office of honor, trust, or profit, as a punishment for setting up or conducting a game of cards whereby money or other thing may be lost or won. *Harper v. Commonwealth*, 19 S. W. 737, 98 Ky. 290.

#### CRUEL NEGLECT.

The mere neglect of a husband, with no circumstances of aggravation, to provide maintenance for his wife and children for 15 years, during which she has supported the children from her own earnings, is not such gross or wanton or cruel neglect as will sustain a libel for divorce in her behalf, under Gen. St. c. 107, § 9, making gross or wanton or cruel neglect a ground for divorce. *Peabody v. Peabody*, 104 Mass. 195, 197.

#### CRUEL WEAPON.

A pistol is not a cruel weapon, within Rev. St. § 3462, relating to punishment for manslaughter in the heat of passion by a weapon, or any means, neither cruel nor unusual. If a pistol is a cruel weapon, then any weapon that is likely to take life or commonly used to take life is a cruel one, and all weapons are cruel. It must be some other than such a common weapon that can be distinguished as cruel. *Schlecht v. State*, 75 Wis. 486, 488, 44 N. W. 509.

#### CRUELLY BEAT.

"Wantonly and cruelly beat," within the meaning of the statute making it criminal for any person to wantonly or cruelly beat, torture, kill, or maim any horse or other domestic animal, does not import that the beating is serious enough to kill the animal, although the crime is aggravated if such result follows. *Commonwealth v. Miller* (Pa.) 3 Lanc. Law Rev. 175.

Evidence that the defendant, with a claspboard in his hand, followed a mule into a barn, and beat the mule so that the witness across the road could hear it, is sufficient to justify an inference by the jury that the defendant cruelly beat the mule. *State v. Gould*, 26 W. Va. 258, 264.

**CRUELTY.**

See "Extreme Cruelty"; "Intolerable Cruelty"; "Repeated and Extreme Cruelty."

The cruelty sufficient to authorize the granting of a divorce "implies either actual personal violence, or a reasonable apprehension of it, or such a course of treatment as endangers life or health and renders cohabitation unsafe." *May v. May*, 62 Pa. (12 P. F. Smith) 206, 210; *Waldron v. Waldron*, 24 Pac. 649, 650, 85 Cal. 251, 9 L. R. A. 487; *Morris v. Morris*, 14 Cal. 76, 77, 73 Am. Dec. 615; *Butler v. Butler* (Pa.) 1 Pars. Eq. Cas. 324, 344; *Richards v. Richards* (Pa.) 1 Grant, Cas. 389, 391; *Gordon v. Gordon*, 48 Pa. (12 Wright) 226, 238; *Uhlmann v. Uhlmann* (N. Y.) 17 Abb. N. C. 236, 237; *Perry v. Perry* (N. Y.) 2 Paige, 500; *Mason v. Mason* (N. Y.) 1 Edw. Ch. 278, 291; *Kennedy v. Kennedy*, 73 N. Y. 369, 373; *Cole v. Cole*, 23 Iowa, 433, 438; *Wheeler v. Wheeler*, 5 N. W. 689, 692, 53 Iowa, 511, 36 Am. Rep. 206; *Williams v. Williams*, 2 South. 768, 769, 23 Fla. 324; *Holyoke v. Holyoke*, 6 Atl. 827, 828, 78 Me. 404; *Odom v. Odom*, 36 Ga. 286, 317; *Holt v. Holt*, 117 Mass. 202, 204; *Bailey v. Bailey*, 97 Mass. 378, 380, 381; *Ratts v. Ratts*, 11 Ill. App. (11 Bradw.) 366; *Gibbs v. Gibbs*, 18 Kan. 419, 423; *Tayman v. Tayman*, 2 Md. Ch. 393, 399; *Daiger v. Daiger*, Id. 335, 340; *Hawkins v. Hawkins*, 3 Atl. 749, 750, 65 Md. 104; *Hughes v. Hughes*, 19 Ala. 307, 309; *Thornberry v. Thornberry*, 25 Ky. (2 J. J. Marsh.) 322, 323; *Cline v. Cline*, 10 Or. 474, 475. And the courts adjudge such a state of things a sufficient cause for a decree of separation on the ground that, in a state of personal danger, no duties to others can be perfectly performed, for the reason that under such circumstances the duty of self-preservation, which is primary in its commencement and paramount in obligation, is superior to the duties imposed by the marital connection, and, when called into action, is inconsistent with those duties and renders their discharge impossible." *Rose v. Rose*, 9 Ark. (4 Eng.) 507, 513. And such acts will constitute cruel and abusive treatment, within the meaning of a statute authorizing a divorce for such cruelty. *Lyster v. Lyster*, 111 Mass. 327, 329. And see, also, *Williams v. Williams*, 28 Pac. 726, 728, 1 Colo. App. 281; *Sharman v. Sharman*, 18 Tex. 521, 525. The denial of necessities and comforts by a husband to his wife, he having the means to furnish them, would certainly endanger her life and health, though done in the blandest manner. *Butler v. Butler* (Pa.) 1 Pars. Eq. Cas. 329, 344. Although the character of the ill treatment, whether it operates directly on the body or primarily upon the mind alone, and all the attending circumstances, are to be considered for the purpose of estimating the degree of the cruelty, yet the final test of sufficiency as a cause of divorce must be its actual or reasonably

apprehended injurious effect upon the body or health of the complaining party. *Waldron v. Waldron*, 24 Pac. 649, 650, 85 Cal. 251, 9 L. R. A. 487.

A good definition of cruelty is the infliction of great pain or misery without necessity. *Judge v. State*, 58 Ala. 402, 403.

"*Sævitia*," of the English law, or "cruel treatment," as it is known in our own, has been defined by the Supreme Court. In the earliest case, that of *Head v. Head*, 2 Ga. 191, the court held that the English law, as construed by the courts of that country, prevailed in this state, and that only for the causes prescribed by the common law, as of force in England at that time, could divorces be granted here, and the court said: "In determining what is *sævitia* by the ecclesiastical law, it has been adjudged to be necessary that there should be a reasonable apprehension of bodily hurt. The causes must be grave and weighty, and show a state of personal danger, incompatible with the duties of married life." This conclusion was distinctly upheld by *Smith v. Smith*, 84 Ga. 440, 11 S. E. 496, 8 L. R. A. 362, and was announced to be the law in Georgia until Act Feb. 22, 1850. Cruel treatment, within the meaning of Civ. Code 1895, § 2427, is the willful infliction of pain, bodily or mental, upon the complaining party, such as reasonably justifies an apprehension of danger to life, limb, or health. *Ring v. Ring*, 44 S. E. 861, 862, 118 Ga. 183, 62 L. R. A. 878 (citing *Odom v. Odom*, 36 Ga. 286).

Cruelty is such conduct in one of the married parties as endangers, either apparently or in fact, the physical safety or health of the other to a degree rendering it physically or mentally impracticable for the endangered party to discharge properly the duties imposed by the marriage. *Sharp v. Sharp*, 16 Ill. App. (16 Bradw.) 348, 349 (citing *Bish. Mar. & Div.* [5th Ed.] 717); *Small v. Small*, 57 Ind. 568, 569; *Beckley v. Beckley*, 31 Pac. 470, 471, 23 Or. 226. See, also, *McMahan v. McMahan*, 40 Atl. 795, 797, 186 Pa. 485, 41 L. R. A. 802; *Atteberry v. Atteberry*, 8 Or. 224, 225, 229; *Knight v. Knight*, 31 Iowa, 451, 456; *Close v. Close*, 24 N. J. Eq. (9 C. E. Green) 338, 339. It is the willful, persistent causing of unnecessary suffering, whether in realization or apprehension, whether of body or mind, in such a way as to render cohabitation dangerous and unendurable. *Gardner v. Gardner*, 58 S. W. 342, 343, 104 Tenn. 410, 78 Am. St. Rep. 924. It is the wrongful act or acts plainly subversive of the marriage relation, and making it impossible that the duties of married life may be properly discharged. *Uhlmann v. Uhlmann* (N. Y.) 17 Abb. N. C. 236.

Conduct which produces perpetual social sorrow, although there be no actual physical cruelty, will constitute cruel and inhuman

treatment, justifying divorce. *Rice v. Rice*, 6 Ind. 100, 105.

The ecclesiastical courts of England held that, in order to justify the granting of a divorce on the ground of cruel treatment, there must be danger of life, limb, or health. However, in many of the cases, they define acts as cruel which they regard as insufficient to authorize a divorce, because not amounting to personal violence or reasonable apprehension thereof. But in Georgia the statute itself provides that, in case of cruel treatment of one toward the other party, the jury may, according to the circumstances of the case, determine whether the divorce shall be from the bonds of matrimony or from bed and board; and cruel treatment, under this statute, consists in any act intended to torment, vex, or afflict, or which actually torments, vexes, or afflicts, without necessity, or any act of inhumanity, wrong, apprehension, or injustice. In accordance with this definition, where a husband took his young wife home; left her alone through a severe illness, while he engaged in dissipation; refused to let her attend the church of which she was a member; though rich, refused to give her the common necessities of wearing apparel; not only refused to punish a negro who had been grossly insolent and insubordinate to her in his absence, but approved of the conduct; disposed of his estate by will to his relatives, leaving her only a small sum; sent back to her father a family of negroes sent him as a gift; refused to let her stay any longer in the house, but drove her out in illness to wander where she might; and refused to acknowledge her child as his own—such conduct constituted cruelty, and would constitute cruelty, though it did not endanger the physical safety of the wife. *Myrick v. Myrick*, 67 Ga. 771, 775.

The phrase "cruelty of treatment," in Acts 1841, c. 262, § 8, relating to divorce, is to be construed as having the same meaning as that attributed to it by the ecclesiastical courts of England, and which has been given in equivalent language in the statutes of New York. *Tayman v. Tayman*, 2 Md. Ch. 393, 399.

Under the statute providing for divorce, the conduct or treatment complained of must be so cruel and inhuman as to make it unsafe for the wife to continue under the husband's power and dominion, or such indignities must be offered to her person as to render her condition so intolerable that she is forced to withdraw from his house. This strong language is not intended to apply to cases where a wife permits herself to become very unhappy and dissatisfied with her condition, by magnifying the faults and indiscretions of her husband. It could not have been intended, as it is inconsistent with the force of the words used by the Legislature, that every fault or indiscretion, or even

wrong, on the part of the husband, which, owing to the greater refinement or peculiar taste and habits of the wife, caused her to feel that her situation was intolerable, should be the ground of the divorce. It must not only appear to the court that she considered it unsafe and improper for her to continue under the control of her husband, but it must appear from the facts that the causes set forth in the statute really existed for such feelings and conclusions; that is, the wrong complained of must be cruel and inhuman, or the indignity to her person so great as to force her to withdraw from him, because her condition is not to be endured, in consequence of such maltreatment. *Shell v. Shell*, 34 Tenn. (2 Sneed) 716, 722.

Treatment which, considered in its entirety, is sufficient to make the plaintiff apprehensive of her personal safety, and is of a nature calculated to affect her mind, undermine her health, and thereby endanger her life, constitutes cruel and inhuman treatment. *Ryan v. Ryan*, 47 Pac. 101, 30 Or. 226.

If a husband inflict on his wife, by force or violence, bodily pain or suffering, and especially degrading pain or suffering, such as cowhiding or whipping, this would be cruel treatment. *Gholston v. Gholston*, 31 Ga. 625, 628.

"The complaint in the bill is cruelty on the part of the husband towards the wife; but the record does not show that degree of extreme and repeated cruelty which the statute requires to authorize a decree for a divorce for that cause. That the husband was unkind in his treatment and tyrannical in his disposition is most likely true, but there was no personal violence shown. \* \* \* The marriage should not be dissolved for light and trivial causes; and parties should not be encouraged by our decisions to come into court and ask for a divorce, unless they can show such a cause as the law requires." *Vignos v. Vignos*, 15 Ill. (5 Peck) 186, 187.

The expression "cruel and inhuman treatment," as used in the Revised Statutes, specifying cruel and inhuman treatment by the husband as a ground for divorce, is a synonymous and convertible term with "such conduct on the part of the husband toward his wife as may render it unsafe and improper for her to cohabit with him," which is also given as a ground for divorce. *Mason v. Mason* (N. Y.) 1 Edw. Ch. 278, 291.

It is difficult to define with precision what is and what is not extreme and repeated cruelty. In *Poor v. Poor*, 8 N. H. 307, 29 Am. Dec. 664, it is said, with perhaps sufficient accuracy, that "any willful misconduct of the husband, which endangers the life or health of the wife, which exposes her to bodily hazard and intolerable hardship, and renders cohabitation unsafe, is extreme cruelty, and in order to amount to such cruelty

it is not necessary that there should be many acts." Hence, where there were four or five distinct assaults and batteries committed by a husband upon his wife, apparently without provocation, and in addition to this almost constant insult and abuse for a period of three years, terminating in separation, a decree was authorized on account of such cruelty. *Ward v. Ward*, 108 Ill. 477, 484.

Cruel and barbarous treatment, and indignities to the person, endangering life or health, must consist of willful and malicious acts, or they would not come within the description of the terms. "Cruel and barbarous" are words implying a merciless and savage disposition, taking pleasure in suffering, and without pity, while "indignities" involves an insulting and contemptuous purpose. The evil and malicious will must be present to constitute an act cruel or barbarous, and insulting intent to make it an indignity. Accidental acts, no matter how injurious, would not be sufficient; for the wrongful intent would be absent. For this reason, therefore, insanity, also, would deprive the conduct of that element of willful purpose necessary to sustain the statutory cause of divorce. The proof, however, must establish such a mental condition as deprived the party of the use of his reason to the extent that he did not know right from wrong, and was incapable of willing the one or the other. In short, the proof must establish insanity; such insanity as, if the party were indicted for the same act as a crime, would be a good defense. *Hansell v. Hansell*, 8 Pa. Dist. R. 724.

A suit for divorce on the ground of cruelty is substantially a proceeding *quia timet*. The court interferes, not so much to punish an offense already committed, as to relieve the plaintiff from an apprehended danger. *Bliss. Mar. & Div.* 456. The law does not require many acts of cruelty. One is enough, if it induces the court to think that the wife is in danger of bodily harm. *Id.* 465. In Massachusetts the language used in their statute is the same as in ours—"extreme cruelty." It must be bodily harm, and not mere mental suffering, to answer the language of the statute; but, as has been before remarked, it is not to punish acts of personal violence, actually committed, that the court interferes, but to afford protection from future injury. *Cook v. Cook*, 11 N. J. Eq. (3 Stockt.) 195, 197, 198.

Acts of violence by a husband toward his wife, in resisting her attempts to prevent him from using morphine, do not constitute extreme cruelty, within the meaning of Rev. St. c. 40, § 1, making extreme and repeated cruelty cause for divorce. *Youngs v. Youngs*, 22 N. E. 806, 808, 130 Ill. 230, 6 L. R. A. 548, 17 Am. St. Rep. 313.

Cruelty, sufficient to authorize a divorce, is shown by evidence that the husband struck the wife in the face, choked her, pulled her

hair, threatened to whip her in the presence of a slave, whom he ordered to bring switches for the purpose, threw a mug at her with such force that it was shattered into atoms against the wall by the force of the blow, and beat her in the face with his fist until one-third part of her face was black and blue. *Turner v. Turner*, 44 Ala. 437, 445.

If the conduct of the husband is shown to be habitually cruel, indifferent, rude, ferocious, vulgar, obscene, and profane toward the wife, and she is seen, shortly after being with him, in tears, with bruises on her face, lips, and a contused wound on her side of a serious character, which lasted two months, and the husband admits, when complained of, that these indications of bad treatment were produced by him, his explanation that they were given in playfulness and jest, and not in anger and in earnest, will not be sufficient to rescue his conduct from the construction that these appearances are evidences of legal cruelty sufficient to justify a divorce in favor of the wife for that cause. under Rev. Code, § 2356, allowing a divorce for the cause of cruelty, when the husband has committed actual violence on the person of the wife, attended with danger to life or health, or when, from his conduct, there is reasonable apprehension of such violence. *Goodrich v. Goodrich*, 44 Ala. 670, 675.

Violent, scandalous conduct of a husband, when drunk, toward a wife of unexceptionable deportment, though he is good-natured and kind occasionally, when sober, sometimes assaulting in a violent manner an amiable and inoffensive wife, sometimes promising reformation, and caressing her with an imploring but transient fondness, so that under the dominion of such husband the wife would have no hope of being either happy or altogether safe, establishes a case of that kind of severity or cruelty denominated "sævitia," and which, according to the civil law and the spirit and object of the statute of 1800 of this state, will authorize a decree for alimony. *Lockridge v. Lockridge*, 33 Ky. (3 Dana) 28, 29, 28 Am. Dec. 52.

#### Abusive language or indignities.

Cruel and abusive treatment, within Act March 13, 1883, c. 212, authorizing the granting of divorce for such treatment, does not require actual violence, but words and deportment may be sufficient. *Holyoke v. Holyoke*, 6 Atl. 827, 828, 78 Me. 404.

Under a statute making cruel and inhuman treatment a ground for separation between husband and wife, proof of continued verbal outrages is sufficient. *Fitzpatrick v. Fitzpatrick*, 47 N. Y. Supp. 737, 21 Misc. Rep. 378.

The cruelty that authorizes a divorce is anything that tends to bodily harm and thus renders cohabitation unsafe, or, as ex-

pressed in the older decisions, that involves danger of life, limb, or health. There may be cases in which the husband, without violence, actual or threatened, may make the marriage state impossible to be endured. There may be angry words, coarse and abusive language, humiliating insults, and annoyances in all the forms that malice can suggest, which may as effectually endanger life or health as personal violence, and which, therefore, would afford ground for relief by the court; but what merely wounds the feelings, without being accompanied by bodily injury or actual menace, does not amount to legal cruelty. *Latham v. Latham* (Va.) 30 Grat. 307, 820, 321; *Myers v. Myers*, 6 S. E. 630, 632, 83 Va. 806; *Butler v. Butler* (Pa.) 1 Pars. Eq. Cas. 329, 339, 344.

Cruelty on the part of a husband, so as to be a ground of divorce for his wife, should be construed to include cursing and swearing at her, and calling her vile and wicked names; she being a sensitive woman, of good taste, culture, and refinement. *Warner v. Warner*, 20 N. W. 557, 558, 54 Mich. 492.

It has uniformly been held in this state that mere language, however opprobrious or insulting, will not justify even strangers beating each other, and certainly the rule ought not to be relaxed as between husband and wife. To allow the husband to beat his wife into submission or to correct her delinquencies would be a return to the barbarism of the old common law, and make the wife the mere vassal or slave of the husband. Where the proof discloses acts of personal violence inflicted by the defendant on his wife, and of gross insults to her, such acts constitute cruel and inhuman treatment, notwithstanding the fact that she has used opprobrious and insulting language toward him. *Wessels v. Wessels*, 28 Ill. App. 253, 257.

"Cruel treatment does not always consist of actual violence. There are words of false accusation that inflict deeper anguish than physical injuries to the person, more enduring and lacerating to the wounded spirit of a gentle woman than actual violence to the person, though severe." Opprobrious epithets used by a husband toward his wife are abusive treatment. *Farnham v. Farnham*, 73 Ill. 497, 500.

The term "cruel," when used in the term "cruel and inhuman treatment" as a cause for divorce, is very broad, and includes more than personal violence. Thus, angry words and abusive language, grossly intemperate habits, etc., might cause greater suffering on a refined and delicate woman than a single act of violence on her person, and such acts may be well considered to be extreme cruelty. *Bailey v. Bailey*, 97 Mass. 373, 378.

In *Barrere v. Barrere* (N. Y.) 4 Johns. Ch. 187, 189, Chancellor Kent says "that  
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mere petulance and rudeness, and sallies of passion, might not be sufficient; but a series of acts of personal violence, or danger of life, limb, or health, are." The conduct of a defendant in raising an ax and threatening to cut down his wife, and continual use of insulting language toward her, are within the meaning of the term "extreme cruelty." *Graecen v. Graecen*, 2 N. J. Eq. (1 H. W. Green) 459, 466.

Under the statute providing for divorce, the conduct or treatment complained of must be so cruel and inhuman as to make it unsafe for the wife to continue under the husband's power and dominion, or such indignities must be offered to her person as to render her condition so intolerable, that she is forced to withdraw from his house. This strong language is not intended to apply to cases where a wife permits herself to become very unhappy and dissatisfied with her condition, by magnifying the faults and indiscretions of her husband. It could not have been intended, as it is inconsistent with the force of the words used by the Legislature that every fault or indiscretion, or even wrong, on the part of the husband, which, owing to the greater refinement or peculiar taste and habits of the wife, caused her to feel that her situation was intolerable, should be the ground of a divorce. It must not only appear to the court that she considered it unsafe and improper for her to continue under the control of her husband, but it must appear from the facts that the causes set forth in the statute really existed for such feelings and conclusions; that is, the wrong complained of must be cruel and inhuman, or the indignity to her person so great, as to force her to withdraw from him because her condition is not to be endured in consequence of such maltreatment. *Shell v. Shell*, 84 Tenn. (2 Sneed) 716, 722.

Where there was no violence ever committed or attempted, and the most that could be claimed was that the husband, in his intercourse with his wife, did not exhibit that regard for her which was due from him as her husband, and that the marriage was never productive of much happiness for either party, there was no ground for a divorce on account of cruelty. *Morris v. Morris*, 14 Cal. 76, 77, 73 Am. Dec. 615.

It is very difficult to give any affirmative definition which will express with entire accuracy the meaning of extreme cruelty in statutes concerning divorce. Courts have refrained from laying down any inflexible rule which should serve as a standard by which to adjudge all cases. The weight of authority is that the injury actually inflicted or reasonably apprehended must be bodily harm, in distinction from mere mental suffering. The injury may be either to the safety of the person or to the health of the aggrieved

party, and it is not necessary that it be actually inflicted. It is sufficient if it be reasonably apprehended. Each case must be determined according to its circumstances. Slight abuse of the person, accompanied by opprobrious language, which would imperil the health of a refined and delicate wife, might be endured with comparative unconcern by one of a less sensitive nature. Without attempting to give a definition applicable to all cases, it may be said that where the husband has been guilty, or there is reasonable ground to apprehend that he will be guilty, of any actual violence which will endanger the safety or the health of the wife, or where he has inflicted any physical injury, accompanied by such persistent exhibition of ill feeling and opprobrious epithets as will endanger her health or render her life one of such extreme discomfort and wretchedness as to incapacitate her to discharge the duties of a wife, there is cruelty justifying divorce. *Close v. Close*, 25 N. J. Eq. (10 C. E. Green) 526, 527, 532.

"Cruel and inhuman treatment," as used in Rev. St. c. 79, § 9, subd. 5, providing that a wife may obtain a divorce for cruel and inhuman treatment by her husband, should be considered to have very much the sense of "sævitia" in the civil and ecclesiastical law; and hence, to justify a court in interfering to dissolve the marriage relation, grave and weighty causes must exist, which show that the duties of the married life cannot be discharged. Abusive and opprobrious language, which wounds the feelings merely, unaccompanied with any bodily injuries, actual or menaced, is not considered a ground for divorce. The use by the husband of cruel and tantalizing language toward his wife, treating her roughly, boasting of having secured his property from her, reminding her of the poverty of her parents, and asserting that their marriage was a shave, however unfeeling and unbecoming an honorable and affectionate husband, is not cruel and inhuman treatment; nor is compelling her to do her ironing on a low water pail bench, or taking the key of the house from her and locking her without the house. *Johnson v. Johnson*, 4 Wis. 135, 141.

Grossly improper language, foul terms, and vile epithets do not, however, of themselves constitute cruelty. *Close v. Close*, 24 N. J. Eq. (9 C. E. Green) 338, 339.

The commission of acts which outrage the feelings of modesty and decency, such as threatening to commit adultery or using insulting language, if persisted in, and unatoned for, constitute cruel treatment. *Gholston v. Gholston*, 31 Ga. 625, 628.

Act May 8, 1854, gave a husband a right to a divorce where the wife, by cruel and barbarous treatment, should render his life burdensome. Held, that mere personal abuse or indignities is not sufficient. *Gordan v. Gordan*, 48 Pa. (12 Wright) 226, 236.

#### Accusation of infidelity.

The public aspersion of a virtuous wife by her husband, charging her with unchastity, constitutes such cruelty as will entitle her to divorce. *Jones v. Jones*, 60 Tex. 451, 458, 461.

A false accusation, either by the husband or wife, that the other is guilty of adultery, is sufficient cause for divorce; and it makes no difference that the charge was made after the parties had separated. Neither husband nor wife can claim a right to continue the marriage relation while falsely charging the other with unchastity. *Smith v. Smith*, 8 Or. 100, 102.

For a husband to falsely accuse his wife, in her presence and to their neighbors, with unchastity, and by reason thereof with being afflicted with a loathsome venereal disease, which she had communicated to him, constitutes cruel treatment, which entitles her to a divorce. *McMahan v. McMahan*, 9 Or. 525, 526.

Cruelty consists of successive acts of ill treatment, if not of personal injury, so that something of a condonation of earlier ill treatment must in such cases necessarily take place. Where a husband charged his wife with being guilty of adultery, and treated her in such a manner as to create a reasonable apprehension of bodily hurt, he was guilty of cruelty, justifying a divorce. *Owens v. Owens*, 31 S. E. 72, 74, 96 Va. 191.

False and malicious accusations of adultery, habitually made by the husband against the wife, constitute cruel and inhuman treatment. It is not necessary that there should be personal violence to constitute cruel and inhuman treatment. Any species of unkind treatment, accompanied by threats and words of menace, from the inevitable consequence of continued indulgence in which violence may reasonably be apprehended and result to the wife, unless prevented, or any danger to life, limb, and health, is cruel and inhuman treatment. It is, however, of the greatest importance that the cause of apprehension should not only be weighty, but such as clearly shows that the duties and obligations of the married life cannot be discharged. *Kennedy v. Kennedy*, 47 N. Y. Super. Ct. (15 Jones & S.) 56, 59, 60 How. Prac. 151, 152; *Bihin v. Bihin* (N. Y.) 17 Abb. Prac. 19, 26.

"'Cruelty' is defined to mean to give pain, willing or pleased to give torment, vex or afflict, or cause grief or misery." A husband could hardly, by any other means, cause a sensitive wife more mental pain, torment, vexation, affliction, grief, and misery, than to falsely charge her with adultery. *Graft v. Graft*, 76 Ind. 136, 138.

Where it appears that on one occasion a husband threatened to knock down his

wife, who had always faithfully performed her wifely duties, and struck at her twice, and that he was continually abusive, calling her, "dirty bitch," "a liar," "a whore," and accused her of adulterous intercourse with other men, naming them, a divorce was justified on the ground of cruel and inhuman treatment. *Waltermire v. Waltermire*, 17 N. E. 739, 110 N. Y. 183.

In an action for divorce on the ground of cruel treatment, it is not necessary that there be actual violence to constitute cruel treatment. It may be such use of abuse and brutal language and charges of infidelity as will justify the conclusion that it will end in personal violence. *Abbott v. Abbott*, 61 N. E. 350, 351, 192 Ill. 439.

#### **Austerity of temper.**

A statute making cruelty a ground for divorce requires such cruelty as endangers life, limb, or health; but actual or threatened physical violence is not necessary to produce this effect. It may be accomplished by any continued course of insults and humiliations. Health and even life may be destroyed thereby. In the great case of *Evans v. Evans*, 1 Hagg. Cons. 35, Lord Stowell laid down certain principles which have been universally approved. He said: "What is cruelty? In the present case it is hardly necessary for me to define it, because the facts here complained of are such as fall within the most restricted definition of cruelty. They affect not only the comfort, but they affect the health, and even the life, of the party. What merely wounds the mental feelings is in few cases to be admitted, when not accompanied with bodily injury, either actual or menaced. Mere austerity of temper, petulance of manner, rudeness of language, a want of civil attention and accommodation, even occasional sallies of passion, if they do not threaten bodily harm, do not amount to legal cruelty. They are high moral offenses in the marriage state, undoubtedly, not innocent, surely, in any state of life; but still they are not that cruelty against which the law can relieve. In the older cases of this sort, which I have had an opportunity of looking into, I have observed that the danger of life, limb, or health is usually inserted as the ground upon which the court has proceeded to a separation. This doctrine has been repeatedly applied by the court in the cases that have been cited. The court has never been driven off this ground. It has always been jealous of the inconvenience of departing from it, and I have heard no case cited in which the court has granted a divorce without proof given of a reasonable apprehension of bodily hurt. I say an apprehension, because assuredly the court is not to wait until the hurt is actually done. But the apprehension must be reasonable. It must not be an apprehension arising merely from an exquisite and diseased

sensibility of the mind." *Kelly v. Kelly*, 1 Pac. 194, 195, 18 Nev. 49, 51 Am. Rep. 732; See, also, *Fritts v. Fritts*, 36 Ill. App. 31, 32, 34; *Harman v. Harman*, 16 Ill. (6 Peck) 85, 90; *Childs v. Childs*, 49 Md. 509, 515; *Harding v. Harding*, 22 Md. 337, 344; *Waldron v. Waldron*, 24 Pac. 649, 650, 85 Cal. 251, 9 L. R. A. 487; *Kenley v. Kenley*, 3 Miss. (2 How.) 751, 753; *Earl of Westmeath v. Countess of Westmeath*, 2 Hagg. Ecc. 238, 264; *Bowie v. Bowie*, 3 Md. Ch. 51, 54; *Daiger v. Daiger*, 2 Md. Ch. 835, 339; *De Meli v. De Meli* (N. Y.) 67 How. Prac. 20, 27, 28; *Kennedy v. Kennedy*, 73 N. Y. 869, 373; *Mason v. Mason* (N. Y.) 1 Edw. Ch. 278, 291; *Finley v. Finley*, 39 Ky. (9 Dana) 52, 33 Am. Dec. 528; *Gleason v. Gleason*, 19 N. W. 784, 16 Neb. 15; *Day v. Day*, 50 N. W. 979, 980, 84 Iowa, 221; *Wheeler v. Wheeler*, 5 N. W. 689, 692, 53 Iowa, 511, 36 Am. Rep. 240 (citing *Beebe v. Beebe*, 10 Iowa, 133; *Caruthers v. Caruthers*, 13 Iowa, 266); *Rhame v. Rhame* (S. C.) 1 McCord, Eq. 197, 206, 16 Am. Dec. 597; *Freeman v. Freeman*, 31 Wis. 235, 249.

Mere want of sympathy, disagreeable manners, delusions of ill temper, habitual disregard of the wife's feelings, refusal to protect her from the insults of others, etc., do not constitute cruelty, furnishing ground for divorce; but personal violence, whether inflicted or only threatened, is sufficient. *Breinig v. Meltzler*, 23 Pa. (11 Harris) 156, 160.

To constitute extreme cruelty in a husband, his misconduct must be such as to show that the inward knot of marriage, which is peace and love, is untied, and that he exercises over his wife, not the mild and salutary authority of a husband, but a harsh and cruel tyranny. *Poor v. Poor*, 8 N. H. 307, 315, 29 Am. Dec. 664.

#### **Communication of disease.**

The communication of a venereal disease will constitute legal cruelty only when the disease is knowingly or willfully communicated. *Anonymous* (N. Y.) 17 Abb. N. C. 231, 235.

#### **Desertion and nonsupport.**

Cruel and inhuman treatment, as a cause of divorce, is not confined to mere physical treatment which is cruel and inhuman, but includes the act of a husband in absconding from the state and leaving his wife to support herself and child, without explanation or correspondence with her. *Eastes v. Eastes*, 79 Ind. 363, 370.

Cruel and inhuman treatment on the part of the husband, entitling the wife to a divorce, is shown by evidence that the wife was an amiable and industrious woman; that the husband was shiftless, furnishing no means of support for himself and wife, but living from place to place, as he was compelled to move for nonpayment of board;



and that he treated her as unworthy of the position as his wife, and finally abandoned her. *Wilson v. Wilson* (Ky.) 38 S. W. 140.

"Cruelty," as used in a statute authorizing divorce for extreme cruelty in neglecting or refusing to provide suitable maintenance for the wife, means acts of cruelty such as to cause injury to the life, limb, or health of the plaintiff, or danger of such injury, or reasonable apprehension of such danger, if the parties continue to live together. Mere nonsupport, however, is not sufficient. *Bailey v. Bailey*, 97 Mass. 373, 378.

The denial of necessities and comforts by a husband to a wife, he having the means to furnish them, would certainly endanger her life and health, though done in the blandest way, and so would constitute cruel and barbarous treatment. *Butler v. Butler* (Pa.) 1 Pars. Eq. Cas. 329, 344.

#### Habits or conduct toward others.

"Cruel and inhuman treatment," as used in a statute authorizing a divorce, means excessive cruel treatment and outrage, which affects the wife directly or personally, and not immediately or remotely. Unless she is so affected in body or in spirit, there is no cruel and inhuman treatment. Though her husband may be the vilest of the vile, a corsair, or a brigand, so long as he treats the wife with gentleness, kindness, and affection, he is not guilty of cruel and inhuman treatment, authorizing a divorce. *Schreck v. Schreck*, 32 Tex. 578, 589, 5 Am. Rep. 251. Lewd and indecent conduct of a husband toward the daughter of his wife by a former husband does not come within this definition. *Cline v. Cline*, 10 Or. 474, 475.

The production of mental as well as physical suffering may constitute cruelty. The cruel beating of a young child, notwithstanding the prayers and remonstrances of the mother, is such an outrage on her maternal sympathies as will constitute cruelty to her. *Bihin v. Bihin* (N. Y.) 17 Abb. Prac. 19, 28.

Drunkenness by itself is insufficient to entitle a party to a divorce on the ground of cruel and inhuman treatment. *Anonymous* (N. Y.) 17 Abb. N. C. 231, 232.

#### Insults and neglect.

Cruel treatment, such as will warrant a divorce, means mental anguish, or wounded feelings, constantly aggravated by repeated insult and neglect, as much as actual bruises to the person. *Glass v. Wynn*, 76 Ga. 319, 322.

Failure of a wife to remain at home and care for her sick husband, or to consent to his hiring a nurse, where he was under the care of a physician and not dependent solely on her, is not cruel and abusive treat-

ment, within Pub. St. c. 146, § 1, providing that a divorce may be granted for such cause. *Bonney v. Bonney*, 55 N. E. 461, 175 Mass. 7, 78 Am. St. Rep. 473.

The phrase "cruel and barbarous," as used in Act 1854, making it a ground of divorce for a wife by cruel and barbarous treatment to render the condition of her husband intolerable or his life burdensome, does not include conduct on the part of the wife, characterized by obstinate silence, laziness, or willful neglect of household duties. *Appeal of Harris* (Pa.) 2 Wkly. Notes Cas. 331, 332.

The statutes do not confine the cruelty necessary to justify a divorce to mere physical violence. But the grievance, of whatever kind, must be of the most aggravated nature to justify a divorce, and the mere fact that parties to a marriage are living in very unpleasant relations is not sufficient to justify divorce on the grounds of cruelty. *Cooper v. Cooper*, 17 Mich. 205, 210, 97 Am. Dec. 182.

#### Insanity as affecting.

A divorce, on default, for inhuman cruelty of a wife declared insane a month later, should be set aside, on a showing by her guardian that the cruelty was the result of insanity existing when the process was served against her. *Cohn v. Cohn*, 24 Pac. 659, 85 Cal. 108. See, also, *Sapp v. Sapp*, 9 S. W. 258, 259, 71 Tex. 348.

Where a husband was insane at the time of committing alleged acts of cruelty to his wife, and mentally incapable of knowing what he did, he could not be held responsible for his acts, and the acts thus committed are not a reasonable cause for divorce, as the cruelty contemplated by the statute as a ground for divorce is conscious and intentional cruelty. *Powell v. Powell*, 18 Kan. 371, 378, 26 Am. Rep. 774.

#### Mental distress.

It is impossible to lay down any precise rule by which to decide under a given set of facts whether legal cruelty does or does not exist. It has, however, generally been held that, when there is no physical violence, the cruel conduct, in order to warrant a divorce, must be such as will produce a degree of mental distress which threatens at least to impair the health of the injured party. *Eastman v. Eastman*, 12 S. W. 1107, 1108, 75 Tex. 473.

There may be legal cruelty without evidence of personal violence. It is true that not every fancied or real wrong, which may for awhile render unsafe the complainant's life, or subject her to momentary pain or temporary illness would amount to legal cruelty; but if the act involves—that is, if it is connected by natural circumstances or affects—the health, not for a moment, not

temporarily, but to its actual and real prejudice, it amounts to legal cruelty. *Cole v. Cole*, 23 Iowa, 433, 438.

Cruelty as a matrimonial offense is defined to be such conduct in one of the married parties as to the reasonable apprehension of the other, or in fact, renders cohabitation physically unsafe to a degree justifying a withdrawal therefrom. Abuse, which causes mental suffering and produces ill health, rendering cohabitation physically unsafe, is legal cruelty, although no personal violence is inflicted or threatened. *Jones v. Jones*, 62 N. H. 463, 464, 465.

Acts and words may be construed as constituting cruel and inhuman treatment, though they cause no physical pain. *Atherton v. Atherton*, 81 N. Y. Supp. 977, 980, 82 Hun, 179.

To constitute such cruelty as will authorize a divorce, it is not necessary that physical injury should be inflicted or threatened, but mental suffering, when intentionally imposed, may be so grievous and lasting as to warrant a dissolution of the bonds of matrimony. *Wright v. Wright*, 6 Tex. 316; *Sheffield v. Sheffield*, 3 Tex. 79, 87; *Taylor v. Taylor*, 18 Tex. 574, 578; *Bahn v. Bahn*, 62 Tex. 518, 50 Am. Rep. 539; *Jones v. Jones*, 60 Tex. 451, 452; *Sapp v. Sapp*, 9 S. W. 258, 259, 71 Tex. 348.

The ordinary meaning of "cruelty" in actions for divorce is that the act endangers or threatens the life, limb, or health of the aggrieved party. To this is added any outrage on the feelings inflicting mental pain or anguish. *McAllister v. McAllister*, 10 S. W. 294, 295, 71 Tex. 695.

#### Refusal of sexual intercourse.

A wife's utter denial of sexual intercourse is not to be regarded, within a reasonable interpretation of the provisions of the statute relating to divorce, as cruel and abusive treatment. The cruelty charged must appear to be such "as shall cause injury to life, limb, or health, or create a danger of such injury, or a reasonable apprehension of such danger." *Cowles v. Cowles*, 112 Mass. 298.

The refusal of a husband to have sexual intercourse with his wife does not constitute cruel and inhuman treatment, and is not a sufficient ground for divorce a vinculo. *Schoessow v. Schoessow*, 53 N. W. 856, 857, 83 Wis. 553.

#### Series of acts.

Cruelty is cumulative, admitting of degrees and augmenting by addition, so that it may be condoned, and even forgiven, for a time and up to a certain point, without any bar in sense or reason to bringing it forward when the continuance of it has rendered it no longer condonable. Cruelty extending

through a series of years must consist of numerous acts, many of which might, and possibly would, be of themselves of the character not to warrant a divorce, yet, constantly recurring, they would indicate a wicked mind, and, taken all together, would show that the condition of the suffering was unsafe and beyond the point of further forbearance. *McClanahan v. McClanahan*, 56 S. W. 858, 861, 104 Tenn. 217.

Cruel and inhuman treatment, such as authorizes a divorce, means any willful misconduct of the husband which endangers the life or health of the wife, or which exposes her to bodily hazard and intolerable hardship and renders cohabitation unsafe, or is extremely cruel, and in order to amount to such cruelty it is not necessary that there should be many acts. *Beyer v. Beyer*, 6 N. W. 807, 808, 50 Wis. 254, 36 Am. Rep. 848 (citing *Poor v. Poor*, 8 N. H. 307, 316, 29 Am. Dec. 664).

Cruelty as a ground for divorce consists in successive acts of ill treatment, if they threaten bodily harm. *Westmeath v. Westmeath*, 4 Eccl. R. 238, 264.

#### Single act or acts of long standing.

"A single act of cruelty may be so severe and attended with acts of such atrocity as to justify a divorce. No single act of indignity to the person is sufficient for a divorce. There must be such a course of conduct or continued treatment as renders the wife's condition unendurable and life burdensome. The indignities to the person need not be such as to endanger life or health, but such as would render life too humiliating to bear." *May v. May*, 62 Pa. (12 P. F. Smith) 206, 210.

In an action for divorce on the ground of cruelty of treatment, the only particular in which the testimony of the wife was corroborated was the alleged fact that her husband on one occasion kicked her. In considering this the court said: "This single act of violence on his part, though it cannot be justified in morals or in law, will not constitute cruelty of treatment within the meaning of the law as a cause for divorce." *Goodhues v. Goodhues*, 44 Atl. 990, 90 Md. 292.

It is not every single touching of the wife's person in anger, at a moment of sudden excitement or of passion, that will authorize the granting of a divorce. A man may lay hands on his wife, even rudely, if necessary to prevent the commission of some unlawful or criminal purpose. *Richards v. Richards* (Pa.) 1 Grant, Cas. 389, 391.

Cruelty is either actual violence or reasonable apprehension of such violence. "Isolated cases of wrong or cruelty of long standing on the part of the husband will not entitle the wife to a divorce, especially where

a different course of treatment has since been pursued; but evidence of such acts is competent and proper, in connection with more recent acts, to show a series of wrongs and injuries on the part of the husband. *Graecen v. Graecen*, 2 N. J. Eq. (1 H. W. Green) 459.

Cruel and abusive treatment is not established by a single blow, though given in anger. *Hardie v. Hardie*, 29 Atl. 886, 887, 162 Pa. 227, 25 L. R. A. 697.

Cruel treatment, as a cause for divorce, means an extreme or continued cruelty of treatment, or any danger to life, limb, or health, such as renders impossible the proper discharge of the duties of married life; and a single act of personal violence is not sufficient. *Hoshall v. Hoshall*, 51 Md. 72, 75, 34 Am. Rep. 298.

A single act of a sufficiently aggravated character may suffice to constitute cruelty; and, where acts are not so highly aggravated, a number of them may be considered together as showing a course of conduct. Where an act constituting cruelty is proved, minor acts of the same kind may be shown by way of aggravation. *Uhlmann v. Uhlmann* (N. Y.) 17 Abb. N. C. 236.

*Finley v. Finley*, 39 Ky. (9 Dana) 52, 33 Am. Dec. 528, was a suit for alimony upon the charge of cruel, inhuman, and barbarous treatment. It was shown that the previous intercourse of the parties had not been of a very agreeable character, that a single act of personal violence had been committed by the husband, and that a separation immediately ensued. Judge Ewing, in delivering the opinion of the court, said: "Upon the whole, we can regard the affair in no other light than as a sudden freak of passion on both sides, in which no serious injury was done, and which should have been passed by and forgotten with the moment, and furnished no sufficient ground to justify a dissolution of the sacred connection of man and wife." *Morris v. Morris*, 14 Cal. 76, 80, 73 Am. Dec. 615.

#### Threats.

Cruelty, such as to entitle a husband to divorce, is such conduct as renders his condition unendurable and his life burdensome. Threats alone may constitute cruelty, since, when they are both serious and diabolical in their nature, and produce alarm and dread, they are in themselves acts. "They are not like mere words of reproach or anger or false imputation, but imbue the mind with fear, and tend directly to endanger health, and may even imperil life." *Jones v. Jones*, 66 Pa. (16 P. F. Smith) 494, 496, 497.

Cruelty, such as to authorize a divorce, does not include words of abuse or reproach; but words of menace, intimating a malignant

intention of doing bodily harm and affecting the security of life, constitute such cruelty, as also such acts as spitting on a wife and compelling her by threats to go to certain places. *D'Aguilar v. D'Aguilar*, 1 Hagg. Eccl. 773.

Mere declarations of the husband, unaccompanied by acts, do not constitute cruel and barbarous treatment, entitling the wife to a divorce. *Eshbach v. Eshbach*, 23 Pa. (11 Harris) 343, 345; *Richards v. Richards* (Pa.) 1 Grant, Cas. 389, 391.

To authorize an interposition of the courts to grant a separation from bed and board on the ground of cruelty, there must be ill treatment and personal injury, or a reasonable apprehension of personal injury. Words of menace, accompanied by a probability of bodily violence, will be sufficient. It may be enough if the words are such as inflict indignity and threaten pain. Spitting on the wife, or a groundless charge against her chastity, constitute gross cruelty; and so, where the evidence shows that force was resorted to and personal violence inflicted, and also a violence done to the feelings of the wife still more cruel and inhuman, a separation from bed and board was justified. *Whispell v. Whispell* (N. Y.) 4 Barb. 217, 219.

A threat, not giving rise to any apprehension of immediate personal injury, does not constitute legal cruelty. *Anonymous* (N. Y.) 17 Abb. N. C. 231, 235.

Cruelty, in order to be ground for divorce, must be such as to raise a reasonable apprehension in regard to the wife's personal safety. She must have ground to believe that she was exposed to physical injury by a continuance of cohabitation. There must be in all cases ill treatment and personal injury, or a reasonable apprehension of injury. Words of menace, accompanied by probability of bodily violence, will be sufficient. *Davies v. Davies* (N. Y.) 55 Barb. 130, 134.

#### Vexatious conduct.

Cruelty "is any act intended to torment, vex, or afflict, or which actually afflicts or torments, without necessity, or any act of wrong, inhumanity, oppression, or injustice. The word 'cruel' has no technical significance, as contradistinguished from its broad, popular sense; and many acts are held by the courts to be 'cruelty,' and not regarded as sufficient to authorize a divorce, because not amounting to personal violence or creating a reasonable apprehension thereof. Not every act of disagreement of husband and wife, or mere austerity of temper, or want of civil attention or accommodations, rudeness of language, and even occasional sallies of passion, will be sufficient to constitute 'cruelty.' Still marriage is a civil contract, in which each is the equal of the other. The wife is not the menial or slave of the hus-

hand, and if, by intentional unkindness, reproach, and indignities he embitters her life and makes it impossible that the marriage state can be continued by the parties in happiness or satisfaction, a divorce should be granted." *Myrick v. Myrick*, 67 Ga. 771, 775.

The husband, by a course of humiliating insults and annoyances, practiced in various forms which ingenious malice could devise, could eventually destroy the life or health of his wife, although such conduct was unaccompanied by violence, positive or threatened; and where this is proven the wife is entitled to a divorce. *Butler v. Butler* (Pa.) 1 Para. Eq. Cas. 329, 344.

"To render the condition of the wife intolerable and her life burdensome, it is not necessary that there should be blows, or cruel and barbarous infliction of batteries, that endanger her life. There may be, without that, such indignities to her as to render her life a burden. \* \* \* All treatment which proceeds from hatred, revenge, and spite, and which renders even the hours devoted to repose hours of weeping and distress, must render a woman's condition intolerable." *Elmes v. Elmes*, 9 Pa. (9 Barr) 166, 167.

Cruel and inhuman conduct, sufficient to authorize the granting of a divorce, is only such conduct in which the husband "evinces a malignant desire to vex, annoy, and harass the wife." *Boon v. Boon*, 8 Pac. 450, 451, 12 Or. 437.

### CRUELTY TO ANIMALS.

The word "cruelty" shall be held to include every willful act, omission, or negligence, whereby unjustifiable physical pain, suffering, or death is caused or permitted. Pen. Code Ga. 1895, § 706; Ann. St. Ind. T. 1899, § 1298; Pen. Code N. Y. 1903, § 660; Code N. C. 1883, § 2490; Rev. St. Me. 1883, p. 911, c. 124, § 48; Gen. St. Minn. 1894, § 6542; *People v. Brunell* (N. Y.) 48 How. Prac. 435, 447; *McKinne v. State*, 9 S. E. 1091, 81 Ga. 164; *Griffith v. State*, 48 S. E. 251, 252, 116 Ga. 835.

The word "cruelty" shall be held to include every act, omission, or neglect whereby unnecessary or unjustifiable pain or suffering is caused, permitted, or allowed to continue, when there is a reasonable remedy or relief. *Bates' Ann. St. Ohio* 1904, § 3721; *Rev. St. Wyo.* 1899, § 2287; *Mills' Ann. St. Colo.* 1891, § 117; *Waters v. People*, 46 Pac. 112, 113, 23 Colo. 33, 33 L. R. A. 836, 58 Am. St. Rep. 215.

"Cruelly," as used in an indictment charging defendant with cruelly beating a certain horse, against the peace of the commonwealth, means a beating with a willful and cool temper of mind, as well as the pain in-

flicted by the act. *Commonwealth v. McClellan*, 101 Mass. 34, 35.

An indictment, alleging in the words of the statute that the defendant, having the custody and charge of a dog, did "knowingly and willfully authorize and permit said dog to be subjected to unnecessary torture, suffering, and cruelty, and that he did this by knowingly and willfully suffering and permitting said dog to be bitten, mangled, and cruelly tortured by a certain other dog," alleges with certainty and without ambiguity facts constituting an offense within the spirit and letter of the statute. *Commonwealth v. Thornton*, 113 Mass. 457, 458.

"Cruel treatment," as used in the statute prohibiting the cruel treatment of animals, includes "severe pain inflicted upon an animal for the mere purpose of causing pain or indulging vindictive passions; and so it is if inflicted without justifiable cause, and with reasonable cause to know that it is produced by the wanton or reckless conduct of the person who occasioned it." *Commonwealth v. Lufkin*, 89 Mass. (7 Allen) 579, 581.

Where one confined colts, and from motives of willful and malicious mischief fixed a scythe at the place of their escape, and then, with intent to wound, maim, and destroy them, forced them over such scythe, whereby they were wounded, he was guilty of a misdemeanor at the common law. When the most wanton cruelty to the beast is the gravamen of the charge, we may pass by the civil injury, and treat the deed as a misdemeanor at common law. With force and arms to injure the property of another is a civil injury, for which the owner of the property may have his remedy by action of trespass; but wounding and torturing a living animal, not only with force and arms, but with wicked and malicious motives and intentions, is a misdemeanor to be punished by the judges. *State v. Briggs* (Vt.) 1 Aikens, 226, 230.

Under Laws 1866, c. 682, providing that every person who shall, by his act or neglect, maliciously kill or maim or wound or injure or torture or cruelly beat any animal, shall be guilty of a misdemeanor, dislocating the limbs of animals to be slaughtered while yet alive, and plunging them while yet alive in boiling water, are criminal offenses. *Davis v. Society for Prevention of Cruelty* (N. Y.) 16 Abb. Prac. N. S. 73, 78.

### Administration of drug.

In Pen. Code, tit. 16, the caption of which is "Cruelty to Animals," the words "torture" or "cruelty" are defined to include any act, omission, or neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted; and under the same title section 660 provides that a person who unjustifiably administers any poisonous or nox-

lous drug or substance to any animal, or unjustifiably exposes such drug or substance with the intent that the same shall be taken by an animal, whether such animal be the property of himself or another, is guilty of a misdemeanor, such acts also constitute cruelty to animals. *People v. Davy* (N. Y.) 32 N. Y. Supp. 106.

#### **Beating.**

Cruelty to animals, as distinguished from that chastisement which is really administered for purposes of training and discipline, is "the beating and needless infliction of pain, which is dictated by a cruel disposition, violent passions, a spirit of revenge, or reckless indifference to suffering. If resorted to in good faith and for a proper purpose, it will not necessarily be malicious, because it may be deemed to be excessive; but the undue severity should be carefully weighed by the jury in determining whether or not it was in fact dictated by a malignant spirit, and not by any justifiable motive." *State v. Avery*, 44 N. H. 892, 896.

The evidence for defendant, indicted for cruelly beating a horse, showed that he was riding the horse, when at his instance a hog was placed on the horse's back; that the horse jumped, and threw both rider and hog; that defendant then struck the horse several blows over the hip with a small plank, and, after this broke, tied the horse to a fence and struck it several times with a stick about four feet long and as thick as defendant's wrist; that the horse jumped through the barb-wire fence; and that the defendant followed and continued to strike him. Held, that such chastisement constituted cruelty. *Tinsley v. State* (Tex.) 22 S. W. 89, 40.

#### **Deliberation.**

The offense of cruelty to animals at common law included deliberation, as evidencing a wicked intent to inflict injury upon animals. This was held in the case of *People v. Ross*, 3 City H. Rec. 191, where a cart man, intending to beat his horse for refusing to draw its load, struck it a single blow upon the neck, which killed it. He was acquitted on the ground that the evidence showed no deliberate intention to kill the animal, but to chastise it. The courts of the state as far back as 1882 have held that wanton cruelty to an animal, e. g., excessive beating by a cartman or any deliberate cruelty to an animal, is a misdemeanor at common law. *Broadway Stage Co. v. Society for Prevention of Cruelty to Animals*, 15 Abb. Prac. N. S. 51, 63.

#### **Killing for sport.**

The term "cruelty to animals" includes the shooting of tame pigeons for sport. *Paine v. Bergh* (N. Y.) 1 City Ct. R. 160.

By Code, § 2487, providing that any person who shall do any act toward the further-

ance of an act of cruelty to any animal shall be guilty of a misdemeanor, the words "torture," "torment," and "cruelty" are defined to include every act, omission, and neglect whereby unjustifiable physical pain, suffering, or death is caused or permitted. So that one who inflicts suffering and death on any useful beast, fowl, or animal for amusement and sport is within such provision. *State v. Porter*, 16 S. E. 915, 916, 112 N. C. 887.

#### **Needless killing.**

The needless killing of chickens is cruelty, within Code, § 2482, though done without torture. *State v. Neal*, 27 S. E. 81, 82, 120 N. C. 613, 58 Am. St. Rep. 810.

Under Rev. St. § 2101, imposing a penalty on one who cruelly beats or mutilates any animal, the killing of an animal, in order to constitute an offense, must be needless, and the simple charge of killing an animal constitutes no offense. *Hunt v. State*, 29 N. E. 933, 3 Ind. App. 383.

#### **Overworking, underfeeding, etc.**

"Cruelty," as the term is used in the phrase "cruelty to animals," with reference to work animals, consists in overworking, underfeeding, or depriving of proper protection, all of which elements may combine and constitute the offense. *State v. Bosworth*, 4 Atl. 248, 54 Conn. 1.

Code, § 705, declares that the cruelty referred to in section 703, providing that "every person who shall instigate, engage in, or do anything in furtherance of an act of cruelty to a domestic animal, shall be punished as for a misdemeanor," includes "every willful act, omission, or neglect, whereby unjustifiable physical pain, suffering, or death is caused or permitted." The omission or neglect to furnish an animal sufficient food for its sustenance, by its owner or keeper, is a willful violation of this statute. *Griffith v. State*, 43 S. E. 251, 252, 116 Ga. 836.

Statutes against cruelty to animals have rarely received judicial construction by courts of last resort. In *Commonwealth v. Wood*, 111 Mass. 408, 410, the jury were instructed that if the defendant, in proper exercise of his own judgment, thought he was not overdriving the horse, he must be acquitted, and that he could not be convicted unless he knowingly and intentionally overdrove it. The Supreme Court, in commenting on this instruction, says: "A proper exercise of his own judgment means the honest exercise of his judgment, as distinguished from mere recklessness of consequences, or willful cruelty." In *State v. Hackfath*, 20 Mo. App. 614, we decided that the intent with which cruelty is inflicted on the animal is immaterial, provided that the act itself was willful, and not accidental. Evidence that a horse was overdriven does not warrant a

conviction under Rev. St. 1879, § 1609, prohibiting cruelty to animals, in the absence of proof that the overdriving was willful, and not accidental. *State v. Roche*, 37 Mo. App. 480, 481, 482.

## CRUISE.

Shipping articles between the owners and the commander, officers, and crew of a privateer stipulated that the steamer should cruise where the owners directed, and three-fifths of the net proceeds of all the prizes and prize goods taken during the cruise should belong to the owners, and no one of the company should, before the end of the cruise, sell more than one-half his share; the captain, officers, and crew agreeing to remain on board for three months from the time of sailing, unless the cruise was sooner completed in the opinion of the owners. Held, that "cruise" meant a voyage for the purpose of making captures *jure belli*. Cruise *ex vi termini* does not include a given portion of time, without reference to the place of commencement or termination, but includes a connected portion or immediate succession of time, in whatever manner the same may be calculated. The boundaries of a cruise, like those of a voyage, may be defined by local limits or by artificial time, or by both combined. A "cruise" imports a definite place of commencement and termination, unless that construction be repelled by the context. If no provision is made to the contrary, it must be presumed that a cruise comprehends a return to the country, if not to the home port, of the privateer. A cruise may still have a continuance, notwithstanding an arrival in port, and is not necessarily extinguished thereby, unless such inference result from the express stipulations or the overt acts of the parties. *The Brutus* (U. S.) 4 Fed. Cas. 490, 494.

## CRUISING GROUND.

The term "cruising ground" is not synonymous with "pilot's water" or "pilotage ground." By "pilot's cruising ground" is meant that distance out in the sea from a certain extent of coast that pilots cruise for vessels bound to ports into which a pilot may take them by his commission, while "pilot's water" or "pilotage ground" means the access to a bay, inlet, or river or port, beginning at the exterior point where a pilot may take leave of an outward-bound vessel, and extending to the place fixed by a law or usage for the anchorage of inward-bound vessels. *The Whistler* (U. S.) 13 Fed. 295, 298.

## CRY.

Webster defines the word "cry" as follows: "To make oral and public proclamation of; to notify or advertise by outcry, especially things lost or found, goods to be

sold, etc.; public advertisement by outcry; proclamation, as by hawkers." As used in a statute authorizing the council of a city to regulate the ringing of bells and the crying of goods and other commodities for sale at auction or otherwise, by "crying of goods" is meant the advertising of any sale of goods by oral and public proclamation, by outcry, and the statute confers no authority on the council in any manner to regulate such a sale. *City of Rochester v. Close* (N. Y.) 85 Hun, 208, 210.

## CUBIC YARD.

A contract for mason work at a certain price per cubic yard is not ambiguous, as "cubic yard" is a term well known to every one. It means 27 cubic feet, and it will be presumed that the term was used in its ordinary and popular meaning. *Corcoran v. Chess*, 18 Atl. 876, 877, 131 Pa. 356.

## CUCKING STOOL

The term "cucking stool" was anciently used as synonymous with the more familiar term "ducking stool." It was an arrangement by which an offender was placed therein and temporarily submerged in water. *James v. Commonwealth* (Pa.) 12 Serg. & R. 220, 227.

## CUL-DE-SAC.

See, also, "Highway"; "Street"; "Thoroughfare."

The term "cul-de-sac" is used to designate a way in a city which is of the nature of a street, but which has but one entrance, and does not communicate with any street or passageway at any place except the one entrance. *Perrin v. New York Cent. R. Co.* (N. Y.) 40 Barb. 65, 70.

The term "cul-de-sac" may be properly used to designate an alley having an entrance at one end, but no outlet at the other. *Talbot v. Richmond & D. R. Co.* (Va.) 31 Grat. 685, 691; *Adams v. Harrington*, 14 N. E. 603, 606, 114 Ind. 66.

A "cul-de-sac" is a street which is closed at one end, and only communicates with a public road or street at the other. Whether a cul-de-sac can or cannot be a public highway, depends on the common law, and not upon statute. *Hickok v. Trustees of Village of Plattsburg* (N. Y.) 41 Barb. 130, 135.

A "cul-de-sac" is a way open at one end only. Such a way may be a public street or highway. "True, in *Holdane v. Trustees of Village of Cold Springs* (N. Y.) 23 Barb. 123, two of the three judges held that a street could not be a highway. They based their decision upon what they supposed to be the common law. It has been laid down by

Lord Kenyon in *Rugby Charity v. Merryweather*, 11 East, 376, that a mere cul-de-sac might be a highway; that otherwise such places would be traps to catch trespassers. And in *Bateman v. Black*, 14 Eng. Law & Eq. 69, the question was fully considered, and the court held that it was no objection to a highway that it was a mere cul-de-sac, and not a thoroughfare. And in *People v. Kingman*, 24 N. Y. 559, the Court of Appeals very pointedly condemn the decision in *Holdane v. Trustees of Village of Cold Springs* (N. Y.) 23 Barb. 123, and held that upon principle as well as authority it is no objection to the highway or public street that it is a cul-de-sac; that public ways with an outlet at one end may and often do exist." *Bartlett v. City of Bangor*, 67 Me. 460, 467.

## CULL

See "Dead Culls."

A "cull," in the lumber business, is a board full of holes or knots, and not considered merchantable. *Sloan v. Allegheny Co.*, 46 Atl. 1003, 1004, 91 Md. 501.

The word "cull," as used in a tie contract, meant ties that did not conform to the specifications. *Chapman v. Kansas City, C. & S. Ry. Co.*, 48 S. W. 646, 652, 146 Mo. 481.

## CULM.

In a lease of all the coal on certain lands, reserving a royalty on coal mined that would pass over a  $\frac{3}{8}$ -inch mesh, and providing that the lessor should have all the culm, the term "culm" meant the coal which passes through the screens or breakers, and is then placed in what is known as the "culm" or "refuse" heap. It is unmarketable coal, and may, according to the demands of the market, include at one time what is marketable at another time. The word "culm" was doubtless brought to the Pennsylvania coal fields by Welsh miners. With them the word has been used to describe an inferior grade of coal of but little value, and it readily came into use to define coal not inferior in quality, but unmarketable and valueless because of its size. It was the adaptation of a word to a use closely akin to its original meaning. The words "culm or refuse" coal, as used in the lease, meant refuse coal; that is to say, coal refused by the lessee because it was unsalable, and which, of necessity, to make room for the operation of the work, was removed and thrown into a pile. *Lance v. Lehigh & W. B. Coal Co.*, 29 Atl. 755, 163 Pa. 84.

## CULPABLE.

"Culpable," as used in speaking of "culpable negligence," means blamable. *Peoria & P. U. Ry. Co. v. Clayberg*, 107 Ill. 644, 651.

An act, to be "culpable"—that is, to be a breach of legal duty—must be such as a reasonably careful man would fear would be productive of injury. It is to be distinguished from the word "proximately," for a breach of duty to be proximately producing an injury must be such that, whether the defendant could foresee the injury to be probable or not, the breach of duty is in fact the probable cause of the injury. *Carter v. Cape Fear Lumber Co.*, 39 S. E. 828, 830, 129 N. C. 203.

## CULPABLE NEGLECT.

Culpable neglect "means not only criminal, but censurable, and, when the term is applied to the omission by a person to preserve the means of enforcing his own rights, 'censurable' is more nearly an equivalent." *Waltham Bank v. Wright*, 90 Mass. (8 Allen) 121, 122.

"Culpable neglect," as used in Rev. St. c. 87, § 19, authorizing a creditor who has not filed his claim against the estate of a decedent within the time limited by the preceding sections to proceed by bill in equity to obtain relief when the Supreme Judicial Court is of opinion that justice and equity require it, and that such creditor is not chargeable with culpable neglect in not prosecuting his claim within the time so limited, is not criminal neglect, but any neglect that was censurable or blameworthy; the neglect which exists when the loss can fairly be ascribed to the plaintiff's own carelessness, improvidence, or folly. *Bennett v. Bennett*, 44 Atl. 894, 895, 93 Me. 241.

## CULPABLE NEGLIGENCE.

"Culpable negligence" is the omission to do something which a reasonable, prudent, and honest man would do, or the doing of something which such a man would not do, under the circumstances surrounding the particular case. *Hot Springs R. Co. v. Newman*, 36 Ark. 607, 611; *Sikes v. Sheldon*, 13 N. W. 53, 54, 58 Iowa, 744; *St. Louis, I. M. & S. Ry. Co. v. Bragg* (Ark.) 50 S. W. 273, 274. Or it is the want of such care as men of ordinary prudence would use under similar circumstances. *Woodman v. Town of Nottingham*, 49 N. H. 387, 392, 6 Am. Rep. 526; *People v. Buddensleck*, 4 N. Y. Cr. R. 230, 265; *Montgomery v. Scott*, 10 S. C. (10 Rich.) 449, 451; *State v. Emery*, 78 Mo. 77, 80, 47 Am. Rep. 92.

A man is guilty of culpable negligence when he does or omits to do an act that an ordinarily prudent man in the same situation and with equal experience would have done or omitted to do, or when he voluntarily exposes himself to a danger which there was no occasion for him to incur in the proper discharge of his duties. *Kimball v. Palmer* (U. S.) 80 Fed. 240, 241, 25 C. C. A. 394 (cit-

ing Chicago, M. & St. P. R. Co. v. Carpenter [U. S.] 56 Fed. 454, 5 C. C. A. 554).

Culpable negligence is "that failure to exercise that degree of care, whether slight, ordinary, or great, which is required in a particular instance, though the party may have exercised some care, and it may be only slightly less than the degree of care required." Chicago, K. & N. Ry. Co. v. Brown, 24 Pac. 497, 499, 44 Kan. 384; Atchison, T. & S. F. R. Co. v. Plaskett, 26 Pac. 401, 403, 47 Kan. 107.

All negligence, to be culpable, necessarily implies the failure to perform some duty. Atchison, T. & S. F. R. Co. v. Plaskett, 26 Pac. 401, 403, 47 Kan. 107.

#### **Injury must be foreseen.**

The word "culpable" is not equivalent to "proximate." An act to be culpable—that is, to be a breach of legal duty—must be such as a reasonably careful man would foresee would be productive of injury. A person is not liable for an injury which he could not foresee. Carter v. Cape Fear Lumber Co., 39 S. E. 828, 831, 129 N. C. 203.

#### **Intent implied.**

An indictment charged that defendant, in the manner and by the means described, willfully and with "culpable negligence" did kill and murder, against the peace and dignity of the state. If the killing was by culpable negligence, then it was not intentional; or, if the killing was willful, then it could not have been accidental. The two terms are inconsistent, and they cannot be true; hence the indictment is insufficient. State v. Lockwood, 24 S. W. 1015, 1016, 119 Mo. 463.

## **CULTIVATE—CULTIVATION.**

See "Suitable for Cultivation."

To "cultivate and have the use of" lands amounts to a receipt of the rents and profits thereof, and therefore a person cultivating and having the use of land may be charged in a proper case with the receipt of the rents and profits. Thompson v. Bostick (S. C.) McM. Eq. 75, 76.

A "state of cultivation," as applied to land, means its condition after it has been redeemed from its original, natural wild state; after it has been cleared and worked, and has been kept cultivated, and not permitted to revert to its original state. It is not necessary that the land should be actually yielding an income, but it is sufficient if it is in such a state as to be capable of being at once used for crops. Johnson v. Perley, 2 N. H. 56, 57, 9 Am. Dec. 55.

Act Cong. June 14, 1878 (20 Stat. 113), declaring a party entering public land should

keep only one-fourth of the number of acres in timber, and requiring him to break or plow five acres the first year, five acres the second year, and to "cultivate to crop or otherwise" the five acres broken the first year, meant to sow or plant in wheat, corn, potatoes, or other annual crop which may be cultivated and harvested or gathered during the year, and not to plant timber seeds or cuttings; or "cultivate" limiting the word "otherwise," so as to apply to some act or process which involves the improvement or amelioration of the soil. United States v. Shinn (U. S.) 14 Fed. 447, 452.

"Cultivation," as used in the law relating to the cultivation of homesteads, means plowing and preparing it for crops, or the raising of something that grows from the ground besides grass. Making a stock farm or stock range of land is not putting it in cultivation. Fitting it for grazing, cutting the trees for the purpose of putting it in condition for grazing purposes, is not putting it in cultivation. United States v. Niemeyer (U. S.) 94 Fed. 147, 150.

By the "cultivation" of land is ordinarily understood something more than the gathering of crops which grow spontaneously or with little care. Land which can be "cultivated" within the meaning of the swamp land act (Act Cong. Sept. 28, 1850) is arable land, that which is adapted to the raising of crops which require annual planting and tillage, as corn, wheat, oats, rye, and barley, and which is susceptible of such cultivation in all ordinary seasons. American Emigrant Co. v. Rogers Locomotive Mach. Works, 83 Iowa, 612, 50 N. W. 52.

## **CULTIVATED FIELDS OR GROUNDS.**

"A 'cultivated field,' as used in a statute providing for the punishment of any one removing a fence from around a cultivated field, means a piece or tract of land which has been cleared, fenced, and cultivated, or proposed to be cultivated, or kept and used for cultivation, according to the ordinary course of husbandry, although nothing may be growing within the inclosure at the time of the taking away of the fence." State v. McMinn, 81 N. C. 585, 588.

"Cultivated grounds," as used in Acts 1846, 1847, c. 70, providing for the punishment of any persons unlawfully burning, destroying, or removing any fence, wall, or other inclosure, or any part thereof, surrounding or about any yard, garden, or any other "cultivated grounds," cannot be construed as meaning only such grounds as had crops growing on them. "The word 'cultivated' may refer either to past or present time. A field on which a crop of wheat is growing is a 'cultivated field,' although not a stroke of labor may have been done in it since the seed was put into the ground; and it is a 'cul-



ivated field' after the crop is removed. It is strictly a cultivated piece of ground." Mr. Bailey, in his Dictionary, defines "cultivate" to be "to till or husband the ground; to forward the product of the earth by general industry." The grounds, to come within the meaning, must be inclosed preparatory to being cultivated, or for some purpose connected with its husbandry. *State v. Allen*, 35 N. C. 86, 37.

### CULTIVATED LANDS.

Using premises as part of a wood lot, taking therefrom wood for fuel and using it as a sugar bush, does not make it "cultivated or improved land," within Code Civ. Proc. §§ 371, 372, so as to sustain a claim of adverse possession. Thus, in *Clark v. Phelps* (N. Y.) 4 Cow. 190, 203, the court, in speaking of the terms "improved or cultivated land," as used in the law as to laying out of highways, says: These terms are to be taken in the popular sense, according to the general understanding of the community, when distinguishing what is called wild land, or land in a state of nature, from that which has been cultivated and improved. To improve and cultivate may be considered synonymous. To "cultivate" is defined as to improve the product of the earth by manual industry. When speaking of improved land it is generally understood to be such as has been reclaimed, is used for the purpose of husbandry, and is cultivated as such, whether the appropriation is for tillage, meadow, or pasture. So, in *Doolittle v. Tice* (N. Y.) 41 Barb. 181, 185, the court says: "Reaping alone can scarcely be considered as cultivating." Nor can the keeping up a fence already made, mowing the grass, and cutting brush be considered an improvement. *Voight v. Meyer*, 59 N. Y. Supp. 70, 72, 42 App. Div. 350.

### CULVERT.

In a deed conveying two parcels of land to a railway, with the understanding that in constructing a culvert in its road on the new location it should be placed so as to drain as far as practicable the bed of a certain river, the word "culvert" was employed in its ordinary and common meaning, as a waterway or water passage, whether of wood or stone, square or arched, and did not necessarily mean an arched waterway of masonry, as is usually understood to be its architectural meaning. *Oursler v. Baltimore & O. Ry. Co.*, 60 Md. 358, 367.

A "culvert" is defined by Worcester as an arched passage or drain for water beneath a road, canal, or railway. A culvert is not a bridge, within the meaning of the statute requiring county commissioners to construct and repair bridges over streams and water courses. *Carroll County Com'rs v. Bailey*, 23 N. E. 672, 673, 122 Ind. 46.

### As bridge.

See "Bridge."

### As covered drain or ditch.

"Culvert," as used in Laws N. H. 1893, c. 59, § 1, making towns liable for damages to a person traveling upon a culvert by reason of any obstruction, defect, insufficiency, or want of repair of such culvert, means a covered drain under a road, designed for the passage of water. *Gale v. Town of Dover*, 44 Atl. 535, 68 N. H. 403; *Boyd v. Town of Derry*, 68 N. H. 272, 38 Atl. 1005.

The term "culvert," as used in Laws 1879, providing for the recovery of damages sustained from a defective street, bridge, crosswalk, and "culvert," cannot be construed to include a ditch used to carry off the surplus water running along the side of a street, though it was covered for the purposes of a sidewalk. A "culvert," as known and designated, is an arched and covered drain running across and under the road, to carry the water across from one side to the other side of the road. *Kowalka v. Common Council of Village of St. Joseph*, 41 N. W. 416, 417, 73 Mich. 322.

### CUM ONERE.

In defining the term "cum onere" Bouvier says that a purchaser with knowledge of an incumbrance takes the property cum onere. *Holmes v. Danforth*, 21 Atl. 845, 83 Me. 189.

### CUM TESTAMENTO ANNEXO.

See "Administrator Cum Testamentis Annexo."

### CUMBER.

The term "cumber," as used in Laws 1857, p. 285, to prevent the "cumbering" of streets, sidewalks, crosswalks, etc., was not synonymous with "encroaching." The Michigan laws have always made a distinction between "cumbering" and obstructing a public way and "encroaching" on it. The former term has been applied to impediments to travel and passage placed in the open street intending to make its use difficult or dangerous, while the latter has embraced actual inclosure of a portion of a street by fences or walks or occupation by buildings. An encroachment on a street may in one sense be said to cumber it, but, as the Legislature has never employed the two words as synonymous terms, a power to impose a penalty for cumbering or obstructing a street will not authorize a proceeding in the same manner as for encroachments. *City of Grand Rapids v. Hughes*, 15 Mich. 54, 57.

## CUMULATIVE.

The definition of the word "cumulative" is "that which augments by addition; that is added to something else; in law, that augments, as evidence, facts, or arguments of the same kind." Webster. "It is derived from the Latin 'cumulo,' to heap up, or 'cumulus,' a heap." *People v. Superior Court of City of New York* (N. Y.) 10 Wend. 285, 294.

When one thing is cumulative on another, whether it be remedy, penalty, or power, we are speaking commonly of two things which are at least consistent, and might without incongruity be applied at the same time, as indictment and summary proceedings, fine and imprisonment, action for breach of covenant and ejectment for forfeiture. Two ways of doing the same thing, where only one of two can in fact be used, may make a case of election, but they are hardly cumulative. *Reg. v. Eastern Archipelago Co.*, 18 Eng. Law & Eq. 167, 183.

## CUMULATIVE EVIDENCE.

Cumulative evidence is additional evidence to support the same point, and which is of the same character with evidence already produced. *People v. Superior Court of City of New York* (N. Y.) 10 Wend. 285, 294; *Brisbane v. Adams*, 3 N. Y. Super. Ct. (1 Sandf.) 195, 198; *Parshall v. Klinck* (N. Y.) 43 Barb. 208, 212; *Fleming v. Hollenback* (N. Y.) 7 Barb. 271, 278; *Guyot v. Butts* (N. Y.) 4 Wend. 579, 581; *Berry v. Ross* (Me.) 47 Atl. 512, 515; *Glidden v. Dunlap*, 28 Me. (15 Shep.) 379, 383; *Bradish v. State*, 35 Vt. 452, 456; *Parker v. Hardy*, 41 Mass. (24 Pick.) 240, 248; *Gardner v. Mitchell*, 23 Mass. (6 Pick.) 114, 116, 17 Am. Dec. 349; *Chatfield v. Laythrop*, Id. 417, 418; *Van Riper v. Dundee Mfg. Co.*, 33 N. J. Law (4 Vroom) 152, 156; *Winfield Building & Loan Ass'n v. McMullen*, 53 Pac. 481, 59 Kan. 493; *Layman v. Minneapolis St. Ry. Co.*, 69 N. W. 329, 66 Minn. 452; *Waller v. Graves*, 20 Conn. 305, 310; *Richter v. Meyers*, 5 Ind. App. 33, 35, 31 N. E. 582, 583; *Vardeman v. Byrne*, 8 Miss. (7 How.) 365, 369 (citing *People v. Superior Court of City of New York* [N. Y.] 10 Wend. 285); *Civ. Code Ga.* 1895, § 5143; *Pen. Code Ga.* 1895, § 983; *Code Civ. Proc. Cal.* 1903, § 1838; *Ann. Codes & Sts. Or.* 1901, § 691; *Price v. Brown*, 1 Strange, 691. Though on the same point it may yet not be cumulative, but, if of the same kind, it is cumulative. Nor can we look to the effect of the new evidence in considering whether it is cumulative. If dissimilar to the previous evidence, it is not cumulative. If similar, it is cumulative. *Grogan v. Chesapeake & O. Ry. Co.*, 39 W. Va. 415, 421, 19 S. E. 563. If it is of a different kind, though upon the same issue, or of the same kind upon a different issue, it is not cumulative. If verbal admissions have been testified to, other verbal admissions tending to establish the

same question are cumulative. *Cooper v. Ellis*, 3 Ind. App. 142, 144, 29 N. E. 444 (citing *Marshall v. Mathers*, 103 Ind. 458, 3 N. E. 120). "That the new testimony is cumulative is clearly shown in the bill of exceptions, in which the court below say that it conduces to prove; thereby indicating, as we understand, contributing or tending to prove certain facts in relation to which some testimony had already been produced on the trial." *Robins v. Fowler*, 2 Ark. (2 Pike) 183, 145. Evidence which brings to life some new and independent truth of a different character, although it tends to prove the same proposition or ground of claim before insisted on, is not cumulative, within the true meaning of the rule. *Anderson v. State*, 43 Conn. 514, 519, 21 Am. Rep. 669. Evidence of verbal admissions is of the same kind when other verbal admissions to the same point were proved on the trial, but evidence to the same point is not cumulative where it is of a different kind or class. An admission testified to by a different witness, but being of the same class as that to which some of the evidence given on the trial belonged, and tending to prove the same fact as that which the evidence adduced on the trial tended to prove, is cumulative. *Hines v. Driver*, 100 Ind. 815, 827. The fact that newly discovered evidence may tend to prove the same issues upon which proof was offered at the trial does not necessarily make it cumulative, and whether or not it is cumulative is to be determined from its kind and character, rather than from its effect. *Winfield Building & Loan Ass'n v. McMullen*, 53 Pac. 481, 59 Kan. 493. Where the newly discovered evidence on which a motion for new trial was based was the finding of a bond, the signature of which was proved in the trial, and was the same as that on the bond after it was found, the bond constituted cumulative evidence. *McMullen v. Winfield Building & Loan Ass'n*, 46 Pac. 410, 412, 4 Kan. App. 459; *Wynne v. Newman's Adm'r*, 75 Va. 811, 817 (citing *Guyot v. Butts* [N. Y.] 4 Wend. 579).

Cumulative evidence is that which speaks as to facts in relation to which there was evidence on the trial. *McGavock v. Brown*, 23 Tenn. (4 Humph.) 251, 252; *Shute v. Jones*, 24 N. Y. Supp. 637.

Cumulative evidence is such as tends to support the same fact which was before attempted to be proved. *Chatfield v. Laythrop*, 23 Mass. (6 Pick.) 417, 418.

That evidence only is cumulative which is in addition to or corroborative of what has been given at the trial. *Wall v. Trainor*, 16 Nev. 131, 134. The rule excluding it must mean that new evidence to a subordinate point or fact is not competent when that subordinate or particular fact was before gone into, because it is then cumulative as to that fact; but if the newly discovered evidence

brings to light some new fact bearing upon the main question, and it will be likely to change the result, it is not cumulative. *Gray v. Harrison*, 1 Nev. 502, 509.

Cumulative evidence is such as tends to support the fact or issue which was before attempted to be proved upon the trial. *Olmstead v. Hill*, 2 Ark. (2 Pike) 346, 353.

"Cumulative evidence," as used in the statement of the rule that a new trial will not be granted on the ground of newly discovered evidence which is merely cumulative, means evidence which goes to the fact principally controverted on the former trial, and respecting which the party asking for a new trial produced testimony on the trial of the cause. *Roe v. Kalb*, 37 Ga. 459, 464.

Cumulative evidence is additional evidence offered to establish a fact as to which witnesses have already testified. It does not necessarily include evidence which tends to establish the same ultimate or principally controverted fact. *Dale v. State*, 15 S. E. 287, 290, 88 Ga. 552; *Able v. Frazier*, 43 Iowa, 175, 177; *Fellows v. State*, 39 S. E. 885, 887, 114 Ga. 233. Thus where, in a defense of alibi, some witnesses testify that the defendant was at one place in a county, and others testified that he was at another place in the county, but both of them placed him at such a distance that he could not have been present at the time of the perpetration of the crime, the testimony of still another witness, who placed the accused in the county where the other witnesses located him, at a different place than any of them, is not merely cumulative, though it assists to establish the truth of the defense of alibi. *Fellows v. State*, 39 S. E. 885, 887, 114 Ga. 233.

Cumulative evidence is said to be additional evidence of the same kind or degree as that previously given, and upon the same point, which, in substance and effect, simply repeats or adds to what has before been testified. *St. Joseph Folding Bed Co. v. Kansas City, Ft. S. & M. R. Co.*, 50 S. W. 85, 87, 148 Mo. 478.

It was held in *People v. Leighton*, 1 N. Y. Cr. R. 468, 469, that evidence is cumulative when it is of the same nature as that previously produced to establish the same fact or facts. Thus newly discovered evidence of the same nature as that previously produced to establish the same fact is cumulative, within the meaning of Code Cr. Proc. § 465, subd. 7, authorizing new trials for newly discovered evidence which is not cumulative. *People v. O'Connor*, 76 N. Y. Supp. 511, 512, 37 Misc. Rep. 754.

#### **Evidence of new facts.**

Evidence is cumulative if it relates to the same subordinate or specific fact to which proof was before adduced of a like character,

but not when it is of a new fact respecting the general question or point in issue. *Aiken v. Bemis* (U. S.) 1 Fed. Cas. 229, 232.

Evidence of distinct and independent facts of a different character, though it may tend to establish the same ground or defense, or relate to the same issue, is not cumulative, within the rule. *Waller v. Graves*, 20 Conn. 305, 310; *Layman v. Minneapolis St. Ry. Co.*, 69 N. W. 329, 66 Minn. 452. Thus where, in an action for personal injuries caused by a collision between a street car and a wagon, there was no evidence on the first trial that the driver of the wagon looked to see if a car was approaching before driving upon the track, evidence of that fact would not be cumulative evidence, though it would tend to disprove contributory negligence. *Layman v. Minneapolis St. Ry. Co.*, 69 N. W. 329, 66 Minn. 452.

Testimony is not merely cumulative when it tends to prove a distinct fact not testified to at the trial, though other evidence may have been introduced by the moving party tending to support the same ground of claim or defense to which such fact is pertinent. *Goldsworthy v. Town of Linden*, 43 N. W. 656, 659, 75 Wis. 24.

The term "cumulative evidence" includes evidence tending merely to strengthen the proof as to any one or more particular facts already shown in evidence, but it does not include evidence of some other facts as to which there is no proof, but which would aid to the general conclusion. In a suit to have a bill of sale declared a mortgage, admissions by defendant that he held the instrument as security are not cumulative as to the particular facts tending to show that such was the intention or understanding of the parties, within the rule as to new trials for newly discovered evidence. *Bullard v. Bullard*, 84 N. W. 513, 514, 112 Iowa, 423.

Cumulative evidence is defined to be that which goes to prove what has already been established by other evidence. In a general sense, cumulative evidence may be considered to be such evidence as tends to strengthen or re-enforce evidence which has been received upon a given point or issue in the progress of the trial. But this rule is not of universal application, for, as said in *Cole v. Cole* (N. Y.) 50 How. Prac. 59, 61: "Evidence bearing on the same issue in a cause is scarcely ever of the same character. Very often the existence or nonexistence of the facts upon which the cause turns depends upon a number of other independent ones from which the former are inferred. When the alleged new evidence is of the same character with that offered upon the former trial, it is cumulative; but, when it tends to bear on a new fact made by the evidence on the pleadings, it is not." Where defendant was convicted of murder, notwithstanding the testimony of one M., corroborated by

three witnesses, that one B. killed the deceased, newly discovered evidence purporting to show that M. did the killing is merely cumulative, as the issue on the trial was whether defendant or another did the killing, and the same issue would be raised by new evidence. *People v. Shea*, 38 N. Y. Supp. 821, 828, 16 Misc. Rep. 111.

### CUMULATIVE OFFENSE.

A cumulative offense is an offense which can be committed only by a repetition of acts of the same kind, but committed on different days. The offense of being the "common seller" of intoxicating liquors is such an offense. *Wells v. Commonwealth*, 78 Mass. (12 Gray) 326, 328.

### CUMULATIVE PUNISHMENT.

Cumulative punishment is an increased punishment inflicted for a second or third conviction under habitual criminal acts, and is to be distinguished from cumulative sentences, which are sentences pronounced upon a person under conviction at the same time for several offenses, one of which sentences is made to begin at the expiration of another. *State v. Hamby*, 35 S. E. 614, 615, 126 N. C. 1066.

### CUMULATIVE REMEDY.

A cumulative remedy is defined by Bouvier as a remedy created by statute in addition to one which still remains in force. Where a statute gives a new remedy, and contains no negative, express or implied, of the old remedy, the new one provided by it is cumulative, and the party may elect between the two. *Chicago & N. W. Ry. Co. v. City of Chicago*, 35 N. E. 881, 886, 148 Ill. 141, 160.

### CUMULATIVE SENTENCE.

Cumulative sentences are not cumulative punishments, and a single sentence for several offenses in excess of that prescribed for one offense may be authorized by statute. *Carter v. McClaughry*, 22 Sup. Ct. 181, 193, 183 U. S. 365, 46 L. Ed. 236.

Where a sentence is made to begin at the expiration of another sentence imposed on the defendant, the practice is called "cumulative sentences." Such practice is universally recognized, except in a very few states. To hold that, where there are two convictions and judgments for imprisonment at the same term, both must commence immediately and be executed concurrently, would clearly be to nullify one of them. To postpone judgment in one case till the termination of the sentence in the other would, if allowable, be attended with inconvenience and expense, without any

corresponding benefit to the convict. It should be noted that there is a difference between "cumulative sentences," such as are pronounced upon a person under conviction at the same time of several offenses, and "cumulative punishment," which is an increased punishment inflicted for a second or third conviction under habitual criminal acts. *State v. Hamby*, 35 S. E. 614, 126 N. C. 1066.

### CUPOLA FURNACE.

A cupola furnace is one used for melting pig iron for the purpose of casting it into useful forms and articles. It constitutes part of the equipment of a foundry. In shape, it is generally a hollow cylinder. The iron is melted by substantially the same process as the ore in a blast furnace. The cupola furnace has an iron notch, but no cinder notch, because there is generally so little cinder or slag in pig iron as to render such an opening unnecessary. *Vinton v. Hamilton*, 104 U. S. 485, 488, 26 L. Ed. 807.

### CURATIVE ACT.

A curative act, in the ordinary sense of that term, is a retrospective law acting on past causes and existing rights. Such laws are passed to validate irregularities in legal proceedings, or to give effect to contracts for failure to comply with technical legal requirements. *Cooley, Const. Lim. p. 454*. But there may be in legal proceedings defects which are not mere informalities or irregularities, and so vital in their character as to be beyond the reach of retrospective legislation. Such defects are called jurisdictional. Laws 1885, c. 448, making a comptroller's tax deed, after the lapse of two years from record, conclusive evidence of the regularity of the sale and all proceedings prior thereto, and providing that such tax deeds and all outstanding tax certificates in force after two years from the last day for redemption shall be conclusive evidence of the regularity of the sale and of all notices required to be given previous to the expiration of the period of redemption, is not, as to the party in actual possession, a curative act, but a statute of limitations, and therefore sufficient to create defects which a curative statute would have been unable to reach. *Meigs v. Roberts*, 56 N. E. 838-840, 162 N. Y. 371, 76 Am. St. Rep. 322.

### CURATOR.

The word "curator," when applied to the care of an estate, merely, means the same as "guardian"; and the fact that an order of appointment designates the appointee as curator of an insane person instead of guardian, in the words of 2 Rev. St. 1879, § 5791,

providing for the appointment of a "guardian for the person and estate of an insane person," is immaterial. *Easley v. Bone*, 39 Mo. App. 388, 391.

A curator is a person who has been legally appointed to take care of the interests of one who, on account of his youth or defects of his understanding, or for some other cause, is unable to attend to them himself. In the civil law the term "curator" is employed for "guardian," but by the common law a guardian is one who has been lawfully invested with the care of the person of an infant, or as representative of his interest. *Larned v. Renshaw*, 37 Mo. 458, 460.

The term "curator" is used in the civil law to designate the person having the care of the estate of an infant. *Sproule v. Davies*, 75 N. Y. Supp. 229, 230, 69 App. Div. 502.

A curator, in the civil law, is the guardian of the estate of a ward, as distinguished from the guardian of his person. *Duncan v. Crook*, 49 Mo. 116, 117.

#### **CURATOR AD HOC.**

Where it appears that an attorney has been appointed curator ad hoc, the phrase "curator ad hoc" will be treated as surplusage, and the appointment be regarded as that of attorney to represent the absentee. *Hall v. Laurence*, 21 La. Ann. 692, 693.

#### **CURATORSHIP.**

A "curatorship" differs from an "administration," in that the latter continues in full force until a final settlement occurs, and meanwhile the executor or administrator represents the heirs and creditors of the decedent; but, where the minor comes of age, the event terminates the curatorship as to all things except the settlement between the minor and the incumbent curator. *State ex rel. Scott v. Greer*, 74 S. W. 881, 883, 101 Mo. App. 669.

#### **CURBSTONES.**

A city ordinance provided that, when any sidewalks should be established, the commissioner of highways should grade the same, set the curbstones, pave the gutters, and construct the sidewalk, and the abutting owners should be assessed therefor their just and proportionate part of the expense of paving the walk, but that no part of the expense of grading the street, setting the curbstones, or paving the gutters should be so assessed, but should be paid for by the city. Held, that the word "curbstones" meant the curbstones between the sidewalk and that part of the street devoted to carriage travel. *Dickinson v. City Council of Worcester*, 138 Mass. 555, 562.

#### **CURE.**

"Cured," as used in the rule that a mariner is entitled to be cured of sickness and wounds received in the service of the ship, is not to be taken in an absolute sense, as that would involve impossibilities. The term "cured" here was doubtless employed originally in the sense of "taking charge" or "care of" the disabled seaman, and not in that of positive healing. *The City of Alexandria (U. S.)* 17 Fed. 390, 394.

#### **CURE OF SOULS.**

Rev. St. c. 71, providing that all regular ministers of the gospel, of every denomination, having the "cure of souls," shall be authorized to solemnize the rites of matrimony according to the rites and ceremonies of their respective churches, and agreeably to the rules in the act prescribed, does not imply a necessity that the minister should be the incumbent of a church living, or the pastor of any congregation or congregations in particular; but those terms import that the person is to be something more than a minister or preacher, merely, and that he has faculty, according to the constitution of his church, to celebrate matrimony, and to some extent, at least, has the power to administer the Christian sacraments, as acknowledged and held by his church. *State v. Bray*, 35 N. C. 289, 290.

#### **CURED BY VERDICT.**

The expression "cured by verdict" signifies that the court will, after a verdict, presume that the particular thing omitted or defectively stated in the pleadings was duly proved at the trial. *State v. Keena*, 23 Atl. 522, 63 Conn. 329; *Treanor v. Houghton*, 36 Pac. 1081, 1083, 103 Cal. 53; *Merrick v. Trustees of Bank of Metropolis (Md.)* 8 Gill 59, 75; *Alford v. Baker*, 53 Ind. 279, 283; *Peck v. Martin*, 17 Ind. 115, 117. Such intentment must arise not merely from the verdict, but from the united effect of the verdict and the issues upon which the verdict was given. And the particular thing which is presumed to have been proved must always be such as can be implied from the allegations of the records by fair and reasonable intentment. *Jackson v. Pesked*, 1 Maule & S. 234. Under such ruling, an information which fails to state an offense cannot be cured by verdict. *State v. Keena*, 23 Atl. 522, 63 Conn. 329. It is based on the principle that where there is any defect, imperfection, or omission in any pleading, whether in substance or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the

judge would direct the jury to give, or the jury would have given, the verdict, such defect, imperfection, or omission is cured by the verdict. *Treanor v. Houghton*, 36 Pac. 1081, 1083, 103 Cal. 53.

## CURRENT.

In the *Century Dictionary*, "current" is defined as "a very small kind of raisin or dried grape imported from the Levant—chiefly from Zante and Cephalonia—and used in cooking." Precisely the same definition is given in *Webster's International Dictionary*, issue of 1890. In the *Encyclopædia Britannica* (Ed. 1877) the following definition is found: "Current. The dried, seedless fruit of a variety of the grapevine (*vitis vinifera*) cultivated principally in Zante, Cephalonia, Ithaca, and near Patras, in the Morea." In the *Standard Dictionary of the English Language*, published in 1895, a "current" is defined to be a small, seedless raisin, imported from the Levant, and called usually "dried currents" and "Zante currents." *Zante Currents* (U. S.) 73 Fed. 183, 187.

## CURRENCY.

See "Bankable Currency"; "Canada Currency"; "Common Currency"; "Continental Currency"; "Lawful Currency"; "National Currency"; "Paper Currency"; "United States Currency."

In a note the term "currency" evidently means that the note is not payable in coin or in notes of the United States, which are made legal tender for all debts, but describes some other medium of circulation. *Huse v. Hamblin*, 29 Iowa, 501, 505, 4 Am. Rep. 244.

Courts judicially take notice in what light the medium or subject-matter of payment of a note or bill is regarded in common understanding, and, where a bill or note is made payable in currency, the value of the currency at the time of payment must be ascertained in the same manner as the value of any other commodity. Therefore an instrument in the form of a bill of exchange, except that it is drawn payable in currency, is not a bill of exchange, within the meaning of statutes defining negotiable instruments. *Farwell v. Kennett*, 7 Mo. 595, 597.

"Currency" does not necessarily mean money, but whatever circulates conventionally on its own credit as a medium of exchange, whether it be bank notes, bills of exchange, or government securities, which, being thus practically current, are properly currency. *Griswold v. Hepburn*, 63 Ky. (2 Duv.) 20, 33.

The word "currency" is defined in *Bouvier's Law Dictionary* to mean money which passes at a fixed value from hand to hand. *Butler v. Paine*, 8 Minn. 324, 328 (Gil. 284).

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"Currency" is a word of exclusive application. It means, among other uses, a continual passing from hand to hand and circulation, as the currency of coin, bank bills, bills of credit, etc. As applied to contracts to pay money, it must be understood in the sense in which the parties intended it, if their intention can be ascertained. *Carlisle v. Davis*, 7 Ala. 42, 44.

The meaning of the phrase "currency used in the common business" of the country, in a bond dated in Virginia on the 30th day of March, 1864, to be paid, with interest, three years from date, in the currency used in the common business of the country at the date of the maturity, is to be determined by parol evidence showing the understanding of the parties in respect to the kind of currency in which the same was to be performed, or with reference to which, as the standard of value, it was made and entered into. *Calbreath v. Virginia Porcelain & Earthenware Co.* (Va.) 22 Grat. 697, 701.

"Currency," when applied to the medium of trade, means equally coin, bank notes, or notes issued by the government. *Leonard v. State*, 22 South. 564, 565, 115 Ala. 80 (citing *Crocker v. State*, 47 Ala. 53; *Noble v. State*, 59 Ala. 73, 81).

The word "currency," when applied to the medium of trade, means coin, bank notes, or notes issued by the government. *Crocker v. State*, 47 Ala. 53. When the charge is made, therefore, that the defendant stole \$80 in United States currency, it means, by common understanding, that that amount of money, in coin, bank notes, or notes issued by the government of the United States, was stolen by him. *Leonard v. State*, 115 Ala. 80, 82, 22 South. 564, 565.

### As bank bills or notes.

"Currency" is defined as "bank notes or other paper money issued by authority, which are continually used as and for coin." This is also the commercial as well as the popular meaning of the term. *Chicago Fire & Marine Ins. Co. v. Keiron*, 27 Ill. (17 Peck) 501, 505; *Osgood v. McConnell*, 32 Ill. 74, 77; *Klauber v. Biggerstaff*, 3 N. W. 357, 359, 47 Wis. 551, 32 Am. Rep. 773; *Springfield Marine & Fire Ins. Co. v. Tinscher*, 30 Ill. (20 Peck) 399, 403.

Currency is defined in *Wharton's Law Lex*, 236, as bank notes or other paper money which are continually passing as a circulating medium. This view is substantially followed by the Supreme Court of Illinois. *Galena Ins. Co. v. Kupfer*, 28 Ill. (18 Peck) 332, 81 Am. Dec. 284, where the judge, delivering his opinion, says: "Currency is bank bills or other paper money which passes as a circulating medium in the business community as and for the constitutional coin of the country. The term 'current funds,' means cur-

rent money, par funds, or money circulating without any discount. These definitions are too restrictive. Currency is a circulating medium, and is generally used—and, indeed, is so defined by Worcester—to indicate the grade of coin, bills, notes, etc., in circulation, as a metal currency, a mixed currency, a paper currency. What, then, does a note or bill payable in currency call for? It calls for payment in anything which circulates current as money. If gold and silver are circulating as money, they are currency. If bank notes are circulating as money, they are currency. Thus currency may be composed of either coin or paper, or both. What 'currency' means, in a note or bill, is not very clear, without some reference to the circulating medium at the time, or without knowing what meaning is attached to the word generally by those who use it, or, rather, without knowing what specific idea the word is used to express. On questions of mercantile construction we have frequently followed the direction of Tindal, C. J., in *Houghton v. Gilbrat*, 7 C. & P. 701: 'You had better set aside your dictionary and appeal to the knowledge of the jury, for, after all, the dictionary is not authority.' *Pilmer v. Branch of State Bank*, 16 Iowa, 321, 329.

"Currency" means what passes among the people, and is made by them to answer in some degree the purpose of money, so that a bond calling for current bank money meant current bank bills for the amount specified. *Lackey v. Miller*, 61 N. C. 28, 28.

In a note payable "in the currency of the country, but not Confederate notes" the terms "currency" and "current bank notes" are synonymous, and mean payable in those bank notes which might circulate currently when the note became due. *Coffin v. Hill*, 48 Tenn. (1 Heisk.) 383, 388.

In the dissenting opinion of Justice Clifford in the *Legal Tender Cases*, "currency" is defined as "a word much more comprehensive than the word money, as it may include bank bills, and even bills of exchange, as well as coins of gold and silver." *Knox v. Lee*, 79 U. S. (12 Wall.) 457, 607, 20 L. Ed. 287.

#### As coin or equivalent.

"Currency" means of the value of cash, and excludes the idea of depreciated paper money; and, if taken as and for coin, such is its value. *Swift v. Whitney*, 20 Ill. (10 Peck) 144, 146.

Currency is coin, or such bank notes as pass freely in commercial transactions as money, and are regarded as equivalent to coin. *Webster v. Pierce*, 35 Ill. 158, 164.

A note payable in current money does not mean bank notes, but gold or silver. The word "current," preceding the word "money," cannot change its meaning, because it is

equally applicable to that kind of money made current by the act of Congress, which is the only current money of Kentucky. "Current money" does not mean the same thing as "currency." *McChord v. Ford*, 19 Ky. (3 T. B. Mon.) 166, 167.

Where a note is payable "in currency," that term means that the designated number of dollars is payable in an equal number of notes which are current in the community as dollars, and are the opposite of the term "in specie," meaning that the note shall be paid in so many gold or silver dollars of the coin of the United States. *Trebilcock v. Wilson*, 79 U. S. (12 Wall.) 687, 695, 20 L. Ed. 460.

#### As current money.

The term "currency," as used in a note declaring that it should be paid in currency, means current money. *Dugan v. Campbell*, 1 Ohio (1 Ham.) 115, 119.

Authorities hold that the term "currency," used in commercial paper, *ex vi termini*, means money, so that paper payable in currency is negotiable. In Michigan it was held that, where a certificate of deposit was made payable in currency, *prima facie*, at least, that must be held to mean money current by law, or paper equivalent in value, circulating in the business community at par; such being the general signification, the fair import, and the ordinary legal effect of the term. *Hatch v. First Nat. Bank*, 47 Atl. 908, 909, 94 Me. 348, 80 Am. St. Rep. 401 (citing *Phelps v. Town*, 14 Mich. 374; *Phoenix Ins. Co. v. Allen*, 11 Mich. 501, 83 Am. Dec. 756; *Black v. Ward*, 27 Mich. 191, 15 Am. Rep. 162).

Plaintiff sent to the defendants for collection certain bills which on their face were payable in currency. Defendant collected them in the treasury notes of the then so-called Confederate States, and held these identical notes, and tendered them to the plaintiff as the proceeds of the collection. The plaintiff refused to receive them, and demanded legal currency. The result of the controversy depends upon the construction to be placed on the words "in currency," used in the bills, for, if the defendants are correct in their interpretation of the words, the plaintiff would have no standing in court. When the words in instruments may convey two different meanings—the one in harmony with, and the other antagonistic to, the law—the former should always, upon principle, be adopted, because in that sense the legal effect can be given to the instrument, while the other would render it nugatory. The words "in currency," in the bills which the defendants undertook to collect for the plaintiff, mean current money, in the legal sense. If the parties intended to attach a different meaning to them, the instruments themselves should show it, which they do not, and the defendants were not authorized to receive in

payment anything but legal currency. *Fry v. Dudley*, 20 La. Ann. 368, 371, 372.

#### As money.

Currency is not necessarily money, but whatever circulates conventionally on its own credit as a medium of exchange—whether it be bank notes, bills of exchange, or government securities, being those practically current—is within the term “currency”; but such currency, merely spontaneous, is not money, which is the legal medium of exchange, and the only true standard of value. *Griswold v. Hephurn*, 63 Ky. (2 Duv.) 20, 23.

“Currency,” as used in a draft made payable in currency, means the established lawful standard medium of exchange, legal tender money, or gold or silver. *Butler v. Paine*, 8 Minn. 324, 329 (Gil. 284, 289).

Where a note is payable in currency, it is, in legal contemplation, payable in money. *Trowbridge v. Seamen*, 21 Ill. (11 Peck) 101.

The word “currency” is not confined in meaning to paper which is not money. The only cases in which it has been held that currency does not mean money, except where it has been qualified by some further definition, are some cases in Iowa and Wisconsin, all of which rest entirely upon the authority of decisions where the papers in question were expressly payable in bank notes. Neither of these definitions supports the idea that “currency” and “bank notes” are purely convertible terms, and the inference is unwarranted, unless founded on what does not appear in any of these decisions. *Black v. Ward*, 27 Mich. 191-194, 15 Am. Rep. 162.

#### As paper money.

The term “currency” is not limited to metallic currency issued by the United States government, but extends as well to paper money issued by or under the authority of Congress. *Juilliard v. Greenman*, 4 Sup. Ct. 122, 130, 110 U. S. 421, 28 L. Ed. 204.

“Currency may be properly defined as something which circulates as a medium of trade. It conveys at the present time the idea of paper money of some sort.” *State v. Gasting*, 23 La. Ann. 609, 610.

#### CURRENCY OF THE STATE.

The terms “currency of this state” or “current bank paper of this state,” and all other such terms, clearly mean bank notes and are distinguishable from the term “good current money of this state,” which means the current coin of the United States. *Wilburn v. Greer*, 6 Ark. (1 Eng.) 255, 258 (citing *Graham v. Adams*, 5 Ark. [5 Pike] 261, 262).

#### Of Illinois.

A certificate stated that plaintiffs had deposited in the bank \$1,781.42, “Ill. Cy.,” payable to the order of themselves on the

return of the certificate. The fair construction of the terms “Ill. Cy.”—taking it for granted that these terms meant “Illinois currency”—is that, if applied to the payment of this certificate, the same might be paid in bills of banks which at the time of payment were received and passed as ordinary currency in the state in ordinary transactions of business, and would not necessarily permit of payment in the same bills which were received by the defendants. *Halbert v. Carver* (N. Y.) 37 Barb. 62, 63.

A certificate of deposit payable in Illinois currency means “bills passing in the locality in the place of coin.” *Chicago Fire & Marine Ins. Co. v. Keiron*, 27 Ill. (17 Peck) 501, 505.

A letter of advice from a bank stating “I hereby credit your account with” a certain number of dollars “in Illinois currency” cannot be construed to mean that the account is payable in Illinois currency, but the depositor is entitled to the number of dollars expressed in the letter of advice. *Marine Bank v. Birney*, 28 Ill. (18 Peck) 90-92.

#### Of Kentucky.

“Currency of Kentucky,” in common acceptance, would not be understood to mean anything else than the common circulating medium in the state, and therefore would include a bank note which might at any time have been converted into money, and was in fact, in the common understanding of the community, the currency of Kentucky. *Lampton v. Haggard*, 19 Ky. (3 T. B. Mon.) 149, 150.

A note for the payment of £50 current money of Kentucky in cash, or in cash notes, is a note for the payment of cash or of cash notes, within the act of Assembly creating the summary mode of recovering debts, and of confining it expressly to notes or bonds for the direct payment of money. *Louden v. Kenney*, 4 Ky. (1 Bibb) 330.

#### Of Missouri.

“Currency of this state,” in a note, imports either, first, gold or silver coin, which is the constitutional currency of the United States, the “tender money” of the several states of the Union; or, second, the notes of the Bank of the State of Missouri, the issuing of which is authorized by the laws of the state, and cannot be construed to mean the notes of the several banks incorporated by the laws of other states. *Cockrill v. Kirkpatrick*, 9 Mo. 697, 701.

#### Of Mississippi.

Properly speaking, the term “currency of the state of Mississippi,” as used in a promissory note payable in such currency, can only mean that which has been declared to be a legal tender, because “currency” implies lawful money. *Wharton v. Morris*



(Pa.) 1 Dall. 125, 126, 1 L. Ed. 65. In a suit for lawful money, paper money, unless shown to be a legal tender, will not be permitted to be brought into court; and, where payment of such note was tendered in the notes of the Mississippi Railroad Company, the tender was insufficient. *Mitchell v. Hewitt*, 13 Miss. (5 Smedes & M.) 361, 366.

## CURRENT.

See "Alternated Current"; "Alternating Current."

The term "current," as defined by the *Century Dictionary*, means "running; moving; following; passing; present in its course, as the current month or year." Other standard authorities give the word about the same definition, and, as applied to current funds of the state, it means funds, the amount of which is constantly changing by reason of receipts and disbursements therein. *State v. Bartley*, 58 N. W. 172, 174, 39 Neb. 353, 23 L. R. A. 67.

"Current," as used in an indictment charging the robbery of several promissory notes then and there of the "currency current" in said commonwealth, is equivalent to "current as money in the commonwealth," and hence would be sustained by proof that the notes stolen were either bank bills or treasury notes. *Commonwealth v. Griffiths*, 126 Mass. 252, 253.

The words "bank notes current in the city of New York," as used in a promissory note payable in "bank notes current in the city of New York," make the note negotiable, for the court will take notice that notes current in the city of New York are of cash value throughout the state, and are distinguished by those words from other bank notes which are received at a discount; and hence it is immaterial whether the notes of banks in other states might be tendered in payment, provided they were current in the city of New York, as in that case they are considered as cash, equally with the current bills of the state. The note, if payable in bank notes generally, would have been valid, and consequently it is valid when confined to a species of bank paper of known cash value. *Judah v. Harris* (N. Y.) 19 Johns. 144, 145.

"Current" means circulatory, common, popular, which may all be with money, without a law of the United States or any law, and as it respects some kinds of silver coin, until the late act of Congress, was so in fact. An allegation in an indictment that coins intended to be counterfeited "were current silver coins of this state and of the United States" is not equivalent to the words in the statute, "which shall be made current by the laws of this or the United States." *State v. Bowman*, 6 Vt. 594, 597.

## CURRENT ACCOUNT.

A current account, as used in the statute, is a running, passing, connected series. *Tucker v. Quimby*, 37 Iowa, 17, 19.

A current account is one in which there has not been a balance agreed on and struck between the parties. *Franklin v. Camp's Ex'rs*, 1 N. J. Law (Coxe) 196.

The expression "account current," in the mercantile sense, is an account which contains items of debit and credit between the parties, from which the balance due one or the other is or can be ascertained. *Wilson v. Calvert*, 18 Ala. 274, 276.

A mutual, open, and current account, within Code Civ. Proc. § 344, providing that an action on such account shall be deemed to have accrued, for the purpose of computing limitations, from the date of the last item only, arises when there are mutual charges between the parties which may be offset, and does not rise from the mere fact of payments made on an account in favor of one of the parties. *Rocca v. Klein*, 16 Pac. 323, 74 Cal. 526.

Gen. St. c. 66, § 9, provides a limitation of actions founded on mutual, "open, and current accounts." Held, that a mutual, open, and current account, within the statute, was an account which was mutual; i. e., that each party had an account against the other, open and current; i. e., unsettled, not closed or stated, but running. There must be reciprocal demands between the parties; that is, cross-demands—something on which either party could sustain an action. *Taylor v. Parker*, 17 Minn. 469, 473 (Gil. 447, 451).

An account showing on one side items for goods sold and delivered at different dates, and only payments made by the purchaser on the other side, is not an "open, current" account, within the statute of limitations, and its operation is not suspended, as respects the earlier items of the account, until the date of the last item proved therein. *Cousins v. St. Paul, M. & M. Ry. Co.*, 45 N. W. 429, 43 Minn. 219.

In order that an account may be held to be an open account current, within Pub. St. c. 197, § 8, declaring that the statute of limitations shall begin to run on such an account from the date of the last item proved, it must be an account of mutual dealings between the parties, consisting of sales made or services performed by each party to or for the other, creating mutual debts and parts of one kind. There must be a mutual agreement, express or implied, that the items of the account on the one side and the other are to be set against each other. In other words, there must be one account upon which the items on either side belong, and upon which they operate to extinguish each other pro tanto, so that the balance on either

side is the debt between the parties, and therefore not a suit by a surviving partner on an account within the statute for the hire and keeping of horses. Medical services rendered by defendant to plaintiff subsequent to the death of the other partner do not create such a mutual dealing between the parties as would take the case out of the statute. *Eldridge v. Smith*, 144 Mass. 35, 36, 10 N. E. 717, 718.

A shopkeeper's account containing charges of articles sold to the defendants, some of them within six years before action brought, and also containing credits given more than six years before action brought, is not a current or mutual account, so that the charges within the six years should draw the previous charges out of the statute of limitations. *Gold v. Whitcomb*, 81 Mass. (14 Pick.) 188.

### CURRENT BANK BILL.

"Current bank bills" means bank bills or other paper money which passes as a circulating medium in the business community as and for the constitutional coin of the country. It is synonymous with "currency." *Osgood v. McConnell*, 32 Ill. 74.

### CURRENT BANK MONEY.

"Current bank money," as used in a bond promising to pay an amount named in "current bank money," will be construed to mean "current bank bills." *Lackey v. Miller*, 61 N. C. 26, 28.

A note payable in current bank money of the state of Mississippi means that species of money called "Mississippi bank notes," and not coin, such as gold and silver, and the measure of damages for failure to pay such a note is the value of current Mississippi bank notes at the time the note was payable. *Hopson v. Fountain*, 24 Tenn. (5 Humph.) 140, 141.

### CURRENT BANK NOTES.

The statute which authorizes judgment to be rendered for bank notes specifically means current bank notes of Kentucky. *Speak v. Warner*, 28 Ky. (5 J. J. Marsh.) 68.

Current bank notes are not a legal tender, and are neither gold nor silver, but are the representatives of both. They are included in the term "money" in the statute making all bonds, promissory notes, etc., drawn for any sum or sums of money, certain, and payable to any person or order, or any person or bearer, etc., negotiable by indorsement. *Swetland v. Creigh*, 15 Ohio, 118-121.

A bill for the payment in current bank notes of \$629 cannot mean that amount in

gold and silver coin, for then the words are perfectly inoperative and useless. It was either intended that as many current bank notes should be paid as are equivalent in market value to the sum in gold and silver, or as are equal in denomination or in nominal amount to that sum. It is the same thing, substantially, as if the expression had been "six hundred and twenty-nine dollars," instead of "in current bank notes." *Gamble v. Hatton*, 7 Tenn. (Peck) 180.

Current bank notes are notes or bills used in general circulation as money, constituting the general currency of the country, and recognized by law at the time and place where payment of a debt was to be made and demanded. *Pardee v. Fish*, 60 N. Y. 265, 270, 19 Am. Rep. 178.

"The term 'current bank notes,' when used in notes and obligations, imports generally such as are convertible into gold and silver at par." *Williams v. Arnis*, 30 Tex. 37, 40.

As used in a note payable in current Tennessee bank notes, the words "current bank notes" mean that which circulates currently as money, and which, in business, is presumed to be of equal value to money. *Baker v. Jordan*, 24 Tenn. (5 Humph.) 485, 486.

Current bank notes have been defined as such as are convertible into specie at the counter where they were issued, and pass at par, in the ordinary transactions of the country. *Bizzell v. Brewer*, 9 Ark. (4 Eng.) 58, 61.

The term "current bank notes" embraces in its ordinary acceptation such bank notes only as are redeemable in gold and silver, or are equivalent thereto in the nearest commercial mart. *Fleming v. Nall*, 1 Tex. 246, 247.

A note payable in current bank notes is not negotiable paper. *Simpson v. Moulden*, 43 Tenn. (3 Cold.) 429, 431; *Kirkpatrick v. McCullough*, 22 Tenn. (3 Humph.) 171, 172, 39 Am. Dec. 158.

### CURRENT BANK PAPER.

"The term 'current bank paper' means paper which passes from hand to hand as money, and does not mean depreciated bank paper, which is bought and sold as merchandise." *Pierson v. Wallace*, 7 Ark. (2 Eng.) 282, 293.

The term "currency of this state," or "current bank paper of this state," and all other such terms, clearly mean bank notes, and are distinguishable from the term "good, current money of this state," which means the current coin of the United States. *Wilburn v. Greer*, 6 Ark. (1 Eng.) 255-258.

**CURRENT BILLS.**

As cash, see "Cash."

The term "current bills," as used in a note declaring that the same shall be payable in "current bills," is to be understood as meaning current bank bills, or bills which, in the ordinary course of business by a conventional arrangement in the community, and for the purpose of business, are treated as money. *Collins v. Lincoln*, 11 Vt. 268, 269.

**CURRENT EXPENSES.**

See "Ordinary Current Expenses."

**Of county.**

"Current expenses of the year," as used in a statute authorizing a county board of supervisors to levy a tax for the "current expenses of the year," should be construed to mean the "expenses of the current year." The adjective was meant to qualify the latter word, and hence the board had power to levy taxes for the payment of expenses incurred within a particular year, though for buildings, etc., which was not a current expense in the sense that it was one that occurred every year, or from year to year, as the erection of a jail. *Babcock v. Goodrich*, 47 Cal. 488, 510.

"Current county expenditures" do not mean county expenditures for years other than the year for which the taxes are levied, and warrants issued in other years are not receivable in payment of taxes in any other year than that in which the warrant is issued, unless there be an excess of revenue after paying the current expenses to the county for such year. Then the excess may be applied to the payment of outstanding warrants as presented in the payment of county taxes, or they may be paid by the county treasurer out of any funds in his hands for the purpose. *State ex rel. Egger v. Payne*, 52 S. W. 412, 414, 151 Mo. 663.

The erection of county buildings is not "current expenses" of a county, but is an extraordinary and exceptional expense. When permanent county buildings are once erected and completed, the benefits to the county are permanent and continuous; and while the erection of such buildings is a county charge and expense, in the sense that the county, under proper conditions, must pay the cost of them, it is not a part of the current expenses of the county. *State v. Marlon County Com'rs*, 21 Kan. 419, 434.

**Of property.**

"Current expenses," as the term is used in a contract whereby the trustees of certain property agreed to pay over all the money received into their hands as trustees, "after paying therefrom all taxes and current expenses of such property in trust, actually im-

posed or incurred," means ordinary expenses. *Taylor v. Mayo*, 4 Sup. Ct. 147, 151, 110 U. S. 330, 28 L. Ed. 168.

**Of railroads.**

Current expenses of a railroad company in the hands of a receiver in mortgage foreclosure proceedings are those incurred within a reasonable time. *Thomas v. Peoria & R. I. R. Co. (U. S.)* 36 Fed. 808, 819.

**Of schools.**

"Current expenses," as used in regard to common schools, means continuing, regular expenditures for the maintenance of the schools; and hence a fund devoted to the payment of current expenses cannot be appropriated to the building of a new schoolhouse, or for the purchasing of the site. *Sheldon v. Purdy*, 49 Pac. 228, 230, 17 Wash. 135.

The words "current expenses," as used in a resolution for a school tax, denote one of the purposes for which a tax may be ordered, and are sufficiently definite, and are identical with "running expenses." *State v. Board of Education of Neptune*, 53 Atl. 236, 237, 68 N. J. Law, 496.

The phrase "current expenses" is identical in signification with the phrase "running expenses," and denotes the purpose for which a school tax may be levied. *State v. Board of Education of Neptune City*, 53 Atl. 236, 237, 68 N. J. Law, 496.

**CURRENT FUNDS.**

"Current funds" signifies cash, or paper money equivalent thereto. *Wood v. Price*, 46 Ill. 435, 437.

A note payable in current funds is payable in money. *Haddock v. Woods*, 46 Iowa. 433, 435.

A promissory note read, "One day after date we promise to pay E. O., or order. \$1,234.40, for value received, payable in current funds." Held, that the note being perfect, as a money demand, without the addition of the words "payable in current funds," the addition of these words meant that the same should be paid in any funds other than money, making the note a contract to pay in current paper funds. *Conwell v. Pumphrey*, 9 Ind. 135, 138, 68 Am. Dec. 611.

**Bank notes.**

"Current funds," as used in certificates of deposit payable in current funds, should be construed to include all funds bankable in the state, and any such funds would answer the description and satisfy the contract. A tender in any of the notes of the banks of the state passing as currency would discharge the obligation. *Platt v. Bank County Bank*, 17 Wis. 222, 227.

**Certificates of deposit.**

The modern and better doctrine is that the term "current funds," when used in commercial transactions as the expression of the medium of payment, should be construed to mean current money—funds which are current by law as money—and that, when thus considered, a certificate of deposit payable in current funds is in this respect negotiable. It is well known that certificates of deposit are commonly made payable in currency or in current funds, and the interpretation given is in accord with the universal understanding of parties giving and receiving these instruments. *Hatch v. First Nat. Bank*, 47 Atl. 908, 909, 94 Me. 348, 80 Am. St. Rep. 401.

**As current money.**

The term "current funds," when used in a draft, bill of exchange, or promissory note, means whatever is receivable and current by law as money, whether in the form of notes or coin. *Bull v. First Nat. Bank*, 8 Sup. Ct. 62, 64, 123 U. S. 105, 31 L. Ed. 97.

"Current funds," as used in a bill payable in funds current in the city of New York, meant gold or silver, or something equivalent to it, and convertible at pleasure into those metals. *Lacy v. Holbrook*, 4 Ala. 88, 90.

"Current funds," as used in a note payable in current funds, does not mean specie, but the representative of it. Parol evidence is admissible to show the species of current funds in which payment was intended by the parties. In the absence of evidence, they will be construed to mean funds that are convertible into gold and silver at par. *Williams v. Arnis*, 30 Tex. 37, 49.

**As funds circulating at par.**

The term "current funds" or "currency" has a specific legal and well-known meaning, to wit, current money of par value, or money circulating without any discount. Hence a check payable in current funds cannot be paid by tender of depreciated bank currency. *Marc v. Kupfer*, 34 Ill. 286, 293; *Galena Ins. Co. v. Kupfer*, 28 Ill. (18 Peck) 332, 335, 81 Am. Dec. 284.

The phrase "current funds," as employed in commercial transactions, has a fixed and known signification, meaning current money, lawful money, or funds or money circulating without any discount. *State v. Bartley*, 58 N. W. 172, 174, 39 Neb. 353, 23 L. R. A. 67.

**As funds current by law.**

"Current funds," when used in a note which is made payable in current funds, means such funds as are current by law, in the absence of evidence showing that the words were used in some other sense. *Phoe-*

*nix Ins. Co. v. Allen*, 11 Mich. 501, 508, 83 Am. Dec. 756.

"Current funds," as used in a bill of exchange or other negotiable instrument to denote the form of payment, means any funds which are made legal tender by law. *Kirkwood v. First Nat. Bank*, 58 N. W. 1016, 1018, 40 Neb. 494, 24 L. R. A. 444, 42 Am. St. Rep. 683.

**As affecting negotiability of note.**

Commercial paper payable in current funds or in currency is not negotiable, since it is not payable in money, or what the court is reasonably bound to consider as equivalent to money. *Lindsey v. McClelland*, 18 Wis. 481, 484, 86 Am. Dec. 786 (citing *Ford v. Mitchell*, 15 Wis. 304).

Where a note was payable in current funds at Pittsburgh, due in 1838, such funds meant funds which were generally current in business transactions in that city, and, that being a currency that had to be valued, such note was not negotiable. *Wright v. Hart's Adm'r*, 44 Pa. (8 Wright) 454, 457.

The words "in current funds," as used in a check, mean nothing more or less than current money; and, so construed, the fact that they are contained in the check does not render it nonnegotiable. *Laird v. State*, 61 Md. 309, 311.

Where a note is payable in current funds, parol evidence is admissible to show that the use of such words, according to a custom prevailing at the time and place of the execution of the note, renders it negotiable. *American Emigrant Co. v. Clark*, 47 Iowa, 671, 672.

**Of state.**

Laws 1891, § 1, declares that the State Treasurer shall deposit, and at all times keep on deposit, in the state and national banks, or some of them, the amounts of money in his hands belonging to the several current funds in the state treasury. Held, that the phrase "current funds," used in such statute, was not employed by the Legislature in the sense in which the term is usually used in commercial dealings, namely, current money, lawful money, par funds, etc., but that the term "current funds," like many other words in the English language, is susceptible of more than one meaning, and, as employed by the Legislature, was used to designate divisions of public money of the state into the various divisions in which it is divided by law. *State v. Bartley*, 58 N. W. 172, 174, 39 Neb. 353, 23 L. R. A. 67.

"Our law recognizes nothing as current funds of the state of Ohio but gold and silver coin, and bank notes issued by banks incorporated by the state, which are by law required to be of equal value with gold and silver coin in the same denomination. A

note payable in current funds of the state of Ohio is a sum certain, within the meaning of the statute providing that a promissory note for the payment of a sum of money certain to the payee or order shall be negotiable by indorsement." *White v. Richmond*, 16 Ohio St. 5-7.

#### Of the United States.

Where one contracted to deliver \$10,000, current funds of the United States, at 15 cents on the dollar, the phrase "current funds of the United States" mean \$10,000 legal tender notes. *Cooke v. Davis*, 53 N. Y. 318, 321.

#### CURRENT MONEY.

See "Good Current Money."

Where a contract provided that money was to be paid in "current, lawful money," the words "current, lawful money" mean such money as is current at the time of entering into the contract. *Lee v. Biddis* (Pa.) 1 Dall. 175, 1 L. Ed. 88.

Where the statute declares that the species of coins which have been and which may be struck at the mint of the United States, and the rates of foreign coins as have been or shall be severally regulated and established by Congress, shall be taken and recognized as the currency of the state, and that all accounts of the state shall be expressed in dollars and cents, an indictment charging that the property stolen was worth so many dollars in current money means that it was so many dollars of the coin of the United States; the addition of the word "current" adding nothing to the meaning. *Gardner v. State*, 25 Md. 146, 150.

#### Bank paper.

Bank paper is not current money. *Burnett v. Commonwealth*, 20 Ky. (4 T. B. Mon.) 106, 108.

#### As coin.

A note payable in good, current money of the state is payable in gold and silver only. *Graham v. Adams*, 5 Ark. (5 Pike) 261, 262.

"Current money," as used in an instrument requiring the payment of a debt in current money, means tender money or constitutional coin. *Bainbridge v. Owen*, 25 Ky. (2 J. J. Marsh.) 463, 464.

"Current money," as used in a note promising to pay \$700, "current money of Kentucky," means gold or silver. The word "current," preceding the word "money," cannot change its meaning, because it is equally applicable to that kind of money made current by act of Congress, which in truth is the only current money of Kentucky. "Current money" does not mean the same thing

as "currency," and in this case would not mean bank notes, as they have been held not to be money. *McChord v. Ford*, 19 Ky. (3 T. B. Mon.) 106, 167.

A contract agreeing to pay "good, current money" means the coin of the Constitution, or foreign coin made current by act of Congress, unless there is evidence giving to those terms a local signification. *Moore v. Morris*, 20 Ill. (10 Peck) 255, 259.

#### As lawful currency or money.

Where a note provides that it shall be paid in current money, such phrase imports lawful currency. *Coco v. Calliham*, 21 La. Ann. 624, 626; *Miller v. McKinney*, 73 Tenn. (5 Lea) 93, 96.

"Current money" means money which passes from hand to hand and from person to person, and circulates through the community, and is generally received as money in common business transactions, and is the common medium in barter and trade. *Stalworth v. Blum*, 41 Ala. 319, 321.

"Current money," as used in a bond wherein it was required that payment should be made in current money, was synonymous with "lawful money." *Wharton v. Morris* (Pa.) 1 Dall. 125, 126, 1 L. Ed. 65.

#### Of state.

The term "good, current money of this state," in a note payable in good, current money of this state, means current coin of the United States, and does not mean Arkansas bank paper, for such bank paper is not money. Such a note is clearly an instrument for the payment of money, and the term is distinguishable from currency of this state and current bank paper of this state, and all such terms, which clearly mean bank notes. *Wilburn v. Greer*, 6 Ark. (2 Eng.) 255-258.

A note which provides that it shall be paid in the current money of the state of Alabama means that it shall be payable in gold or silver. *Carter v. Penn*, 4 Ala. 140, 141.

A note payable in the current money of Missouri should be construed to mean payable in gold or silver coin alone. *Cockrill v. Kirkpatrick*, 9 Mo. 697.

A bond conditioned for the payment of a sum in current money of Pennsylvania meant the paper money emitted under the authority of Congress. *Wharton v. Morris* (Pa.) 1 Dall. 125, 126, 1 L. Ed. 65.

#### CURRENT NOTES.

In mercantile phrase, a note not due is current, that is, it passes in the market, where the maker is known to be good. If the note is overdue, it is no longer current. *Hinsdill v. Safford*, 11 Vt. 309, 313.

"Current notes" means notes considered as cash. *Pierson v. Wallace*, 7 Ark. (2 Eng.) 282, 298.

"Current notes," as used in a bond for \$150, to be paid in current notes of the Bank of the State of Arkansas, amounted, in plain and popular sense, to a promise to pay the sum specified in the notes of the state bank at their nominal value. *Bizzell v. Brewer*, 9 Ark. (4 Eng.) 58, 61.

A note payable in current notes of the state of North Carolina might mean either treasury notes of the state, or notes on the various banks of the state, and is not negotiable. *Warren v. Brown*, 64 N. C. 381, 382.

### CURRENT PRICE.

"Current price" and "market value" are synonymous words. 3,109 Cases of Champagne (U. S.) 23 Fed. Cas. 1168, 1171.

### CURRENT RATE OF EXCHANGE.

The term "current rate of exchange" can have but one legal signification, and that an unambiguous one. The rate of exchange is the rate at which drafts are negotiated. It is the amount in dollars for which a draft for sterling will sell per pound. *Blue Star S. S. Co. v. Keyser* (U. S.) 81 Fed. 507, 511.

"Current rate of exchange," as used in a note payable with current rate of exchange, should be construed to destroy the negotiability of the note. *John Church Co. v. Spurrer*, 50 N. E. 93, 94, 20 Ind. App. 39.

### CURRENT VALUE.

The current value of imported commodities is their common market price at the place of exportation, without any reference to what price the importer actually gave for them. *Tappan v. United States* (U. S.) 23 Fed. Cas. 690, 692.

### CURRENT WAGES.

Current wages are such compensation for personal services as are to be paid periodically or from time to time as the services are rendered, as where the services are to be paid for by the hour, day, week, month, or year. *Sydnor v. City of Galveston* (Tex.) 15 S. W. 202, 203, 4 Willson, Civ. Cas. Ct. App. § 59.

"Current," as used in Rev. St. art. 2335, exempting from execution or attachment current wages for personal services, means running, now passing, or present in its progress; and hence current wages are such as are to be paid periodically or from time to time as the services are rendered, as when the services are to be paid for by the hour, day, week, month, etc. The services rendered must be such as that the compensation there-

for is measured by the time of the continuance of the services. *Dempsey v. McKennell*, 23 S. W. 525, 526, 2 Tex. Civ. App. 284. "Current wages," as used in Rev. St. art. 218, providing that current wages for personal services shall be exempt from execution and attachment, means compensation paid periodically, or from time to time as the services are rendered or the work is performed—progresses. *First Nat. Bank v. Graham* (Tex.) 22 S. W. 1101, 1102.

### Attorney's fees.

An attorney's fees for legal services rendered or to be rendered in a single case, or in the transaction of a single matter, or in the transaction of any amount of legal business, where he has not been hired for his services by day, week, or month, to be paid at the expiration of the time for which he was hired, and not in proportion to the business done, are not current wages. *First Nat. Bank v. Graham* (Tex.) 22 S. W. 1101, 1102.

### Past-due wages.

The Constitution and laws of Texas exempting from garnishment current wages for personal services should be construed to include the money earned by a physician employed by a city to attend smallpox patients at a certain amount per day, which was not payable until his services were completed, though the money was left in the city treasury. *Sydnor v. City of Galveston* (Tex.) 15 S. W. 202, 203.

"Current wages," as used in Const. art. 16, § 28, and Rev. St. art. 218, providing that no current wages for personal services shall be subject to garnishment, means, where the wages are payable monthly, the wages for the month current at the time of the service of the writ of garnishment, and the exemption ceases to apply when the wages become past due. *Bell v. Indian Live Stock Co.* (Tex.) 11 S. W. 344, 346, 3 L. R. A. 642.

Current wages, within the meaning of Const. art. 16, § 28, and Rev. St. 1895, art. 252, providing that no current wages for personal services shall ever be subject to garnishment, do not include past-due wages voluntarily left by an employé in the hands of the employer. *Davidson v. F. H. Logeman Chair Co.* (Tex.) 41 S. W. 824.

### CURRENT YEAR.

"Current year," relating to a lease, refers to the time of entry, unless the party stipulates to the contrary. *Doe v. Dobell*, 1 Adol. & E. 806, 808.

Under a statutory limitation on the power of the county board to contract for bridge building, to cost a sum not greater than the amount of money on hand in the county bridge fund, derived from a levy of previous years and two-thirds of the levy of the current year, it is held that the terms "previous

year" and "current year" do not refer to the previous calendar year or current calendar year, but refer to the year from one levy to another. *Clark v. Lancaster County (Neb.)* 96 N. W. 593, 598.

## CURSE.

A complaint for divorce, alleging that defendant cursed and abused plaintiff, "cursed" is susceptible of but one meaning. It was intended to convey hate and detestation, and indicative of harm or injury. Its synonyms are "malediction," "imprecation," "ex-ecration," and constitutes cruelty and inhumanity. *Irwin v. Irwin*, 37 Pac. 548, 550, 2 Okl. 180.

Evidence that a person accused of cursing used the word "damn" or something to that effect, is insufficient to support a conviction. *Carr v. City of Conyers*, 10 S. E. 630, 631, 84 Ga. 287, 20 Am. St. Rep. 357.

## CURSORY EXAMINATION.

A cursory examination is an examination of not a very minute character—an inspection of defects visible or discernible by ordinary examination. *Anderson v. Erie R. Co.*, 54 Atl. 830, 831, 68 N. J. Law, 647 (citing *Eaton v. New York Cent. & H. R. R. Co.*, 163 N. Y. 391, 57 N. E. 609, 79 Am. St. Rep. 600; *Baltimore & P. R. Co. v. Mackey*, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624).

## CURTESY.

"Tenancy by curtesy" is defined by Littleton as "where a man taketh a wife seised in fee-simple or in fee-tail general or seised as heir in tail especial and hath issue by the same wife, male or female born alive, albeit the issue after death or liveth, yet if the wife dies the husband shall hold the land during his life." And Justice Kent, in his Commentaries, vol. 4, p. 27, says: "Tenancy by the curtesy is an estate for life created by the act of the law. When a man marries a woman seised at any time during the coverture of an estate of inheritance in severalty, in coparcenary, or in common, and hath issue by her born alive, which might by possibility inherit the same estate as heir to the wife, and the wife dies in the lifetime of the husband, he holds the land during his life by curtesy." *Guion v. Anderson*, 27 Tenn. (8 Humph.) 298, 802; *Forbes v. Sweesy*, 8 Neb. 520, 525, 1 N. W. 571, 573; *Billings v. Baker (N. Y.)* 28 Barb. 343, 345; *Ferguson v. Tweedy (N. Y.)* 56 Barb. 168, 173; *Bottoms v. Corley*, 52 Tenn. (5 Helsk.) 1, 8; *Guion v. Anderson*, 27 Tenn. (8 Humph.) 298, 802; *Westcott v. Miller*, 42 Wis. 454, 465; *Hutchison v. Exton*, 32 Atl. 682, 684, 53 N. J. Eq. (8 Dick.) 688; *McDaniel v. Grace*, 15 Ark. 465, 483; *De Hart v. Dean (D. C.)* 2 MacArthur, 60, 63; *Withers v. Jenkins*, 14

S. C. 597, 607; *Moore v. Darby*, 18 Atl. 763, 769, 6 Del. Ch. 193, 13 L. R. A. 346; *Todd v. Oviatt*, 20 Atl. 440, 58 Conn. 174, 7 L. R. A. 693; *Templeton v. Twitty*, 14 S. W. 435, 437, 88 Tenn. (4 Pickle) 595; *Carrington v. Richardson*, 79 Ala. 101, 104; *Barr v. Galloway (U. S.)* 2 Fed. Cas. 903, 905; *McNeer v. McNeer*, 32 N. E. 681, 682, 142 Ill. 388, 19 L. R. A. 256 (citing *Cole v. Van Riper*, 44 Ill. 58); *McMasters v. Negley*, 25 Atl. 641, 642, 152 Pa. 303. The husband's right to curtesy at the common law was contingent upon there being issue of the marriage born alive, capable of inheriting the mother's estate; and, as he has no estate by curtesy at the wife's death, unless such issue has been born, he could have had no interest prior to the birth of such issue. *Turner v. Heinberg*, 65 N. E. 294, 295, 30 Ind. App. 615.

A tenant by curtesy is one who, on the death of his wife seised of an estate of inheritance, after having by her issue born alive and capable of inheriting the estate, holds the lands and tenements owned by her during his life. The seisin must be during the coverture of the wife, and, by the English common law, must be seisin in fact—the wife must have actual possession of the inheritance. *Redus v. Hayden*, 43 Miss. 614, 633.

"Tenancy by the curtesy is an estate for life created by the act of the law. When a man marries a woman seised at any time during the coverture of an estate of inheritance in severalty, in coparcenary, or in common, and hath issue by her born alive, and which might by possibility inherit the same estate as heir to the wife, and the wife dies in the lifetime of the husband, he holds the land during his life by the curtesy of England; and it is immaterial whether the issue be living at the time of the seisin or the death of the wife, or whether it was born before or after the seisin." 4 Kent, Comm. (11th Ed.) 26. By another distinguished American author it is said: "It is immaterial whether the child is born before or after the wife acquires her estate, if, had it lived, it would have inherited that estate; and it matters not though it dies before she acquires the estate, so far as the husband's right to curtesy is concerned." 1 Washb. Real Prop. (4th Ed.) pp. 178, 179, § 45. In the celebrated case of *Jackson v. Johnson (N. Y.)* 5 Cow. 74, 102, 15 Am. Dec. 433, Chief Justice Savage says: "It is immaterial at what period during coverture the wife became seised—whether before issue or after; nor is it material whether the issue be living at the time of the seisin." *Templeton v. Twitty*, 14 S. W. 435, 438, 88 Tenn. (4 Pickle) 595.

"An estate by curtesy rests on the unity of existence produced by the conjugal relation. The personality of the wife is by marriage merged in that of the husband. She

has no separate existence. She has lost her individuality by marriage, and the tenancy comes by mere operation of law on the death of the wife, the other requisites concurring." *Bottoms v. Corley*, 52 Tenn. (5 Helsk.) 1, 8.

One of the reasons for the introduction of this estate into the English system was that the husband, being the natural guardian of his child, was entitled to the profits of the land in order to maintain the child; but a more prominent and important idea of the system was the reason that then existed in England in regard to all estates in land under the feudal law, to wit, that the husband, having become dignified by having an interest in land, was bound to do homage to his superior lord, and, the interest being once vested in him, it was the policy of the feudal system not to suffer it to determine during the life of the husband, as otherwise the lord might lose that homage which was his due from the land. To this estate the husband never had any natural right. Sir J. Jekyl said that the estate had no moral foundation to support it; and Crabb, an English writer, says that the term "curtesy" is derived from "courtesie," (Latin, "curialitas") signifying urbanity or suavity, to denote that the custom sprung from favor to the husband, rather than from any right. *Billings v. Baker* (N. Y.) 28 Barb. 343, 345.

Curtesy is considered a continuance of the inheritance of the wife for the life of the husband, and is said to have had its origin in his obligation to support the children. The right of curtesy attaches to equitable as well as legal estates of inheritance. *Templeton v. Twitty*, 14 S. W. 435, 437, 88 Tenn. (4 Pickle) 595.

Lord Coke says: "Four things belong to an estate of tenancy by the curtesy, viz., marriage, seisin of the wife, issue, and death of the wife. But it is not necessary that these should concur together all at one time; and therefore if a man taketh a woman, seised of lands in fee, and is disseised, and then have issue, and the wife dies, he shall enter and hold by the curtesy. So if he hath issue which dieth before the descent." *Jackson v. Johnson* (N. Y.) 5 Cow. 74, 95, 15 Am. Dec. 433.

At common law, tenancy by the curtesy occurs where a man marries a woman who is seised at any time during coverture of an estate of inheritance, and has by her issue born alive, and which was capable of inheriting the same estate as her heir. The common law requires four things in order to create a tenancy by curtesy: (1) Marriage; (2) actual seisin of the wife; (3) issue; and (4) death of the wife. The right of tenancy by the curtesy was secured to the husband by the married woman's act of 1846, § 6, on the same terms as it existed at common law. *Ryan v. Freeman*, 36 Miss. 175, 176.

It is immaterial whether the issue be living at the time of the seisin or at the death of the wife, or whether it was born before or after the seisin. *McDaniel v. Grace*, 15 Ark. 465, 483; *De Hart v. Dean* (D. C.) 2 McArthur, 60, 63. If there was a child which by possibility might have inherited the land from the mother—a child to whom the land would have descended, had it survived the mother—that is all that is required as to issue, and the father takes an estate for life as tenant by the curtesy. *Templeton v. Twitty*, 14 S. W. 435, 437, 88 Tenn. (4 Pickle) 595.

In order that a man may become tenant by the curtesy, his wife must have been seised of the land in fee or in tail. This seisin means a seisin in deed, and not a seisin in law; and therefore a man shall not be tenant by the curtesy of a bare right, title, use, or of a reversion or remainder expectant upon an estate or freehold, unless the particular estate be determined or ended during the coverture. *Stoddard v. Gibbs* (U. S.) 23 Fed. Cas. 126, 123; *Ferguson v. Tweedy* (N. Y.) 56 Barb. 168, 173; *Orr v. Hollidays*, 48 Ky. (9 B. Mon.) 59, 60.

Seisin in law of the wife is not sufficient to invest the husband with an estate as tenant by curtesy, but there must be seisin in fact. *Carpenter v. Garrett*, 75 Va. 129, 133.

#### **Dower distinguished.**

There is a radical difference between a right of dower and an estate by the curtesy. The latter takes effect as a freehold estate immediately on the death of the wife. On the other hand, dower is not in any sense an estate until assigned. This is the common-law rule, the widow not being vested with the title or possession. She has no legal seisin or right of entry until dower is assigned. *Malone v. Conn*, 23 S. W. 677, 678, 95 Ky. 93.

#### **As a freehold estate.**

As interest in land, see "Interest (In Property)."

An estate by the curtesy is a freehold estate, although, when the right of curtesy is in the separate real property of a married woman, it is not a vested estate until it becomes consummate. *Hayden v. Peirce*, 43 N. E. 119, 120, 165 Mass. 359.

Tenancy by the curtesy is a well-known species of freehold estate in lands, recognized in all the states having a common-law origin, unless changed by statute. It is a life estate in the surviving husband of a deceased wife. *Carrington v. Richardson*, 79 Ala. 101, 104.

#### **CURTESY CONSUMMATE.**

Curtesy consummate is the interest which a husband has in the estate of his wife



after the birth of issue capable of inheriting and after her death, and is an estate held, not in right of the wife, but in the husband's own right. *Churchill v. Hudson* (U. S.) 34 Fed. 14, 15; *Hughes v. Milligan*, 22 Pac. 313, 314, 42 Kan. 396.

An estate by curtesy initiate became an estate by curtesy consummate upon the wife's death, and was a freehold estate for the term of the natural life of the husband. It was said to be in many respects but a continuation of the estate of the wife, though regarded more in the nature of an estate by descent than purchase. *Turner v. Heinberg*, 65 N. E. 294, 295, 30 Ind. App. 615 (citing *Watson v. Watson*, 13 Conn. 83).

### CURTESY INITIATE.

Curtesy initiate is the interest which a husband has in his wife's estate after the birth of issue capable of inheriting, and before the death of the wife, and is an estate by the marital right held by the husband in right of his wife, and is essentially different from curtesy consummate. *Churchill v. Hudson* (U. S.) 34 Fed. 14, 15; *Hughes v. Milligan*, 22 Pac. 313, 314, 42 Kan. 396.

Curtesy initiate is the interest or estate which marriage, seisin, and issue give to a husband before the death of his wife. Such interest may be conveyed before the death of the wife. *Wait v. Wait*, 4 Barb. 192, 205 (citing *Co. Litt.* 30a).

Until the birth of issue a husband had no estate of curtesy that the law recognized, but upon birth of issue he began to have an interest in the land, and was called "tenant by the curtesy initiate," and such an estate is sufficient to recover upon in ejectment. *Billings v. Baker* (N. Y.) 28 Barb. 343, 367. And this estate by the curtesy initiate might be taken on execution for the husband's debts. *Turner v. Heinberg*, 65 N. E. 294, 295, 30 Ind. App. 615 (citing *Roberts v. Whiting*, 16 Mass. 186).

### CURTILAGE.

"Curtilage originally signified the land with the castle and outhouses inclosed with high stone walls, where the old barons sometimes held their court in the open air, and has been corrupted into 'court yards.'" *Coddington v. Hudson County Dry Dock & Wet Dock Co.*, 81 N. J. Law (2 Vroom) 477, 484.

Jacobs, in his *Law Dictionary*, says "curtilage" is a court yard, backside, or piece of ground lying near and belonging to a dwelling house, and, though it is said to be a yard or garden belonging to a house, it seems to differ from a garden. The definition given in *Shep. Touch.* p. 84, *Cunningham's Law Dictionary*, and *Webster's*, *Johnson's*, and *Walker's Dictionaries*, is substantially the

same. Mr. Bouvier defines it to be a space of ground within a common inclosure belonging to a dwelling house. It is perhaps unfortunate that this term, which is found in the English statutes, and which is descriptive of the common arrangements of dwellings and yards surrounding them in England, should have been perpetuated in our statutes. It is not strictly applicable to the common disposition of inclosure and buildings constituting the homestead of the inhabitants of this country, and particularly of farmers. In England the dwellings and outhouses of all kinds are usually surrounded by a fence or stone wall inclosing a small piece of land embracing the yards and outbuildings near the house, constituting what is called the court. This wall is so constructed as to add merely to the security of the property within it, but, as such precautionary arrangements have not been considered necessary in this country, they have not been adopted. *People v. Taylor*, 2 Mich. 250, 251.

Mr. Burrill in his *Law Dictionary* says that curtilage is a yard, court yard, or piece of ground lying around or near to a dwelling house, included within the same fence. *State v. Taylor*, 45 Me. 322, 329.

Curtilage in law means a fence or inclosure of a small piece of land around a dwelling house, usually including the buildings occupied in connection with the house, which inclosure may consist wholly of a fence, or partly of a fence and partly of the exterior side of buildings so within the inclosure. *Commonwealth v. Barney*, 64 Mass. (10 Cush.) 480, 482; *Commonwealth v. Intoxicating Liquors and Vessels*, 8 N. E. 4, 5, 140 Mass. 287.

To include buildings within the curtilage, a fence is not necessary, if they are within a space no larger than that usually occupied for the purpose of the dwelling and outbuildings. It is a very common thing in the newer parts of the country, where, from the nature of the materials used, a large building is not readily made, to have two or more small buildings, with one or two rooms in each, instead of a large building divided into apartments. *Pond v. People*, 8 Mich. 150, 181.

"Curtilage" means the yard or court for the protection and security of the mansion house; an inclosure belonging to a dwelling house. When used in a penal statute without modification, it must be construed according to the strict signification of the term. *State v. Shaw*, 31 Me. 523, 525.

"Curtilage" includes the yard, garden, or field, which is near to and usually in connection with the dwelling. Where the facts were indeterminate, the court properly left to the jury, in a trial for arson, the question whether a barn burned was within the curtilage. *Cook v. State*, 83 Ala. 62, 64, 3 South. 849.

Where a deed conveyed a hotel and lands adjoining it, being two or three acres, more or less, it was held that the words "land adjoining" were not synonymous with "messuage" and "curtilage," and that if they were these latter terms were not broad enough to include a small island in the river back of the land on which the same stood. *Miller v. Mann*, 55 Vt. 475, 479.

#### Garden or land adjoining.

Curtilage is the court yard in the front or rear of a house, or at its side, or any piece of ground lying near, inclosed and used with the house, and necessary for the convenient occupation of the house. *People v. Gedney* (N. Y.) 10 Hun, 151, 154; *Derrickson v. Edwards*, 29 N. J. Law (5 Dutch.) 468, 474, 80 Am. Dec. 220; *Washington v. State*, 2 South. 356, 357, 82 Ala. 31; *State v. Hecox*, 83 Mo. 531, 536 (citing *Burrill's Law Dict.*; *Webst. Dict.*). It is parcel of the house, and passes with the grant of the same. *Edwards v. Derrickson*, 28 N. J. Law (4 Dutch.) 39, 72.

Curtilage is a piece of ground, either inclosed or not, that is commonly used with the dwelling house. *State v. Twitty*, 2 N. C. 102; *Ivey v. State*, 61 Ala. 58, 61.

The "curtilage" of a dwelling house is a space necessary and convenient, and habitually used for the family purpose, the carrying on of domestic employments. It includes the garden, if there be one, and need not be separated from other lands by fence. *State v. Shaw*, 81 Me. 523-527.

"Curtilage" is sometimes defined as a field next to and belonging to a messuage. *Edwards v. Derrickson*, 28 N. J. Law (4 Dutch.) 39, 45.

"Curtilage" is not synonymous with the term "lands adjoining" in a deed conveying certain land and the "lands adjoining." *Miller v. Mann*, 55 Vt. 475-478.

#### Land under tide water.

A division of land under the tide water is not a "lot" or "curtilage," within the meaning of those words as used in a mechanic's lien law. *Coddington v. Hudson County Dry Dock & Wet Dock Co.*, 31 N. J. Law (2 Vroom) 477, 484.

#### Separate buildings.

The term, within the meaning of a statute making it unlawful to burn in the nighttime any barn, etc., within the curtilage of any dwelling house, was construed to include a barn standing 80 feet from the dwelling house, in a yard or lane in which there was a communication by a pair of bars. *People v. Taylor*, 2 Mich. 250, 251. And as used in a complaint and warrant for the search of premises for intoxicating liquors, describing the place to be searched as a certain

building, the cellar under the same, and the out buildings within the "curtilage" thereof situate on a certain corner, it cannot be construed to include the basement of another building connected with the building described by a covered passageway, there being no common inclosure within which the buildings stood. *Commonwealth v. Intoxicating Liquors*, 3 N. H. 4, 5, 140 Mass. 287.

The term "curtilage" does not include a store at a distance of 20 feet from the dwelling house, but not connected with it by any fence or inclosure, and therefore the breaking into the store is not burglary. *People v. Parker* (N. Y.) 4 Johns. 424.

The curtilage includes a smokehouse, having the front and door thereof in the yard of the dwelling house, though part of the building is not in the yard, and therefore the breaking into such building, though it occurs in the part outside of the yard, constitutes burglary. *Fisher v. State*, 43 Ala. 17-20.

A barn, situated 15 rods from a dwelling house, with a public highway passing between them, and a yard between the barn and the highway, is not within the curtilage of such dwelling house. *Curkendall v. People*, 36 Mich. 309, 310.

A frame building situated and standing near to and in the same yard with a dwelling house, and used in connection with it, but not forming a part thereof, is within the curtilage of a dwelling. The curtilage of a dwelling includes all buildings in close proximity to the dwelling which are continually used for the carrying on of domestic employment, though neither the dwelling nor the building is inclosed. *State v. Bugg*, 72 Pac. 236, 66 Kan. 668.

## CURVED LINE.

St. 1871, c. 343, § 11, authorized certain railroads entering the city of Worcester to unite in the location of a union passenger station, the tracks to extend by a curved line across a certain street. Held that, where the general course of the line prescribed by the jury commissioners for the crossing of the street was a curve, it was a "curved line," within the meaning of the statutes, though a short piece of it, taken by itself, was straight. *City of Worcester v. Railroad Com'rs*, 113 Mass. 161, 171.

## CUSPIDOR.

The word "cuspidor" is derived from the Portuguese word "cuspo," to spit; "cuspidore," a spitter. The English cuspidor is a spittoon of peculiar form. The difference between a spittoon and a cuspidor is only the form. *Ingersoll v. Turner* (U. S.) 7 Fed. 859.

## CUSTODIA LEGIS.

See "Custody of the Law."

The phrase "custodia legis" means in the custody of the law. *Stockwell v. Robinson* (Del.) 82 Atl. 528, 9 Houst. 313.

## CUSTODY.

See "Proper Custody"; "Safe and Close Custody."

"Custody," within a bill of items rendered by an officer for a keeper of attached property and for custody of the same, is probably used to denote the responsibility which the officer is under when he puts a keeper over property. *Cutter v. Howe*, 122 Mass. 541, 543.

The term "custody of property," as contradistinguished from legal possession, means the charge to keep and care for the owner, subject to his order and direction, without any interest or right therein adverse to him, which every servant possesses with regard to the goods of his master confided to his mere care, which custody may be terminated and prolonged according to the will and pleasure of the master. *People v. Burr* (N. Y.) 41 How. Prac. 293, 296.

"Possession" and "custody" are not convertible terms. To constitute possession mere temporary custody is not sufficient; there must be combined with it the control, care, and management of the property, so that, under statute relating to theft, if the property be in the mere temporary custody of a servant or other person, the indictment need not allege the possession to be in such temporary custodian. *Emmerson v. State*, 25 S. W. 289, 290, 33 Tex. Cr. R. 89.

The words "confined," "imprisoned," "in custody," "confinement," "imprisonment," refer not only to the actual, corporeal and forcible detention of a person, but likewise to any and all coercive measures by threats, menaces, or the fear of injury, whereby one person exercises a control over the person of another and detains him within certain limits. *Code Cr. Proc. Tex. 1895*, art. 171.

### As charge or control.

The words "charge" and "custody" are frequently used as synonymous. The lexicographers give them as synonyma. *State v. Clark*, 29 Atl. 984, 86 Me. 194.

A party who swears that a paper is neither in his possession nor his control certainly swears substantially that it is not in his custody. There can be no custody in the absence of both possession and control. *Roe v. Irwin*, 82 Ga. 39, 49.

Act 1867, § 2, requires that the jury wheel shall be in the custody of the jury commissioners. Held. that the word "cus-

tody" did not mean physical possession, but control; and hence the clerk's custody of a chest in a vault, in which the jury wheel was deposited, was custody of the wheel, within the statute. *Rolland v. Commonwealth*, 82 Pa. 306, 319, 22 Am. Rep. 758; *Klemmer v. Mt. Penn Gravity R. Co.*, 30 Atl. 274, 278, 163 Pa. 521.

Act April 10, 1867, providing that the jury wheel shall remain in the "custody" of the jury commissioners, and the keys thereof in the custody of the sheriff, did not require the jury commissioners to carry it to their private residences; and when deposited in a vault attached to one of the public offices, under the immediate charge of a sworn officer, it was clearly in their custody, within the meaning of the law. *Rolland v. Commonwealth*, 82 Pa. 306, 320, 22 Am. Rep. 758.

The word "custody," in Act April 10, 1867, requiring the jury wheel to remain in the custody of the jury commissioners, does not necessarily imply a constant keeping under lock and key. Thus, in a case where the commission had no separate office, the keeping of such wheel in a corner of the county commissioners' safe, used for no other purpose, was held to be in the custody of one who was a clerk for both boards. *Commonwealth v. Valsalka*, 37 Atl. 405, 409, 181 Pa. 17.

*Gantt's Dig. § 399*, providing that an officer shall execute an order of attachment on personal property capable of manual delivery by taking it into his "custody and holding" subject to order of the court, means that the property shall be taken into the actual and real custody of the officer, and that he must obtain control over it, and take it out of the control and power of the debtor and that the officer must continue in the actual possession of it himself or an agent appointed by him for that purpose, and that if it is necessary to remove the property it must be removed, and the debtor divested of his possession and control; and the fact that the removal of the property would be attended with some inconvenience is not an excuse for the failure to retain actual possession of it, and an ideal or constructive possession of the property is not sufficient to meet the requirements of the statute. *Adler v. Roth* (U. S.) 5 Fed. 895, 897.

### Guardianship.

"Custody and tuition," as used in *Laws 1893*, c. 175, providing that on the death of one parent the surviving parent may by will dispose of the custody and tuition of an infant child, includes guardianship of the estate as well as of the person. *In re Zwicker*, 26 N. Y. Supp. 773, 774, 5 Misc. Rep. 272.

### Imprisonment.

A sentence of a person convicted of a crime that he be in "custody" till the sen-

tence imposed upon him be complied with means imprisonment until the defendant shall comply with the sentence or be discharged in due course of law, and not a mere keeping watch or care of him. *Smith v. Commonwealth*, 59 Pa. (9 P. F. Smith) 820, 321.

One who is in jail is in "custody," within the meaning of Act Dec. 17, 1838, punishing any one who, by force or menace, sets any one at liberty who is in lawful custody. *Hillman v. State*, 8 S. W. 834, 835, 50 Ark. 823.

#### Jail liberties.

In an action against a sheriff for permitting a debtor in his custody on execution to escape, it appearing that when the debtor was placed in the jail he received a key thereof from the sheriff, which key was retained by the debtor so long as he continued in the jail, the court said: "Custody implies physical force sufficient to restrain a prisoner from going at large. When that physical force is removed it is, in the eye of the law, an escape. No moral obligation can be received as a substitute for it. Although promises may be made and may be observed to remain in close jail, the moment compulsion and force are withdrawn there is no legal custody. The prisoner becomes a free agent, and there is no longer any imprisonment, and the precept of the sheriff is disobeyed." *Wilkes v. Slaughter*, 10 N. C. 211, 218.

Where a prisoner is permitted to act not merely as a turnkey, but to have possession and custody and perform all the duties of the deputy or an assistant without any restraint whatever, he cannot be justly deemed in custody, and such proceedings constitute an escape as to him. *Steere v. Field* (U. S.) 22 Fed. Cas. 1210, 1221.

#### Release on bail.

A person arrested by law, and put in the custody of the law, remains in custody, either actually or potentially, until he is discharged according to law. Letting a person arrested for bastardy to bail, and allowing him a trial, without being in actual custody, was no waiver on the part of the relator in bastardy, and his voluntary absence cannot be allowed to impair her right or restrict the remedy. While he was on bail he was in the bail's custody, within the meaning of the law. *Turner v. Wilson*, 49 Ind. 581, 585.

Under the common law, right of bail has been construed to mean the custody of the bail; and where a person was in the custody of his bail he was in custody under an arrest, within the meaning of an act providing that where a defendant is in custody the plaintiff, without having a judgment against him, may file interrogatories to him. *Levy v. Arnsthall* (Va.) 10 Gratt. 641, 648.

"In custody," as used in a statute providing for a writ of habeas corpus for the

purpose of procuring the discharge of persons unlawfully "in custody," etc., means in actual confinement or the present means of enforcing it; and a defendant in a criminal prosecution, who has given bail for his appearance at the next term of court, and is thereby entitled to his freedom, is not in custody, within the meaning of the statute. *Spring v. Dahlman*, 52 N. W. 587, 34 Neb. 692.

#### CUSTODY OF THE LAW.

"When property is lawfully taken by authority of legal process it is in the custody of the law, and not otherwise." *Gilman v. Williams*, 7 Wis. 329, 334, 76 Am. Dec. 219.

Property lawfully taken by virtue of legal process is in the "custody of the law," and property legally in the hands of a receiver cannot be levied on or interfered with by another officer of the law. *Weaver v. Duncan* (Tenn.) 56 S. W. 39, 41.

A thing is in custodia legis when it is shown that it has been and is subjected to the official custody of a judicial executive officer in pursuance of his execution of a legal writ. The officer holding such a thing cannot, after he has made his return of the writ, release it on his own motion to any one claiming title to the thing. Its status as to third parties is fixed by his return, and can be changed only by order of court. Money received by a trustee in bankruptcy from the sale of property which he has received in his official capacity under the orders of the bankruptcy court is in custodia legis. *McFarland Carriage Co. v. Solanes* (U. S.) 108 Fed. 532, 636.

The actual possession by an assignee under a general assignment for the benefit of creditors of the property of his assignor is not custodia legis. *Rothschild v. Hasbrouck* (U. S.) 65 Fed. 283, 285.

The phrase "in custodia legis" may be used to designate goods seized under attachment and in the possession of the sheriff. *Stockwell v. Robinson* (Del.) 32 Atl. 528, 9 Houst. 813.

Property in the hands of a receiver is property in the custody of the law. The receiver is but the agent through whom the court for greater facility acts. In re Receivership of New Iberia Cotton Mill Co., 33 South. 903, 904, 109 La. 875.

#### CUSTOM.

See "General Custom"; "Local Customs"; "Particular Customs"; "Usual Course and Custom."

In England and in the states of this Union which have no written constitution "custom" is the supreme law, always deemed to have had its origin in an act of a state

legislature of competent power to make it valid and binding, or an act of parliament which, representing all inhabitants of the kingdom, acts with the consent of all, exercises the power of all, and its acts become binding by the authority of all. *United States v. Arredondo*, 31 U. S. (6 Pet.) 691, 715, 8 L. Ed. 547.

"*Consuetudo*, says Sir Edward Coke, is one of the main triangles of the laws of England, these laws being divided into common law, statute law, and particular customs; for if it be the general custom of a realm it is part of the common law. *Co. Litt.* 113-115. A custom used upon a certain reasonable cause depriveth the common law. *Id.* p. 112, § 169. A custom so long persisted in as to be known and practiced by the community is the law of the particular business in which it exists. Such a custom is supposed to be in the view of the parties when they contracted about its subject-matter." *Adams v. Pittsburgh Ins. Co.*, 95 Pa. 348, 355, 40 Am. Rep. 662.

"Custom is unwritten law established by common consent and uniform practice from time immemorial." *Lindsay v. Cusimano* (U. S.) 12 Fed. 504, 507; *Albright v. Cortright*, 45 Atl. 634, 635, 64 N. J. Law, 330, 48 L. R. A. 616, 81 Am. St. Rep. 504.

A custom is something which, by its universality and antiquity, acquired the force and effect of law in the particular place or country in respect to the subject-matter to which it relates. *Milroy v. Chicago, M. & St. P. Ry. Co.*, 67 N. W. 276, 278, 98 Iowa, 188 (citing *Wilcox v. Wood* [N. Y.] 9 Wend. 346, 349). And is ordinarily taken notice of without proof. *Morning Star v. Cunningham*, 11 N. E. 593, 595, 110 Ind. 328, 59 Am. Rep. 211; *Hopper v. Sage*, 47 N. Y. Super. Ct. 77, 79; *Lane v. Union Nat Bank of Massillon*, 29 N. E. 613, 615, 3 Ind. App. 299.

"Custom is the law or rule which is not written, and which men have used for a long time, supporting themselves by it in the things and reasons with respect to which they have exercised it. On that definition are founded three axioms: (1) That custom is introduced by the people, under which name we understand the action or assemblage of persons of all descriptions of that country where they are collected. (2) That it derives its authority from express or tacit consent of the King. (3) That, once introduced, it has the force of law. To establish a custom the whole or greater part of the people ought to concur in it. Customs are general or particular. The latter respects a specific thing, a particular person or place, or with respect to the whole of certain persons or places; general with respect to specific acts of all the inhabitants of the kingdom, and may destroy the law, but a particular custom in any province or seigniorly has only this effect in that district or

part where it hath been exercised." *Strother v. Lucas*, 37 U. S. (12 Pet.) 410, 445, 9 L. Ed. 1137.

Custom is that part of the unwritten law of the land established by long usage and consent of our ancestors, and may be further defined to be usage which has obtained the force of law, it thereby becoming the binding law generally or within a particular district or right of particular place as to the persons and things which it concerns. *Minis v. Nelson* (U. S.) 43 Fed. 777, 779; *Somerby v. Tappan* (Ohio) *Wright*, 570, 573.

"Customs, according to our law, result from a long series of actions, constantly repeated, which have by such repetition, and by continued acquiescence, acquired the force of a tacit and common consent. *Code*, art. 3." *Broussard v. Bernard*, 7 La. 211, 215.

"Custom is that length of usage which has become law. It is a usage which has acquired the force of law. *Bouv. Law Dict.* And ignorance the law will not excuse. A general custom is the law itself or a part of it. Thus, the allowance of days of grace on bills or notes is a custom of merchants, but it is established by usage so general, so long continued, and so pervading the whole commercial world that it is universally understood to enter into every bill or note of a mercantile character, and to form so complete a part of the contract that the bill or note does not become due in fact or in law on the day mentioned on its face, but on the last day of grace." *Wells v. Bailey*, 49 N. Y. 464, 471, 10 Am. Rep. 407.

"Customary law" is that which rests on no other foundation than usage, and hence it may be abrogated by usage. It derives its whole authority from the silent assent of those who are affected by it. *Toler v. White* (U. S.) 24 Fed. Cas. 3, 6.

"A legitimate custom has the force of law; derogates the former law that is contrary to it, and interprets the doubtful law; from whence it is said that there is a custom beyond the law, contrary to the law, and according to the law." 1 *White*, 360. "Custom is either general or special—general when it is observed throughout the whole kingdom; special when it is observed in some particular district. We must not confound custom with usage. Usage is no more than a fact; custom is a law. There may be usage without custom, but there can be no custom without usage to accompany or precede it. Usage consists in the repetition of acts, and custom arises out of this repetition. The usage leading to a custom may be proved by public writing, by the testimony of distinguished and ancient persons of the country, or by two concurring judgments upon the matter to which it relates." *Escrive, Dicc. voc. "Costumbre."* See, also, *Recopilacion de Leyes de las Indias*, lib. 2, tit. 1, law 4, in 2

White, 25. It will be seen that the requisites of a good local custom under the Spanish law are that it shall have been used by the greater part of the people for the space of at least 10 years; that it should have been approved or at least acquiesced in, by the public authorities; and that it should not be immoral or unreasonable. *Cutter v. Waddingham*, 22 Mo. 206, 284.

"Custom," says Escriche, "is the practice long used and received which has acquired the force of law. In order that custom may be legitimate, and not corrupt (corruptela), it is necessary that it should have been introduced with the tacit consent of the legislator, that it be conformable to the general welfare, and that it should have been observed for the space of 10 years. Legitimate custom acquires the force of law, not only when there is no law to the contrary, but also when its effect is to abrogate any former law which may be opposed to it, as well as to explain that which is doubtful. \* \* \* Hence it is said that there may be a custom without law, 'in opposition to law, and according to law.'" Escriche's *Derecho Español*, 23, 24. A custom, in order to be asserted, need not have prevailed for 20 years and be conformable to law. On the contrary, 10 years are sufficient to establish it; and, having prevailed for that length of time, and possessing the other necessary qualities, it acquires the force to abrogate the previously existing law. In a will contest evidence was admissible to prove a custom requiring only two attesting witnesses to a will. *Panaud v. Jones*, 1 Cal. 488, 498.

Any custom may be destroyed by evidence of its nonexistence in any part of the long period from the commencement of the reign of Richard I to the present time. 2 Bl. Comm. 81. This is sufficient to destroy all common-law customs in New Jersey, for the country was not discovered by civilized inhabitants, and civil rights could not consequently have been in use till more than three hundred years after the beginning of the reign of Richard I. *Ackerman v. Shelp*, 8 N. J. Law (3 Halst.) 125-130.

When a rule is clear and explicit, free from ambiguity and equivocation, evidence of custom and usage is inadmissible to vary or alter its terms. *Memphis & C. R. Co. v. Graham*, 94 Ala. 545, 10 South. 288. The true office of a custom and usage is to interpret the otherwise indeterminate intention of parties; to fix the meaning of words, expressions of doubtful or various senses. 2 Greenl. Ev. § 251. When it is said that custom and usage may be relied upon to excuse the violation of a rule (*Andrews v. Birmingham Mineral R. Co.*, 99 Ala. 438, 12 South. 432), it is merely the enunciation of the same principle we have already declared, that a principal may knowingly acquiesce in or assent to a

continuous disregard of rules established and promulgated, and for such a length of time as to justify those for whom they were intended to consider that the principal has abandoned them, and that they have ceased to be binding. To justify this conclusion, it must satisfactorily appear that notice or knowledge of such disregard by the persons for whom they were intended has been brought home to the principal or to some one whose duty it is to take action, and is authorized to bind the principal. *Alabama G. S. R. Co. v. Roach*, 110 Ala. 266, 272, 20 South. 132-134.

#### As course of business or habit.

The word "custom" is used interchangeably with "usage" and "course of trade." *Richmond v. Union Steamboat Co.*, 87 N. Y. 240, 249.

A finding of the court in an action on a policy of insurance on a vessel that "custom and usage" of the steamship company with reference to the voyages of their steamships between San Francisco and Hong Kong, with cargo laden for Hong Kong or Batavia, was for the vessel to carry the same to Hong Kong without transshipping it at Yokohama, at which port they touched, indicated a course of business pursued by the owners of the ship for a series of years, and establishing a state of things referred to in the policy of insurance as existing at the time it was signed and delivered, which signified a course of business of a particular line of steamships with reference to which the contract was made. *Schroeder v. Schweizer Lloyd Transport Versicherungs Gesellschaft*, 60 Cal. 467, 480, 44 Am. Rep. 61.

A finding that after the original building of said ditch the waters thereof were granted by the custom of the settlers and original appropriators to all new settlers, etc., "was intended as a finding of fact that a habit had grown up that all persons making settlements on lands that could be irrigated by the waters of this ditch were allowed to use it, and thus any new settler would not be compelled to get an express grant in his favor, but could assume that, although this habit would not give him title, yet it could be shown as evidence of the consent of the settlers to the use of the ditch and water by the new settlers." *Lehi Irr. Co. v. Moyle*, 9 Pac. 867, 871, 4 Utah, 327.

#### Immemorial, universal usage.

A custom is something which has the force and effect of law, and is law by the authority and consent of the people; but it must be uniform and universal within the sphere of its action, and so ancient that the memory of man runneth not to the contrary. *Hursh v. North*, 40 Pa. (4 Wright) 241, 243 (quoting 1 Bl. Comm. 68, 74). See, also, *Stimmel v. Brown* (Del.) 30 Atl. 996-997, 7 Houst. 219.

Before custom or usage can have the force of law it must be shown to exist by proof that the custom is certain, reasonable, and to have existed from time immemorial; and if any one can show its beginning, or that there has been an interruption, it is not a good custom. *Minis v. Nelson* (U. S.) 43 Fed. 777, 779; *Somerby v. Tappan* (Ohio) Wright, 570, 573.

It is not essential that usage should be so ancient that the memory of man runneth not to the contrary, nor that it should contain all the other elements of a common-law custom as defined in the books. *Lane v. Union Nat. Bank*, 29 N. E. 613, 615, 3 Ind. App. 299; *Morningstar v. Cunningham*, 11 N. E. 593, 595, 110 Ind. 323, 59 Am. Rep. 211.

With reference to trade, a custom is a practice which is universal, or almost universal, in the trade in question. *Smith v. Sixty Thousand Feet of Yellow Pine Lumber*, 2 Fed. 396, 399.

#### As local custom.

Custom is local, and is alleged in no person, but laid within some manor or other place. *Littlefield v. Maxwell*, 81 Me. 134, 141, 1 Am. Rep. 653 (citing Co. Litt. 114a).

"Custom is a law established for long usage. A universal custom becomes common law. If the usage be confined to a particular place it is a custom. Customs are sometimes allowed to prevail contrary to the rules of common law, but in such cases are construed strictly." *Wilcox v. Wood* (N. Y.) 9 Wend. 346, 349.

Custom is unwritten law established by common consent and uniform practice from time immemorial, and is local, having respect to the inhabitants of a particular place or district. A right to take fish in certain waters claimed for the entire public is too comprehensive to be good by way of custom, as a custom so general would be indistinguishable from the law itself. So the question in such case really is not whether the usage is customary, but whether it is lawful. *Albright v. Cortright*, 45 Atl. 634, 635, 64 N. J. Law, 830, 48 L. R. A. 616, 81 Am. St. Rep. 504.

"A custom can only exist in favor of the community of a town, village, or hamlet, and cannot be claimed in favor of a whole nation, for then it becomes the common law. A custom relied on must be pleaded." *Post v. Pearsall* (N. Y.) 22 Wend. N. Y. 425, 441.

#### As part of contract.

A custom may be incorporated in a contract where it appears to have been the intention of the parties to contract with any reference thereto, and will be construed to become a part of it. *Hopper v. Sage*, 47 N. Y. Super. Ct. (15 Jones & S.) 77, 79.

A custom, in order to become part of a contract, must be so far established and so far known to the parties that it must be supposed that their contract was made in reference to it. For this purpose the custom must be established and not casual, uniform and not varying, general and not personal, and known to the parties. *Slipperly v. Stewart* (N. Y.) 50 Barb. 62. A custom is not established where the evidence shows that the custom was to pay from 15 to 20 cents a folio to stenographers for copies of minutes. *Cavanagh v. O'Neill*, 45 N. Y. Supp. 789, 20 Misc. Rep. 233.

"To render a custom valid and binding on a party to a transaction, it should include within it the proof or proofs to show it of such long continuance or general application as reasonably to warrant the conclusion that it was known to the party designed to be affected by it, or that he had actual knowledge or notice of its existence. A custom is the result of usage, and can only be properly shown by proof of the usage by which it may be claimed to be derived." *Gallup v. Lederer* (N. Y.) 1 Hun, 282, 286.

Custom or usage in law is something which exists in general repute. It is so prevalent that every one is supposed to know its existence, and is presumed to act and contract with reference to it. *Duling v. Philadelphia, W. & B. R. Co.*, 6 Atl. 592, 594, 66 Md. 120.

A custom must be shown to have been known to the parties when the contract was made, and to have been so generally known as to raise a presumption that the parties had it in mind at the time of the execution of the contract. In order that custom and usage may be operative in the interpretation of a general or ambiguous clause, it must be shown to be reasonable, uniform, well settled, not in opposition to fixed rules of law, and not in contradiction of the express terms of the contract, and of such a character as will be deemed to have entered into the contemplation of the parties. *Robinson v. New York & T. S. S. Co.*, 71 N. Y. Supp. 424, 428, 63 App. Div. 211.

In its ordinary acceptation, "custom" is the frequent repetition of the same act, or way of acting common to many; ordinary manner, habitual practice; method of doing or living; and, in its legal acceptation, a long-established practice, considered as unwritten law, and resting for authority on long consent; usage. To establish the validity of a custom of trade, the usage must have existed such a length of time as to become generally known, and must be shown to be reasonable, uniform, certain, and not contrary to law. If, however, it is not directly known to the parties to the transaction, but is so general and well established as to raise a presumption of knowledge, it will nevertheless be binding upon them. *Nelson v.*

Southern Pac. Co., 49 Pac. 644, 645, 15 Utah, 325.

The office of a custom or usage in trade is to ascertain or explain the meaning and intention of the parties to a contract, whether written or in parol, which could not have been done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation, on the theory that the parties knew of its existence, and contracted with reference to it. *Barnard v. Kellogg*, 77 U. S. (10 Wall.) 883, 888, 19 L. Ed. 987.

**Usage distinguished.**

See "Usage."

**CUSTOM OF MERCHANTS.**

The custom of merchants was the systems of rules relative to commercial paper, partnerships, and other mercantile matters arising from the usage of merchants. Chief Justice Hobart, in *Van Hearsh v. Turner*, Winch, 24, said "that the custom of merchants is a part of the common law of this kingdom, of which the judges ought to take notice, and if any doubt arises about the customs they may send for the merchants to know their customs." *Adams v. Pittsburgh Ins. Co.*, 95 Pa. 343, 355, 40 Am. Rep. 682.

**CUSTOMARY.**

See "As customary."

"Customary" means according to usage. *Rev. St. Okl.* 1903, § 2802; *Code Civ. Proc. Mont.* 1895, § 3463, subd. 11; *Rev. Codes N. D.* 1899, § 5129; *Civ. Code S. D.* 1903, § 2463.

Where plaintiffs offered to show that they had carried out their contract according to the "usual and customary" methods of the Philadelphia coal trade, the offer was not insufficient to admit evidence of such custom, because it did not propose to prove the usage "based on a custom," since the phrase "usual and customary" imports more than actual or exceptional causes, and indicates a fixed and established usage. *Carter v. Philadelphia Coal Co.*, 77 Pa. (27 P. F. Smith) 286, 290.

The fact that the usual, customary, and ordinary method of handling a locomotive was being pursued at the time a fire was set by it does not necessarily show that the prudent and careful way was being pursued, especially if the wind was blowing hard at the time, and the land adjacent to the roadway was covered with very combustible material. It might well be contended that more than ordinary care and caution was required. *Solum v. Great Northern Ry. Co.*, 65 N. W. 443, 444, 63 Minn. 233.

**In charter party.**

A charter party requiring the vessel to proceed with all convenient speed to Cardiff,

and there load a full cargo in coals "in the customary manner," means a loading of according to the usage of the port, and in a reasonable time, without reference to unforeseen casualties. *Adams v. Royal Mail Steam Packet Co.*, 5 C. B. 492, 494.

"Customary," when used in a charter of a ship which provided that the cargo was to be received and delivered as customary, refers rather to the mode of receiving and delivering the cargo than to the time of doing the same. *Aalholm v. A Cargo of Iron Ore* (U. S.) 23 Fed. 620, 622 (citing *Tapscott v. Balfour*, L. R. 8 C. P. 46, 53).

Charter party providing that the hirer should be allowed laydays as customary in loading, held that the words "customary in loading" did not mean such number of days as vessels had theretofore generally been detained to the port for loading, but such number as would be necessary under the custom of the port to secure a cargo; and that, therefore, where the vessel was obliged to wait her turn for several days before she could obtain a berth for loading, such delay was not to be imputed to the hirer; but that since the shipper, under the terms of the charter party, was bound to furnish a cargo, he was liable for any delay occasioned by a deficiency in the customary supply of merchandise which he wished to load as cargo at that port. *Nichols v. Tremlett* (U. S.) 18 Fed. Cas. 205.

Under a charter fixing the rate of demurrage to be paid by the charterer at "customary" dollars per day, the rate recoverable for delay in New York is not governed by the rules of the maritime association of the port, in the absence of proof that the rate thereby fixed is the customary rate. *Randolph v. Wiley* (U. S.) 118 Fed. 77, 80.

**CUSTOMARY DISCHARGE.**

The meaning of these words "customary discharge" in a charter party is the usual dispatch of persons who are ready to receive a cargo. It enlarges the source of delay, and makes it include all those usages at the port of delivery which the charters cannot control, such as the working hours, the order in which vessels must come up to the wharf, the observance of holidays, the allowance of three days to obtain a berth providing one cannot be sooner obtained; but here their force stops. They cannot be held to include any delay which is purely voluntary on the part of the charterers, though such delay is customary in the fruit trade, in which the charterers were engaged. The phrase must be confined in its meaning to excuse the parties for want of opportunity by reason of the customs prevailing at the port. *Linsay v. Cusimano* (U. S.) 10 Fed. 302, 303.



**CUSTOMARY DISPATCH.**

See "Customary Quick Dispatch."

A charter party providing for the unloading of the cargo with "customary dispatch" means a berth where the vessel can unload as soon as she is ready to deliver cargo, and the usual dispatch of persons who are ready to receive cargo. *Dayton v. Parke*, 22 N. Y. Supp. 613, 614, 67 Hun, 187.

Where a ship is to be discharged with the "customary dispatch" of the port, the freighter is bound to use reasonable diligence at his port towards the unloading, according to the terms and meaning of the charter party. *Williams v. Theobald* (U. S.) 15 Fed. 465, 469.

**As custom of port.**

"Customary dispatch," as used in a charter party relative to the discharge of the vessel, enlarges the source of delay, and makes it include all those usages at the port of delivery which the charterers cannot control, such as the working hours, the order in which vessels must come to the wharf, observance of holidays; but cannot be held to include any delay truly voluntary on the part of the charterers, though such delay is customary in the particular trade. *Lindsay v. Cusimano* (U. S.) 10 Fed. 302, 303.

A charter party providing for a voyage from New York to Arica, Peru, with a privilege of a second port in Peru not north of Callao, charterers to be allowed "customary dispatch" for discharging the cargo after the captain reports the vessel in the berth ready to discharge the cargo, means the dispatch customary at the place of discharge, and means only the custom of the port itself to which the vessel goes; so that the vessel in going to a place which was never a port before, and had no customary dispatch, would take no benefit from that clause, because it would have no application and no meaning in reference to such places. *The Spartan* (U. S.) 25 Fed. 44, 48.

"Customary dispatch," as used in a charter party obligating the vessel to receive the cargo with "customary dispatch," does not mean the acceptance in that period of time which is found to be the average time taken to discharge all like cargoes in that port, but means dispatch in accordance with all known and well-established usages or customs of the port. Thus, where the custom established in a particular port, in a particular trade, was to allow the consignee three days in which to procure a berth, and allowing him to remove the vessel to a second place of discharge as to a part of the cargo, such custom was included in the terms "customary dispatch," and made a part of the charter party. *Smith v. Sixty Thousand*

Feet of Yellow Pine Lumber, 2 Fed. 396, 399.

"Customary dispatch" in discharging, in a charter party, means dispatching with speed, haste, expedition, due diligence, according to the lawful, reasonable, well-known customs of the port of discharge. It is the same as usual dispatch, not the same as quick dispatch, which latter has been held to exclude certain usages and customs. *Lindsay v. Cusimano* (U. S.) 12 Fed. 504, 507 (citing *Davis v. Wallace* [U. S.] 7 Fed. Cas. 182; *Thacher v. Boston Gaslight Co.* [U. S.] 23 Fed. Cas. 874, 875; *Keen v. Audendried* [U. S.] 14 Fed. Cas. 177).

"Customary dispatch," when used in a charter party of a vessel which is to load or discharge in a general port with customary dispatch, refers to the general customs of the port, and not to the special usage of the charterer in his business, or to his means of dispatching his ship. "Customary dispatch, strikes and accidents of the mine excepted, would permit the charterer of a ship where coal is the only export, and is always loaded from the mine, to load from his mine with all usual diligence, working the railroad to its full capacity." In re *Eleven Hundred Tons of Coal* (U. S.) 12 Fed. 185, 187.

**CUSTOMARY INTERPRETATION OF LAWS.**

Under Spanish jurisprudence the customary interpretation of laws is that given by judges consulting the spirit of the law jurisprudence, usages, and equity, and has a certain force and authority when two or more decisions, made by a superior tribunal on a similar subject-matter, are in conformity with each other. The authentic interpretation of laws, however, is that given by the legislator himself. *Houston v. Robertson's Adm'r*, 2 Tex. 1, 28 (citing *Diccionario de Legislacion*, p. 316).

**CUSTOMARY PRACTICE.**

"Customary practice" means the custom or usage of a particular business house, association, etc. Where, however, the rights of the parties were fixed by their contract and the rules and by-laws of the association, its customary practice in dealing with its members was immaterial. *American Bldg. & Loan Ass'n v. Mordock*, 58 N. W. 107, 108, 39 Neb. 413.

**CUSTOMARY QUICK DISPATCH.**

See "Customary Dispatch."

The word "customary," in a stipulation in a bill of lading that the cargo is to be discharged with as quick dispatch as customary, manifestly means with as quick dispatch as is customary at the port of deliv-

ery. *Terjesen v. Carter* (N. Y.) 9 Daly, 193, 194.

The meaning of the expression "customary quick dispatch," when used in a charter, is well settled. It is the usual quick dispatch of the port where delivery is to be made. As distinguished from the usual dispatch employed there it requires haste, the ordinary haste of quick dispatch. Customary quick dispatch gives the charter a lower rate than customary dispatch. *Smith v. Harrison* (U. S.) 50 Fed. 565, 566.

An agreement to discharge a cargo of 475,000 feet of lumber with "customary quick dispatch" is not complied with by taking 30 or 31 working days in such discharge, where such lumber had been loaded in 16 days, although some allowance was to be made for wet weather. *Freeman v. Wellman* (U. S.) 67 Fed. 796, 797.

An agreement that a cargo of sugar should be discharged with "customary quick dispatch" at the port of discharge requires the use of platform scales for weighing, and is not complied with by the use of the tedious method of weighing on "sticks." *Harrison v. Smith* (U. S.) 67 Fed. 854, 856, 14 C. C. A. 656.

#### CUSTOMER.

A customer is a person with whom a business house or a business man has regular or repeated dealings. The customer of a real estate broker is one for whom he has acted in the buying or selling of the real estate. *Weinhouse v. Cronin*, 86 Atl. 45, 68 Conn. 250.

"Customer," as used in instructions relating to the right of a customer of a partnership to notice of his dissolution, means one whose dealings with the partnership have been confined to the purchase of its goods. *Askew v. Silman*, 22 S. E. 573, 574, 95 Ga. 678.

#### CUSTOMS.

Impost distinguished, see "Imposta."

Cooley, Tax'n, p. 3, says that the word "customs" means a duty imposed on imports and exports, and has a narrower meaning than the word "duty," which ordinarily means an indirect tax imposed on the importation, exportation, or consumption of goods. *Pollock v. Farmers' Loan & Trust Co.*, 15 Sup. Ct. 912, 915, 158 U. S. 601, 39 L. Ed. 1108.

Customs are duties charged upon commodities on their being imported into or exported from a country. *Marriott v. Brune*, 50 U. S. (9 How.) 619, 632, 13 L. Ed. 282 (citing 1 McCul. Dict. p. 548).

#### CUSTOMHOUSE BROKER.

Every person, firm, or company whose occupation it is, as the agent of others, to arrange entries and other customhouse papers, or transact business at any port of entry relating to the importation or exportation of goods, wares, or merchandise, shall be regarded as a customhouse broker, within the meaning of the war revenue act of 1898. U. S. Comp. St. 1901, p. 2287.

#### CUSTOMHOUSE PERMIT.

The only customhouse permit known when the factors act of 1830 was passed, which provided that any factor or other agent intrusted with any bill of lading, customhouse permit, or warehouse keeper's receipt for the delivery of merchandise should be deemed the owner for the purchase and sale, etc., was that which was granted to a consignee when the goods mentioned in his invoice and bill of lading had been duly entered at the customhouse, and the duties thereon paid or secured to be paid; and the term in the act does not include the permit for the landing of goods on which the duties are not paid, to the end that they may be stored in a bonded warehouse, as authorized by the act of Congress passed August 6, 1846. *Bonito v. Mosquera*, 15 N. Y. Super. Ct. (2 Bosw.) 401, 440.

#### CUSTOMS OFFICER.

The expression "officer of the customs," as used in Collection Act March 1, 1799, c. 128, § 71 (1 Story's Laws, 633, 1 Stat. 678, c. 22), making it unlawful to impede any "officer of the customs" or their deputies, should be construed to include an inspector of the customs, who acts under the direction and superintendence of the collector of customs. He is an officer known to and recognized by law. His duties are in many instances prescribed, and the omission of those duties, and any fraudulent conduct in his office, will subject him to heavy forfeitures. *United States v. Sears* (U. S.) 27 Fed. Cas. 1006, 1008.

#### CUT.

The copyright act of June 18, 1874, c. 301, 18 Stat. 78 [U. S. Comp. St. 1901, p. 3411], declares that the words "print, cut, and engraving" shall be applied only to pictorial illustrations or works connected with the fine arts. *Higgins v. Keuffel*, 11 Sup. Ct. 731, 733, 140 U. S. 428, 35 L. Ed. 470; *United States v. Marble* (D. C.) 3 Mackey, 32, 49.

"Cut," as used in Gen. St. 1878, c. 1, § 82, prohibiting the use of any ballot containing a "cut or device" on its face or back, made to distinguish one ballot from

another, cannot be construed to include stickers or pasters with the name of a candidate printed thereon, and pasted on the face of the ballot, over the printed name of an opponent. *Quinn v. Markoe*, 35 N. W. 263, 264, 37 Minn. 439.

Whether the word "cuts," in an action on a policy of insurance on steel plates and cuts of a publisher, includes brass plates cut with designs and letters, and used for making impressions on the covers of books, is a question for the jury, when there is evidence of a trade custom that the term "cuts" does not include such plates. *Houghton v. Watertown Fire Ins. Co.*, 131 Mass. 300, 302.

## CUT—CUTTING.

The word "cut" imports a wound made with an instrument having an edge. *State v. Patza*, 3 La. Ann. 512, 514; *State v. Cody*, 23 Pac. 891, 894, 18 Or. 506.

The word "cutting" is used to designate a wounding with an instrument having a sharp edge. *State v. Cody*, 23 Pac. 891, 894, 18 Or. 506.

The word "cut," when used in an indictment, is equivalent to the word "stab." *Starks v. State*, 66 Tenn. (7 Baxt.) 64, 69.

"Cutting," as used in an indictment charging a person with willfully cutting off the nose of another person, means severing by some sharp instrument, and the nature of the instrument is immaterial, so that such an indictment is satisfied by proof that the nose was bitten off. *State v. Mairs*, 1 N. J. Law (Coxe) 453.

Where, as in Gen. St. c. 29, art. 6, § 2 (Rev. St. c. 28, art. 28, § 2), the language used was, "cut, strike, or stab another with a knife, sword, or other deadly weapon," it was held that the words were not restricted to weapons or instruments made for the destruction of life or the infliction of injury, but embraced a chisel. *Commonwealth v. Branham*, 71 Ky. (8 Bush) 387.

In *Philpot v. Commonwealth*, 86 Ky. 595, 6 S. W. 455, it was held (speaking of the words "cut, strike, or stab"): "This language has reference to, first, to any instrument which is capable of being used for the purpose of cutting, thrusting, or stabbing a person, and which may be dangerous to his life if used by the assailant for that purpose; or, second, any instrument capable of being used for the purpose of striking a person, and which may be dangerous to his life if used by the assailant for that purpose." There is no doubt that a sledge hammer falls within the second clause. *Morehead's Adm'r v. Bittner*, 20 Ky. Law Rep. 1983, 1988, 50 S. W. 857, 859, 106 Ky. 523.

## On line of railroad.

See "Railroad Cut."

A contract for grading and preparing for ties for the bed of a railroad provided that the contents of "cuttings on the line of the road" should be removed into the adjacent hollows to form embankments. Held, that the phrase "cuttings on the line of the road" meant those places along the line of the road which would be found too high for the grade, and which would have to be cut down. *Grand Rapids & Bay City R. Co. v. Van Dusen*, 29 Mich. 431, 436.

## Of timber.

"Cutting timber," as used in Rev. St. § 2461 [U. S. Comp. St. 1901, p. 1527], prohibiting the cutting of timber on the public domain with intent to use and employ it in a manner other than for the navy of the United States, includes boxing and chipping trees for the purpose of extracting gum and sap for the manufacture of turpentine. *United States v. Leatherberry* (U. S.) 27 Fed. 606.

## CUT GLASS.

Cut glass is glass, the form of which or ornamentation of which is made by means of grinding upon wheels. *Binns v. Lawrence*, 53 U. S. (12 How.) 9, 17, 13 L. Ed. 871.

## CUT OF THE MILL.

A contract for the sale of the "cut of the mill," the mill being a sawmill, means all merchantable lumber—everything the mill saws, with the exception of culls. *Sloan v. Allegheny Co.*, 46 Atl. 1003, 1004, 91 Md. 501.

## CUT OFF.

Rev. St. c. 34, provides the punishment for any one who shall purposely and unlawfully bite or cut off an ear. Held, that the phrase "cut off an ear" did not mean the entire severing of the ear from the head, but it is an offense, within the statute, if enough be bit or cut off to attract observation and to render the person less comely. *State v. Girkin*, 23 N. C. 121, 123.

Wharfs and docks were not cut off from bays and inlets, within an act providing that, if the building of a railroad shall cut off any wharf or dock, the railroad shall extend the same, where the railroad constructed its road across a deep bay about 1,900 feet from the wharfs, placing a sufficient draw in the structure. But wharfs not within the bays or inlets were cut off where the railroad passed between them and the channel, where drawbridges were not erected. *Tillotson v. Hudson R. R. Co.*, 9 N. Y. (5 Seld.) 575, 581, 15 Barb. 403, 410.

**On railroad.**

The term "cut off" is a railroad term defined to designate a shorter and straighter road, by which the length of a course or passage is reduced. *Erie R. Co. v. Steward*, 70 N. Y. Supp. 698, 701, 61 App. Div. 480.

**CUT OUT.**

"Cut out," as used in reference to the practice of cattlemen on ranches to round up the cattle each spring and cut out the cattle of the several ranches and owners, means separated. *Hebberd v. Southwestern Land & Cattle Co.*, 36 Atl. 122, 128, 55 N. J. Eq. 18.

**CUTLERY.**

"Cutlery" is defined as including all tools made of steel, such as knives, forks, scissors, razors, shears, etc. In common parlance, there are different kinds of cutlery—such as table and pocket cutlery—but the word "cutlery" is evidently a generic term, which is often used to describe razors, shears, etc., as well as knives for table, pocket, and other uses. As used in the tariff act of 1883, fixing a duty on cutlery, it includes sheep shears. *Simmons Hardware Co. v. Lancaster* (U. S.) 81 Fed. 445.

**CWT.**

"Cwt." means the twentieth part of a ton, and has also a common meaning as designating, not the twentieth part of a ton, but 112 pounds. *Helm v. Bryant*, 50 Ky. (11 B. Mon.) 64, 65.

**CYCLONE.**

A cyclone is a rotary storm or whirlwind, of extended circuit, and it was held, in an action on a tornado policy, that an allegation that loss was caused by a cyclone or hurricane was admitted by an answer alleging that it was caused by a high wind blowing a steamboat against the property. *Queen Ins. Co. of Liverpool v. Hudnut Co.*, 35 N. E. 897, 398, 8 Ind. App. 22.

**CYCLOPS.**

"Cyclops" is a word in which the right of exclusive user for trade purposes may be created. *Hainque v. Cyclops Ironworks*, 68 Pac. 1014, 136 Cal. 351.

**CY PRES.**

The definition of "cy pres" is "as near to." Imp. Dict. This authority also defines the term as follows: "When there is an excess in an appointment under a power executed by will, affecting real estate, the court will carry the power as near to (cy pres) the

testator's intention as practicable, and prevent such excess disappointing the general design. The doctrine is not applicable to personalty, but is confined to wills. In regard to charitable legacies, where a literal execution becomes inexpedient or impracticable, the court will execute it as nearly as it can according to the original purpose, or, as the technical expression is, 'cy pres.'" *Allen v. Stevens*, 33 App. Div. 485, 497, 54 N. Y. Supp. 8, 16.

The meaning of the doctrine of cy pres, as received by us, is only when a definite function or duty is to be performed, and it cannot be done in exact conformity with the scheme of the person or persons who have provided for it. It must be performed with as close an approximation to that scheme as reasonably practicable, and so, of course, it must be enforced. It is the doctrine of approximation, and it is not at all confined to the administration of charities, but is equally applicable to all devises and contracts wherein the future is provided for, and it is an essential element of equity jurisprudence. *City of Philadelphia v. Girard's Heirs*, 45 Pa. (9 Wright) 9, 28, 84 Am. Dec. 470.

"The cy pres power which constitutes the peculiar feature of the English system of charitable trusts, and is exerted in determining gifts to charity where the donor has failed to define them, and in framing schemes of approximation near to or remote from the donor's true design, is unsuited to our institutions, and has no existence in the jurisprudence of this state." *Grimes' Ex'rs v. Harmon*, 35 Ind. 198, 252, 9 Am. Rep. 690.

The doctrine of cy pres is a doctrine of prerogative, and is that, where the specified object of a charity cannot be accomplished, the funds may be applied to other charitable purposes, or that the chancellor may seize them as a waif and apply them according to the King's conscience. *White v. Fisk*, 22 Conn. 31, 54.

The cy pres doctrine is the doctrine that if, in the administration of trusts, the original purpose of a public charity fail, and there are no objects to which, under the specific terms of the trust, the funds can be applied, the court may determine whether, in the event that has happened, it was not the probable intention of the donor that his gift should be applied to some kindred charity, as nearly like the original purpose as possible. The doctrine, in its last analysis, is found to be a simple rule of judicial construction, designed to aid the court to ascertain and carry out, as nearly as may be, the true intention of the donor. *Doyle v. Whalen*, 32 Atl. 1022, 1026, 87 Me. 414, 31 L. R. A. 118.

Where the scheme of a charity was wanting in sufficient definiteness of details to admit of its practical administration, a

court of equity would order a reference to a master in chancery to devise a scheme for its administration which should, as nearly as possible, conform to the conditions of the founder of the charity, and thus was called into operation what was called the "cy pres doctrine." *Allen v. Stevens*, 49 N. Y. Supp. 431, 434, 22 Misc. Rep. 158.

The cy pres doctrine is a rule of construction in equity, whereby the intention of the parties is carried out as nearly as may be in cases where it is possible to give the instrument its material effect, as where the testator attempts to create a perpetuity. In such a case the court will endeavor to explain the instrument in such a way as to carry out the testator's intention as far as the rule against perpetuities will permit. Where a testator has two objects, one primary or general, and the other secondary or particular, which objects are incompatible, the particular must be sacrificed in order that effect may be given to the general object as near as may be to the testator's intention according to law. But the doctrine cannot be resorted to for the purpose of modifying and restraining an intention itself, as, where a testator's will shows a manifest intention to vest trustees with discretion to devote a fund either to a charitable or non-charitable use, the doctrine of cy pres could not be invoked so as to render the will not void for uncertainty. *Taylor v. Keep*, 2 Ill. App. (2 Bradw.) 368, 383.

The rule of cy pres, though ancient, is by no means obsolete, and has been stated as follows in *Jackson v. Brown* (N. Y.) 13 Wend. 437, 445: "Where the disposition made by a testator of his property is contrary to the rules of law as to the estates granted by him, courts, for the purpose of carrying into effect the general intent of the testator so far as possible (cy pres), adopted that construction of the devise which will most nearly conform to the general intent of the tes-

tator, though in part it defeats his particular intent." In *re Howland's Will*, 74 N. Y. Supp. 950, 956, 37 Misc. Rep. 114.

The cy pres doctrine of the English chancery, which might be defined as the right of making an approximate or discretionary will for a testator where he has only declared some indefinite, illegal, or ineffectual charitable purpose, has been distinctly disavowed. Nevertheless in this country a charitable gift, definite both in its subject and purpose, and made to a definite trustee, who is to receive the fund and apply it in the manner specified, is to be maintained, although it would be void, by the general rules of law, because the particular objects of the gift, or persons to be benefited by it, are unascertained. Such a gift is capable of being enforced by a judicial sentence, and affords no rule for an exercise of the cy pres power, but further than this the American courts cannot go. *Beekman v. Bonsor*, 23 N. Y. 298, 308, 80 Am. Dec. 269.

In New York the cy pres doctrine is now a part of the statute law, by 1 Rev. St. 748, § 2, providing that in the construction of every instrument creating or conveying, or authorizing a creation or conveyance of, any estate or interest in lands, it shall be the duty of the courts of justice to carry into effect the intent of the parties, so far as such intent can be collected from the whole instrument, and is consistent with the rules of law. *Coster v. Lorillard* (N. Y.) 14 Wend. 265, 308.

## CYROGRAPHUM.

"Cyrographum" means chirographum, or, in other words, any writing. One meaning is "a note of hand," and therefor, under the common-law rule that detinue will lie for any cyrographum, detinue will lie to recover a note of hand. *Gibbs v. Usher* (U. S.) 10 Fed. Cas. 303, 304.

## D

**D. C.**

The letters "D. C." in a bail bond cannot be construed to mean Dimmit county, as they are equally susceptible of meaning De Witt, Duvall, Donnelly, or any other county having the letter "D" for its initial. *Vivian v. State*, 16 Tex. App. 262, 264.

**DAGGER.**

A "bowie knife" or "dagger," as the terms are used in the Penal Code, means any knife intended to be worn on the person, which is capable of inflicting death, and not commonly known as a "pocketknife." Pen. Code Tex. 1895, art. 606.

**DAILY.**

The prima facie meaning of the word "daily" is "every day." The question here was as to whether the word as used in section 7 of the gaslight and coke and other gas companies acts amendment acts of 1880 (43 & 44 Vict. c. 181), included Sunday. That section required a gas examiner to make daily at each testing place certain tests of the purity and power of the gas supplied. By section 3 of the South Metropolitan Gaslight & Coke Company's act of 1869 (32 & 33 Vict. c. 130), "day" was defined to mean 24 hours, reckoned from 9 o'clock in the forenoon of one day to 9 o'clock in the forenoon of the next day. It was argued that, from the provisions of said section 7 of the amendment act, the 24 hours from midnight on Saturday to midnight on Sunday must be altogether excluded. The argument was that such was the practice down to the passing of the act of 1880, and that therefore that act must be construed as having been passed with reference to the prior act. But the court said that, if the argument was sound, the practice in this case was insufficient. *London County Council v. South Metropolitan Gas Co.*, 88 Law T. (N. S.) 623, 626, affirmed 89 Law T. (N. S.) 618.

**DAILY NEWSPAPER.**

See, also, "Newspapers."

"Daily newspaper," as used in Gen. Laws 1889, c. 47, providing that the official paper designated by the common council of Duluth shall be a "daily newspaper," means a newspaper printed and published six days consecutively each week, though one of such days is Sunday; there being no publication on Monday. *Tribune Pub. Co. v. City of Duluth*, 47 N. W. 309, 45 Minn. 27.

"Daily newspapers," as used in Act April 1, 1872, providing that the resolution expressing the intention of the board of supervisors to cause certain work to be done shall be published for a period of ten days in two "daily newspapers," is to be understood in its popular sense; and, in this sense, it is clear that a paper which, according to its usual custom, is published every day, except one, is a daily paper. The term would not admit of a construction that a paper which is published every day except Sunday is not a daily paper. *Richardson v. Tobin*, 45 Cal. 30, 83.

A publication devoted to the courts, financial, real estate, building, and business interests, which is printed daily, except Sunday, has an actual subscription price, circulates generally among business and professional men, prints daily a list of real estate conveyances and mortgages, contains notices of sales under trust deeds, and commercial advertisements not confined to any particular trade, and has brief items of general news, is a daily newspaper, within the law governing the advertisement of sales under trust deeds. *Kingman v. Waugh*, 40 S. W. 884, 885, 139 Mo. 360 (citing *Kellogg v. Carrico*, 47 Mo. 157; *Benkendorf v. Vincenz*, 52 Mo. 441).

**DAILY USE.**

The phrase "often or daily use" of alcoholic stimulants means that the person charged to make such use thereof is an habitual user of such stimulants. *Ætna Life Ins. Co. v. Davey*, 8 Sup. Ct. 331, 332, 123 U. S. 739, 31 L. Ed. 315.

**DAIRY PRODUCTS.**

Authority given a corporation under its charter to buy and sell dairy products gives it no authority to sell oysters. *Bowman Dairy Co. v. Mooney*, 41 Mo. App. 665, 669.

**DAM.**

See "Milldam"; "Sluice Dam."

The common meaning of the word "dam" is the structure across the stream, including the abutment on the sides. *Paris Mill Co. v. Paris Water Co.* (Ky.) 71 S. W. 513, 514.

A dam is an instrument for turning water to the use of a mill, as a bulkhead is the means of drawing the water from the dam; but neither may in fact have been used for either purpose at all, or, if at all, in such a

way as to change or affect the original rights of the riparian owners on either hand. *Burnham v. Kempton*, 44 N. H. 78, 89.

A dam is an obstruction to the natural flow of the water of a river. A structure of planks built in the bank of a river, and not erected across the channel of the river, is not a dam. *People v. Gaige*, 23 Mich. 93, 94.

"Dam," as used in Sp. Laws 1871, c. 303, authorizing the proprietors of a certain marsh to erect a dam and dikes at different points, is employed synonymously with "dikes." *Commonwealth v. Tolman*, 21 N. E. 377, 378, 149 Mass. 229, 3 L. R. A. 747, 14 Am. St. Rep. 414.

#### As the pond created.

The word "dam" is used in two different senses. It properly means a structure raised to obstruct the flow of water in a river, but by well-settled usage it is often applied to designate the pond of water created by its obstruction. The word is used in this conventional sense in some statutes, and it is evidently used in this sense in a statute giving power to raise the "dam and water-works" to a height mentioned. *Colwell v. May's Landing Water Power Co.*, 19 N. J. Eq. (4 C. E. Green) 245, 248.

A dam is a bar built across a water course to confine and keep back flowing water, yet it is frequently used to designate the pond resulting from the dam. Thus the grant of a dam includes an easement in the pond. *Natoma Water & Mining Co. v. Hancock*, 101 Cal. 42, 81 Pac. 112, 114.

#### As real property.

See "Real Property."

#### DAM FLOWS.

In a conveyance of a water privilege, a grant of the land which a certain dam flows may reasonably be held to mean the land which the dam flows when used for the purpose for which it was erected and conveyed, and the extent of which is capable of being readily determined at any one time, rather than the small portion of land which happens to be flowed at the moment of the conveyance, when the dam is out of repair, and the flumes and waterways are open; depending as much on the condition of the stream as upon that of the dam, and the bounds of which can with difficulty be ascertained at any subsequent time. *Morse v. Marshall*, 95 Mass. (13 Allen) 288, 290.

#### DAMAGE—DAMAGES.

See "Actual Damages"; "Added Damages"; "Affirmative Damages"; "Civil Damages"; "Compensatory Damages"; "Consequential Damages"; "Country

Damage"; "Direct Damages"; "Double Damages"; "Estimated Damages"; "Excessive Damages"; "Exemplary Damages"; "Fee Damages"; "General Damages"; "Imaginary Damages"; "Inadequate Damages"; "Intervening Damages"; "Just Damages"; "Land Damages"; "Legal Damages"; "Liquidated Damages"; "Necessary Damages"; "Nominal Damages"; "Pecuniary Damages"; "Presumptive Damages"; "Proximate Damages"; "Punitive Damages"; "Punitory Damages"; "Serious Damage"; "Sounding in Damages"; "Special Damages"; "Speculative Damages"; "Unliquidated Damages"; "Vindictive Damages."

All damages, see "All."

Any damages, see "Any."

"'Damages' have been defined as a sum of money adjudicated to be paid by one person to another as a compensation for a loss sustained by the latter in consequence of an injury committed by the former." *City of Cincinnati v. Hafer*, 80 N. E. 197, 198, 49 Ohio St. 60; *Nesbitt v. Moore*, 17 S. E. 798, 799, 39 S. C. 351.

Damage is defined to be "loss, injury, or deterioration caused by the negligence, design, or accident of one person to another, in respect of the latter's person or property." *Black, Law Dict.* The plural of the word "damage" signifies a compensation in money for a loss or damage. *Wainscott v. Occidental Bldg. & Loan Ass'n*, 98 Cal. 253, 255, 33 Pac. 88; *Richardson v. Harrell*, 36 S. W. 573, 574, 62 Ark. 469.

"Damages" are defined to be the indemnity recoverable by a person who has sustained an injury, either in his person, property, or relative rights, from the act or default of another. *Carvill v. Jacks*, 43 Ark. 439, 449; *Collins v. East Tennessee, V. & G. R. Co.*, 56 Tenn. (9 Heisk.) 841, 850; *Davidson-Benedict Co. v. Severson* (Tenn.) 72 S. W. 967, 970.

Damages are based on the idea of a loss to be compensated—a damage to be made good. In general, damages are "that which is given or adjudged to repair a loss." *Maryland Casualty Co. v. Hudgins* (Tex.) 72 S. W. 1047, 1048.

"Damages" are indemnity or compensation in money which the law gives to an injured party for the breach of a contract or duty. *Western Union Tel. Co. v. Cobbs*, 1 S. W. 558, 559, 47 Ark. 344, 58 Am. Rep. 756.

Damages are compensation awarded by law for the injury sustained by the doing of a wrongful act. *Crane v. Peer*, 4 Atl. 72, 73, 43 N. J. Eq. (16 Stew.) 553; *Pegram v. Storts*, 31 W. Va. 220, 234, 6 S. E. 485.

Damages are the pecuniary compensation for an injury recovered in an action at

law. The rules which regulate the amount to be recovered vary according to the forms of action and the circumstances, but in every modification of them the principle of compensation is observed. *Stallings v. Corbett* (S. C.) 2 Speers, 613, 615, 42 Am. Dec. 388.

Damages are the compensation given by the jury for an injury or a wrong done the party before action brought. *City of New York v. Lord* (N. Y.) 17 Wend. 285, 293 (citing Co. Litt. 257); *McCoy v. Lemon* (S. C.) 11 Rich. Law, 165, 175, 70 Am. Dec. 246; *City of New York v. Lord* (N. Y.) 17 Wend. 285, 290. See, also, *Thompson v. Morris Canal & Banking Co.*, 17 N. J. Law (2 Har.) 480, 482.

Damages have been defined to be the compensation which the law will award for an injury done. *Scott v. Donald*, 17 Sup. Ct. 265, 267, 165 U. S. 58, 41 L. Ed. 632.

Damages are compensation, recompense, or satisfaction in money. *O'Connor v. Dila*, 26 S. E. 354, 355, 43 W. Va. 54.

Damages are the pecuniary consequences which the law imposes for the breach of some duty or violation of some right. *Deane v. Willamette Bridge Co.*, 29 Pac. 440, 442, 22 Or. 167, 15 L. R. A. 614.

Damages are given as compensation or satisfaction to the plaintiff for an injury actually sustained by him from the defendant. They shall be precisely commensurate with the injury—neither more nor less—and this whether it be to his person or to his estate. *Spokane Truck & Dray Co. v. Hoefler*, 25 Pac. 1072, 1073, 2 Wash. St. 45, 11 L. R. A. 689, 26 Am. St. Rep. 842.

"Damage" means every loss or diminution of what is a man's own, occasioned by the fault of another, whether it results directly to the thing owned, or is but an interference with the right which the owner has in the legal and proper use of his own. *Gainesville, H. & W. Ry. Co. v. Hall*, 14 S. W. 259, 78 Tex. 169, 9 L. R. A. 298, 22 Am. St. Rep. 42.

Damage is the substance and consummation of the injury, and from it alone springs the right of recovery, so that the locus of a tort must always be determined by the place where the injury and damage arose, rather than where the negligent act is committed. *Rundell v. La Compagnie Generale Transatlantique* (U. S.) 100 Fed. 655, 657, 40 C. C. A. 625, 49 L. R. A. 92.

Gen. St. c. 69, § 1, making towns liable for damages happening to any person, his team or carriage, traveling on a highway or bridge, by reason of any obstruction or defect, means a compensation, recompense, or satisfaction to a party for an injury actually received by him, and precisely commensurate with injury, whether it be to his person or estate. In our view, a fair and reasonable construction necessarily implies that the

words "damage which shall happen to any person" include all injury to property as well as person. *Woodman v. Town of Nottingham*, 49 N. H. 387, 391, 6 Am. Rep. 526.

Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called "damages." Rev. St. Okl. 1908, § 2723; Civ. Code S. D. 1903, § 2286.

#### As actual loss.

The clause "damage in his property," as used in Rev. St. c. 25, § 89, giving a right of recovery to any person who may have suffered in his property through a defect in a highway, means some injury to an article by which its value is destroyed or diminished. "Damage" means actual loss. This is Webster's first definition of the word. *Weeks v. Inhabitants of Town of Shirley*, 33 Me. 271, 272.

The object of damages is to give compensation to the party injured for the actual loss sustained, and the measure of damages is the actual, and not the speculative, loss. *Kountz v. Kirkpatrick*, 72 Pa. (22 P. F. Smith) 376, 386, 13 Am. Rep. 687.

"Damage," as used in the statute providing that a person may impound any beast found in his inclosure doing damage, means doing actual and substantial damage—in other words, doing damage in fact. *Dudley v. McKenzie*, 54 Vt. 685, 687.

#### Costs synonymous.

The words "damages" and "costs," though technically not synonymous, may be construed as applicable to costs only, since costs in many cases are considered as damages; and, where necessary to support the proceedings, the court will consider them as such, especially unless the party making objection shows that in fact the word "damages" had reference to a recovery of damages distinct from costs. *Smith v. Mumford* (N. Y.) 9 Cow. 26, 29.

As used in Gen. St. c. 53, providing that on taking an appeal the appellant shall execute a bond conditioned that he shall prosecute the appeal with effect, and pay all damages and costs which may be awarded against him on such appeal, "appeal" is synonymous with "costs" because in the very nature of things the only damages that could be awarded against appellant on such appeal would be the taxable costs. *Riley v. Mitchell*, 35 N. W. 472, 38 Minn. 9.

#### Costs of suit included.

Bouvier says that in modern law the term "damages" is not used in a legal sense to include the costs of the suit, though it was formerly so used. *Brock v. Bolton*, 16 S. E. 370, 371, 37 S. C. 40.



"Damages," as used in 2 Rev. Laws 396, § 143, providing that no execution on any judgment to be given by virtue of the act shall be prevented or stayed by any certiorari or other writ in case the party in whose favor such judgment shall be given shall give such security as may be satisfactory to the court to restore the debt or damages for which such judgment shall be obtained, with interest and costs, in case such judgment is reversed, does not mean to make the obligor liable on his bond for the costs of the reversal in case the judgment be reversed. Damages and costs are distinct and separate parts of a judgment, and are so entered on the record, and a judgment may be reversed as to the latter and affirmed as to the former. "Debt or damages" are intended to embrace a recovery before the justice. *Griffin v. Mortimer* (N. Y.) 8 Wend. 538, 541.

#### As damages found by the court.

"Damage," as used in a statute requiring towns to pay for damages done by dogs, and authorizing the collection of damages therefor by such city or town from the owners of the dogs, or from the town in which such owner resides, though he is a nonresident, by the commencement of a suit, if necessary, means actual damages found by the court before which the suit is finally instituted, if such suit shall be brought. *Town of Wilton v. Town of Weston*, 48 Conn. 325, 334.

#### Debt.

Damages are no debt until they are liquidated. *Day v. Bennett*, 18 N. J. Law (3 Har.) 287, 288 (quoting *Jeffery v. Wooley*, 10 N. J. Law [5 Halst.] 123).

"Debt" does not mean damages, and an action to recover damages is not an action to recover a debt. *Millington v. Texas & P. Ry. Co.* (Tex.) 2 Willson, Civ. Cas. Ct. App. § 171.

Under a statute giving to a landlord or employer double the damages he may have sustained by reason of his renter or servant having been wrongfully enticed away, the word "damages" is not used to embrace "debts," in the ordinary sense of that word. The statute is not one for the collection of debts, but for securing to the landlord or employer double all the damages he may have sustained, which amount will not only reimburse him, but operate as a penalty on the person so enticing away the laborer or renter. *Chrestman v. Russell*, 18 South. 656, 73 Miss. 452.

#### Exemplary damages.

Damages are the indemnity recoverable by a person who has sustained an injury—the sum claimed as such indemnity by the plaintiff in his declaration; and the term includes not only compensatory, but also exemplary or punitive and vindictive and dou-

ble or treble damages, so that as used in Const. art. 6, § 11, providing that justices shall have jurisdiction in cases of forcible entry and detainer, where the whole amount of damages does not exceed \$200, the term "damages" includes the whole amount to be adjudged, and, where treble damages are authorized, the jurisdiction is to be determined, not by the amount of the damage, but by it as trebled. *Hoban v. Ryan*, 62 Pac. 296, 297, 130 Cal. 96.

#### Injury distinguished.

There is a material distinction between "damages" and "injury." Injury is the wrongful act or tort which causes loss or harm to another. Damages are allowed as an indemnity to the person who suffers loss or harm from the injury. The word "injury" denotes the illegal act. The term "damages" means the sum recoverable as amends for the wrong. The words are sometimes used as synonymous terms, but they are, in strictness, words of widely different meaning. There is more than a mere verbal difference in their meaning, if they describe essentially different things. This the law has always recognized, for it is often declared that no action will lie because the action is *damnum absque injuria*. *City of North Vernon v. Voegler*, 2 N. E. 821, 824, 103 Ind. 314.

A distinction must be made between the words "damnum" and "injuria." We commonly use the words "injury" and "damage" indiscriminately but in the rule that "*ex damno absque injuria non oritur actio*," these Latin words are distinct. "Damnum" means only harm, hurt, loss, damage, while "injuria" comes from "in," against, and "jus," right, and means something done against the right of the party, producing damage, and has no reference to the fact or amount of damages. Unless a right is violated, though there be damage, it is *damnum absque injuria*. *West Virginia Transp. Co. v. Standard Oil Co.*, 40 S. E. 591, 592, 50 W. Va. 611, 56 L. R. A. 804, 88 Am. St. Rep. 895.

#### Injury synonymous.

The word "damages" in an act entitled "An act concerning damages sustained by agents, servants, and employes," is used in the sense of the injury for which compensation is sought, and hence is synonymous with the word "injuries," and thus sufficiently states the matter treated in the body of the act, and is not used in its technical sense, to express simply compensation for injuries received, or the amount which the injured party is entitled to recover. *Colorado Milling & Elevator Co. v. Mitchell*, 58 Pac. 23, 29, 26 Colo. 284.

Within Const. art. 6, § 7, par. 2, providing that justices of the peace shall have jurisdiction in cases of injuries or damages to personal property which do not exceed \$100, the words "injuries or damages" were evi-

dently intended to be synonymous, and, when applied to property, they mean some physical injury to the property itself—some trespass upon it by virtue of which its value has become diminished or destroyed—and in this sense conversion implies no such injury, and hence the justice court has no jurisdiction of the action of trover. *Blocker v. Boswell*, 34 S. E. 289, 290, 109 Ga. 230.

Comp. St. Neb. c. 72, art. 1, § 3, declares that every railroad company shall be liable for all damages inflicted on the person of a passenger while being transported over its road, except in cases where the injury arises from the criminal negligence of the person injured, or when the injury complained of shall be the violation of some express rule or regulation of said road, actually brought to his or her notice. Held, that the word "damages," as used in such section, was not used in its technical sense, but in the sense of "injury," and was intended to refer to legal damages sustained by any person on account of injuries inflicted on a passenger. *Omaha & R. V. Ry. Co. v. Chollette*, 59 N. W. 921, 924, 41 Neb. 578.

Const. art. 7, § 20, giving justices of the peace concurrent jurisdiction in all "matters of damages to personal property" when the amount in controversy does not exceed the sum of \$100, means all injuries which one may sustain in respect to his ownership of personal property. *Stanley v. Bracht*, 42 Ark. 210, 214.

By the use of the word "damaged" in a complaint in an action of trespass, alleging that plaintiffs have been damaged by the entry and by other acts committed by defendants, is evidently meant "injured," which means, in law, the privation or violation of a right; something, in other words, for which an action will lie in behalf of the injured person; an actionable wrong. *Hitch v. Edgecomb*, County Com'rs, 44 S. E. 30, 182 N. C. 573.

#### **Loss synonymous.**

"A synonym of 'damage,' when applied to a person sustaining an injury, is 'loss.' Loss is the generic term. Damage is a species of loss. Loss signifies the act of losing, or the thing lost. 'Damage' (in French 'dommage'; Latin, *damnum*, from 'demo,' to take away) signifies the thing taken away—the lost thing which a party is entitled to have restored to him, so that he may be made whole again. When used to signify the money which a plaintiff ought to recover, 'damage' is never nor in any sense synonymous with, nor collateral to, the terms 'example,' 'fine,' 'penalty,' 'punishment,' 'revenge,' 'discipline,' or 'chastisement.' Loss or damage sustained—the thing taken away—may be supplied by compensation; but the loss, damage, or thing taken away cannot be supplied or restored by the vindictive punishment of him who has occasioned the loss or damage."

*Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270.

The words "loss and damage," as used in a fire insurance policy—that in case of loss the amount of loss or damage shall be ascertained by arbitration—are synonymous. *Chippewa Lumber Co. v. Phenix Ins. Co.*, 44 N. W. 1055, 1057, 80 Mich. 116.

#### **As proximate consequences of injury.**

All damages which may be recovered in an action at law must be such as are the proximate consequences of the injury complained of. *Oldfather v. Zent*, 41 N. E. 555, 14 Ind. App. 89.

The words "damages sustained," in an action to recover damages under the dram-shop act, should be construed with reference to their own legal signification; i. e., to mean such damages as in legal contemplation are to be regarded as the result of the wrongful act. *Tetzner v. Naughton*, 12 Ill. App. 148, 153 (citing *Shugart v. Egan*, 83 Ill. 56, 25 Am. Rep. 359).

The term "damages" has a definite legal signification, and does not include any premium, bonus, or sum which a person chooses to charge, or a party to pay. Damages, when given as the penalty against a party for the nonperformance of a contract, mean the necessary, natural, and proximate damages resulting from such nonperformance, and not some remote, accidental, or special injury to the party to whom the right of action accrues. *Low v. Archer*, 12 N. Y. 277, 282.

#### **As a punishment.**

Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment for the guilty, to deter from any such proceeding in the future, and as a proof of the detestation of the jury to the act itself. *Lake Shore & M. S. Ry. Co. v. Prentice*, 13 Sup. Ct. 261, 262, 147 U. S. 101, 37 L. Ed. 97.

#### **Total loss included.**

A bill of lading exempting the carrier from all damage that may occur to such goods, arising from leakage, decay, chafing, breakage, or any other cause, while in transit, held not to include a total loss or destruction of the goods by fire while in the warehouse of the company while at an intermediate station while on the line of transit. *Menzell v. Chicago & N. W. Ry. Co.* (U. S.) 17 Fed. Cas. 23, 24.

A contract for the sale of dressed granite, which provided that the purchaser should assume the risk of damage to cutting on said stone while being transported, meant "injuries to the smooth surface or the sharp edges of the cut granite in the course of transportation, and not to the loss by a peril of the sea of the granite, with its cutting uninjured."

Tillson v. United States, 9 Sup. Ct. 255, 256, 129 U. S. 101, 32 L. Ed. 638.

#### Unliquidated damages included.

The words "damages on assumption," in the act of Assembly requiring a defendant before a justice of the peace to set forth his demand, if any he has, whether founded upon bond, note, penal or single bill, writing obligatory, bank account, or damages on assumption must necessarily apply to cases of unliquidated damages arising from contract, because, if they were liquidated by the contract, they would be clearly embraced by the previous description of demands founded on writings obligatory, as distinguished from bonds and single bills. *Shoup v. Shoup*, 15 Pa. (3 Harris) 361, 362.

#### As unusual or extraordinary damage.

"Damage by fire, wind or water," as used in a stipulation in a lease by which the lessee agreed to take good care of the demised property, and return the same to the lessor in as good order as when taken—damage by fire, wind, or water excepted—means unusual or extraordinary damage. *Waddell v. De Jet*, 23 South. 437, 438, 76 Miss. 104.

#### As value of property.

"Damages," in the article relating to miscellaneous provisions applying to cities, towns, and villages, are defined to be the depreciation in the value of the property which may result from the construction and operation of the proposed railroad. *Rev. St. Mo. 1890*, § 6117.

#### For attachment.

The term "damages sustained by reason of the attachment," under a bond conditioned that, if the attachment be dissolved, plaintiff shall pay all costs, fees, and damages which defendant shall sustain by reason of the attachment, cannot be construed to include indirect or punitive damages. The phrase is limited to damages for pecuniary loss ordinarily and naturally resulting from the seizure of goods, such as loss of sales, interruption of business, and expenses necessarily incurred. *Commonwealth v. Magnolia Villa Land & Imp. Co.*, 29 Atl. 793, 163 Pa. 99.

As used in Code Civ. Proc. § 640, providing that an undertaking shall be given in an attachment proceeding, by which the sureties obligate themselves, in case the defendant recovers judgment, or the warrant is vacated, to pay all "damages sustained by reason of the attachment," cannot be construed to mean counsel fees for the services of counsel rendered in the course of the litigation, and which were in no degree incurred by defendant in any proceedings taken for the purpose of vacating or setting aside the attachment. The resistance being wholly directed to defeating the action itself, by establishing the

result that the plaintiff in the suit had no legal claim against the defendant, and the services of counsel, rendered and bestowed in the litigation, being for that end entirely, the fees for such counsel services cannot be said to have been incurred by way of damages occasioned by the issuing and service of the attachment, though the services resulted in vacating the attachment, since that did not result from any effort or attempt to set it aside, but because the action itself failed, by exonerating the defendant from liability. *Northampton Nat. Bank v. Wylie*, 4 N. Y. Supp. 907, 908, 52 Hun, 146.

#### For breach of contract.

Damages for breaches of contract are those which are incidental to, and directly caused by, the breach, and may reasonably be presumed to have entered into the contemplation of the parties. *Dowd v. Krall*, 65 N. Y. Supp. 797, 798, 32 Misc. Rep. 252.

Mere speculative profits, such as might be conjectured would be the probable result of an adventure, defeated by the breach of a contract, the gains from which are entirely conjectural, and with respect to which no means exist of ascertaining even approximately the probable results, cannot under any circumstances be brought within the range of recoverable damages. *Masterson v. City of Brooklyn* (N. Y.) 7 Hill, 61, 42 Am. Dec. 38. Profits that are speculative or conjectural are not generally regarded as elements in fixing damages, not because there is anything in their nature per se which demands their rejection, but because they cannot be estimated with reasonable certainty. *Hodges v. Fries*, 15 South. 682, 684, 34 Fla. 63.

Damages for breaches of contract are only those which are incidental to, and directly caused by, the breach, and may reasonably be presumed to have entered into the contemplation of the parties, and not speculative profits or incidental or consequential losses. So, where defendant contracted to transport certain oats to market by a certain time, and failed to transport them until a considerable time thereafter, and in the meantime the oats were damaged from heating, such damage was not the result of the breach of contract to transport, but of the neglect of the plaintiff, or the person who, as his agent, had charge of the oats, to properly care for them. *Hamilton v. McPherson*, 28 N. Y. 72, 76, 84 Am. Dec. 330.

The term "damages" is one of very broad meaning, but, when applied to contracts, it is limited to such as may be supposed to have entered into the contemplation of the parties, and flow naturally from the violation of the agreement, and are certain in their nature, having respect to the cause from which they proceed; and speculative profits and accidental and consequential losses are

not recoverable. *Dodds v. Hakes*, 21 N. E. 398, 399, 114 N. Y. 260.

Although the general rule is that damages are the amount of the loss the creditor has sustained, or of the gain of which he has been deprived, by breach of the contract, yet there are cases in which damages may be assessed without calculating altogether on a pecuniary loss or the privation of pecuniary gain to the party. When the contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality, or taste, or some convenience or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach. *Lewis v. Holmes*, 34 South. 66, 67, 109 La. 1030, 61 L. R. A. 274.

#### For breach of covenant.

Damages are the compensation given by law for the loss a man sustains by the breach of a covenant of warranty for land sold. The value of the land at the time of eviction is the measure of damages. *Guerard's Ex'rs v. Rivers* (S. C.) 1 Bay, 265, 266.

The rule of assessing damages for breach of covenant either of seisin, or for quiet enjoyment, or warranty of title, after an eviction by legal proceedings, is to allow, first, the amount of consideration paid for the land; secondly, interest thereon for so many years as plaintiff will be liable for the mesne profits; and, thirdly, the taxable costs paid in defending the suit which terminated in his eviction. *Morris v. Rowan*, 17 N. J. Law (2 Har.) 304, 309.

#### For debauching another's wife.

In an action of case for debauching plaintiff's wife, the parties entered into an agreement in writing submitting the question of damages to referees, and agreed that the court might enter judgment on the report. Held, that the submission was of the quantum of damages only, and that the term "damages" was not equivalent to "liability," so as to authorize a submission of the question of defendant's guilt or innocence, but the only question for submission was, "How much shall he be required to pay to the plaintiff?" *Samson v. Young*, 50 N. H. 62, 64.

#### For failure to repair fence.

Laws 1838, p. 253, providing that if any person liable to contribute to the erection or reparation of a division fence shall neglect or refuse to make and maintain his proportion of such fence, or shall permit the same to be out of repair, he shall not be allowed to have and maintain any action for damages incurred, means such damages as are brought upon the party by his own negligence, and it cannot be extended to damages sustained in any other way whatever. *Deyo v. Stewart* (N. Y.) 4 Denio, 101, 103.

#### For infringement of patent.

Profits, within the meaning of patent laws, are the net gains of the infringer from the use of the patented invention, while damages are the losses sustained by the owner in consequence of the infringement. *La Baw v. Hawkins* (U. S.) 14 Fed. Cas. 899.

"Profits" and "damages," as used in the patent act, making one who infringes on a patent liable to the owner of the patent for the profits and damages, are not convertible terms. Damages are to be awarded in addition to the profits. "Profits" doubtless referred to what the wrongdoer has gained by the unlawful use of the patented invention, and "damages" to what the complainant has lost. *Goodyear Dental Vulcanite Co. v. Van Antwerp* (U. S.) 10 Fed. Cas. 749, 750.

#### For injunction.

The word "damage," in an undertaking given on the granting of a preliminary injunction, includes necessary counsel fees paid to secure the enacting of the same (*Edwards v. Bodine* [N. Y.] 11 Paige, 223; *Aldrich v. Reynolds* [N. Y.] 1 Barb. Ch. 613; *Andrews v. Glenville Woolen Co.*, 50 N. Y. 282; *Hovey v. Rubber Tip Pencil Co.*, Id. 335; *Disbrow v. Garcia*, 52 N. Y. 654; *Rose v. Post*, 56 N. Y. 603, 604), and, as used in a receipt for a sum of money deposited with the officer in lieu of the bond of indemnity, and as security for damages, includes the payment of counsel fees. *De Sisto v. Loewy*, 53 N. Y. Supp. 807, 809, 24 Misc. Rep. 725.

"Damages," as used in a bond conditioned to pay to the party enjoined such damages as he might sustain by reason of the injunction, meant all damages which occurred to the plaintiff by reason of the injunction, and is clearly broad enough to embrace the counsel fees which the plaintiff had been obliged to pay out in defending the suit which the defendant brought against him; such damages legitimately arising from the defendant's bringing that suit and contesting the claim. *Corcoran v. Judson*, 24 N. Y. 106, 109.

"Damages," as the term is used in reference to damages resulting from an illegal injunction, means pecuniary loss arising from the restraint imposed by the injunction, not the expenditure in the defense of the suit; and therefore a bond conditioned to pay damages will not authorize a recovery of the attorney's fees expended in resisting the injunction. *Barrett v. Bowers*, 32 Atl. 871, 872, 87 Me. 185.

In an injunction bond, which followed the statutes, and was conditioned to pay "all such costs as may be awarded against the said plaintiff, and all such damages as shall be incurred, in case the said injunction be dissolved," the word "damages" was not intended to cover an allowance of counsel fees.

*Wisecarver v. Wisecarver*, 34 S. E. 56, 57, 97 Va. 452.

The word "damages" is the term commonly employed in all injunction bonds to express the obligation assumed by the sureties. It is well established that the loss of the use and rental of premises during the time defendant was enjoined is a proper element of damages to be recovered in an action on the bond. Thus, under a bond to pay all damages which plaintiff may incur by the vacation of a temporary injunction against floating logs down a stream, it embraces loss for tollage on the logs. *De Camp v. Burns*, 53 N. Y. Supp. 1035, 1037, 33 App. Div. 517.

**For laying one railroad across another.**

The term "damages," which, in the case of laying out one road over and across another, has been held not to include compensation for the interruption and inconvenience to the business of the latter occasioned thereby is still a much broader term than "costs." *City of Newton v. Boston & A. R. Co.*, 51 N. E. 183, 185, 172 Mass. 5.

**For personal injury.**

Damages for a personal injury consist of three principal items: First, the expenses to which the injured person is subjected by reason of the injury complained of; second, the inconvenience and suffering naturally resulting from it; third, the loss of earning power, if any, and whether temporary or permanent, consequent upon the character of the injury. *Goodhart v. Pennsylvania R. Co.*, 35 Atl. 191, 192, 177 Pa. 1, 55 Am. St. Rep. 705 (citing *Owens v. People's Pass. Ry. Co.*, 155 Pa. 334, 26 Atl. 748).

Rev. St. § 2326, prohibiting the commencement of suit against municipal corporations for damages arising from any cause prior to the filing of a claim therefor with the clerk of the corporation, etc., does not include damages for personal injuries. *City of Warren v. Davis*, 3 N. E. 301, 43 Ohio St. 447.

**For sale of liquor to minor.**

A bond given by a person holding a liquor license, conditioned to pay all damages which shall be recovered from him under and pursuant to the provisions of St. 1875, c. 99, § 9, as required by such act, includes the forfeit of \$100 authorized by section 15 for selling or giving intoxicating liquors to minors. *Day v. Frank*, 127 Mass. 497, 498.

**For taking appeal or writ of error.**

Judiciary Act 1789, c. 20, § 22, requires every judge or justice signing a citation on a writ of error to take security that the plaintiff in error shall prosecute his writ to effect, and "answer all damages and costs if he fails to make a good plea." Held, that the

word "damages" is not used as descriptive of the nature of the claim upon which the original judgment is founded, but as descriptive of the indemnity which the defendant is entitled to if the judgment is affirmed. Whatever losses he may sustain by the judgment not being satisfied and paid after the affirmance, these are the damages which he has sustained, and for which the bond ought to give good and sufficient security. *Catlett v. Brodie*, 22 U. S. (9 Wheat.) 553, 554, 6 L. Ed. 158.

In *Catlett v. Brodie*, 22 U. S. (9 Wheat.) 553, 6 L. Ed. 158, it was held that the term "damages," as included in the bond to pay damages and costs that should be adjudged for the delay caused by the issuance of a writ of error, covered whatever losses the plaintiff might sustain by the judgment not being satisfied and paid after affirmance. *Omaha Hotel Co. v. Kountze*, 2 Sup. Ct. 911, 919, 107 U. S. 378, 27 L. Ed. 609.

United States Supreme Court rule 29 (3 Sup. Ct. xvi), requiring a supersedeas bond in the Circuit Court to be taken in an amount sufficient to secure the sum recovered for the use or detention of the property, and the costs of the suit, and just damages for delay, cannot be construed, in mortgage foreclosure proceedings, to include all the accumulation of interest on the mortgage indebtedness, and pending the appeal and supersedeas, but merely the accumulation of interest consequent on the appeal; nor can it include the loss of profits by the loss of the opportunity of bidding in the property at a reduced price and speculating on its rise. *Jerome v. McCarter*, 88 U. S. (21 Wall.) 17, 32, 22 L. Ed. 515.

An appeal bond given to secure any damages which might arise in consequence of the appeal includes interest at the rate fixed by the statute on the amount of the judgment from the date of its rendition to the time of entering the judgment above. *Mason v. Smith*, 79 Tenn. (11 Lea) 67, 72.

The word "damages," as used in the United States statutes relating to a supersedeas bond on writ of error and appeal to the Supreme Court of the United States, should be construed to include not only those which may be awarded by the appellate court for the delay or prospective damages, but also those which the appellee may sustain by reason of not having his judgment paid or enforced. *Ray v. Ray*, 1 Idaho, 705, 706.

Rev. St. c. 104, requiring a lessee, on appealing from a judgment rendered by a justice of the peace, in the process given to a lessor by the statute, conditioned to pay the intervening rent and damages, would not include remuneration for loss sustained by reason of the appellees being prevented from making sale of the premises, and for injury to the same for the improper manner of oc-

cupation, but include nothing more than the rent at a stipulated rate, and interest thereon. *Bartholomew v. Chapin*, 51 Mass. (10 Metc.) 1, 8.

The appropriation by the mortgagor of the rents, issues, and profits of the mortgaged land during the pendency of a wrongful appeal by him from an order confirming the sale of the land under foreclosure was damage, within the meaning of the statute and the condition of a supersedeas bond. *Woodworth v. Northwestern Mut. Life Ins. Co.*, 22 Sup. Ct. 676, 680, 185 U. S. 854, 48 L. Ed. 945.

#### For taking property.

Laws 1898, p. 62, provides for condemnation of property, and requires the value and damages allowed to each owner to be expressly stated in the findings of the commissioners. Held, that the word "damages" is used in the enlarged sense of covering all damages suffered by the landowner by reason of the condemnation, whether they result from the taking of the land, or from the damage to the remainder not condemned to public use. *City of St. Joseph v. Crowther*, 43 S. W. 786, 788, 142 Mo. 155.

The term "damages," in a grant of a right of way to a railroad company on payment of the damages, means all the damages resulting from the location and construction of the railroad through plaintiff's land; the measure being the difference in value of the entire property or tract as a whole, as it was before the railroad was laid upon it, and as it is affected by the railroad after it is finished and completed. *Hoffman v. Bloomsburg & S. R. R. Co.*, 27 Atl. 564, 565, 157 Pa. 174.

The word "damages," as used in Code, § 1437, providing that a person applying for the establishment of a road shall, when the damages are assessed to the owner, etc., is used to indicate the compensation to be paid to the owner, and is equivalent to the words "just compensation," and hence will not be limited to the mere value of the land taken. *Commissioners' Court of Colbert County v. Street*, 22 South. 629, 632, 116 Ala. 28.

The word "damages," in relation to the right of a person to recover compensation and damages for property taken by eminent domain, is of general import, and equivalent to "compensation." It includes more than the mere value of the property taken, for often the main injury is not in the value of the property absolutely lost to the owner, but in the effect upon the balance of his property of the cutting out of the part taken. *Bauman v. Ross*, 17 Sup. Ct. 966, 979, 167 U. S. 548, 42 L. Ed. 270 (citing *Pottawatomie County Com'rs v. O'Sullivan*, 17 Kan. 58, 60).

The word "damages," as used in the charter of a city providing that when the mayor and general council shall exercise

their authority to open, lay out, etc., public streets, they shall appoint freeholders to assess the damages sustained, was not intended to embrace compensation for incidental injuries to realty, which it had been held could not be recovered, but is limited to damages which are incurred in the actual taking and appropriation of the property itself. *Hurt v. City of Atlanta*, 28 S. E. 65, 67, 100 Ga. 274.

The word "damages," as used in Lateral Railroad Act Feb. 17, 1871 (P. L. 1871, 56), is used as a relative and comparative term, and means damages or hurt which might happen or result to a landowner, over and above the advantages by possibility accruing to him. *Hays v. Briggs* (Pa.) 3 Pittsb. R. 504, 517.

Rev. St. 1894, § 5660 (Rev. St. 1881, § 4290), provides that damages on the laying out of the drains shall be assessed to the parties owning the lands benefited in proportion as each tract of land assessed is benefited. Held, that "damages" means the actual damage, if any, after deducting the benefits. *Wilson v. Talley*, 42 N. E. 1009, 1010, 144 Ind. 74.

Act Feb. 4, 1830, authorized the organization of a canal company, and provided that, in case the company could not agree with the owner for the purchase of lands over which the canal was to extend, commissioners should be appointed to assess and report the damages which should be paid for the land, and that, if either party was dissatisfied with the report of the commissioners, he should apply to the Supreme Court at the next term, and, on good cause shown, the report might be set aside, and the issue tried by a jury, who should assess the value of the land and the damages sustained. Held to include all damages accruing to the owner from any and every physical effect produced by the construction and use of the canal, whether the same could be clearly seen and easily estimated before the construction of the canal, or whether they were uncertain and doubtful results from such construction; and the owner is entitled to all damages sustained by him, or likely to be sustained, from such construction, whether they arise from the alteration or destruction of a public or private way, the exclusion or the overflowing of waters, the alteration or change in the current of streams, or the destruction of crops, the deterioration of the adjacent lands by leakage, or whatever other damages may result from the natural and physical effects produced by the canal, provided, always, that it shall be constructed in accordance with the provisions of the act, and with proper care and skill. *Van Scholck v. Delaware & R. Canal Co.*, 20 N. J. Law (Spencer) 249, 254.

The phrase in the act relating to the exercise of eminent domain. "which may dam-

age property not actually taken," relates to contiguous lands of the same owner, a part of which only are taken, so that where the party seeking condemnation has not embraced all the owner's contiguous lands not actually taken, but damaged, the owner may file a cross-petition, and have the damages to the other lands assessed. *Stetson v. Chicago & E. R. Co.*, 75 Ill. 74, 77.

#### For taking trees from another's land.

"Damages," as used in 2 Rev. St. p. 323, § 1, providing that every person who shall cut down or carry off any trees on the land of another person without leave of the owner shall forfeit and pay to the owner of such land treble the amount of the damages which should be assessed therefor in an action of trespass, means the amount of damages sustained by the trespass, and does not mean the value of the wood taken. *McCruden v. Rochester Ry. Co.*, 25 N. Y. Supp. 114, 118, 5 Misc. Rep. 59.

#### For wrongful death.

To constitute a right to recover damages, the party claiming damages must have sustained the loss. The party against whom they are claimed must be chargeable with the loss. *Davidson-Benedict Co. v. Severson*, 72 S. W. 967, 970, 109 Tenn. 572 (citing *Collins v. East Tennessee, V. & G. R. Co.*, 56 Tenn. [9 Heisk.] 841). In an action for wrongful death, if plaintiff has a reasonable expectation of pecuniary advantage from the continuance of the life of the deceased, her husband, she can recover for it; and, the greater the value of the life in a pecuniary sense, the more perfect the right of recovery. *Collins v. East Tennessee, V. & G. R. Co.*, 56 Tenn. (9 Heisk.) 841, 850.

"Damages," as used in Shannon's Code, § 4029, relating to actions for wrongful death, does not authorize recovery for mental or physical suffering caused to the widow by the wrongful killing of her husband. *Knoxville, C., G. & L. R. Co. v. Wyrick*, 42 S. W. 434, 436, 99 Tenn. 500.

#### DAMAGE BY THE ELEMENTS.

See "Elements."

#### DAMAGE EX CONTRACTU.

Mr. Justice Spofford, in *Kohn v. Town of Carrollton*, 10 La. Ann. 719, distinguishes between damages ex delicto and damages ex contractu by saying that "the former flow from the violation of a general duty; the latter, from the breach of a special obligation." *State v. Fourchy*, 31 South. 825, 331, 106 La. 743.

#### DAMAGE EX DELICTO.

Damage ex contractu distinguished, see "Damage Ex Contractu."

#### DAMAGE FOR PUBLIC USE.

Const. art. 2, § 21, providing that compensation shall be made to an owner for property taken or damaged, could not be construed to include in its meaning the burdening of a street with a new use, as by the construction and operation of a railroad at grade. *Henry Gaus & Sons Mfg. Co. v. St. Louis, K. & N. W. Ry. Co.*, 20 S. W. 658, 113 Mo. 308, 18 L. R. A. 339, 35 Am. St. Rep. 706.

Const. 1875, § 21, providing that private property shall not be taken or "damaged for public use" without just compensation, applies to a damage by establishing a grade of a street, or by raising or lowering a grade previously established. *McElroy v. Kansas City (U. S.)* 21 Fed. 257, 260.

"Damaging," as used in a constitutional provision prohibiting the taking or damaging of private property for public use without compensation, does not include the legal vacation of city streets and alleys. *City of East St. Louis v. O'Flynn*, 10 N. E. 395, 119 Ill. 200, 59 Am. Rep. 795.

A regulation adopted for public safety under the police power of the state, as the requirement of a railroad company to plank a street crossing and erect gates and maintain a gateman at the crossing of a street over the tracks of the railroad company, is not a taking or damaging of private property without just compensation, although such regulation involves expense. *Morris & E. R. Co. v. City of Orange*, 43 Atl. 730, 732, 63 N. J. Law, 252.

In *Ruckert v. Grand Ave. Ry. Co.*, 63 S. W. 814, 818, 163 Mo. 260, *Rude v. City of St. Louis*, 6 S. W. 257, 98 Mo. 408, construing the words "taken or damaged" in connection with a claim for damages by an abutting owner against a city, is cited with approval; it being held in the latter case that the abutting owner must show himself entitled to recover damages for an obstruction of the street, and that the damages are peculiar to him—different in kind, and not merely in degree, from those suffered by other members of the community. *Hickman v. Kansas City*, 25 S. W. 225, 120 Mo. 110, 23 L. R. A. 658, 41 Am. St. Rep. 684, was also cited in support of this doctrine. In that case the court says that section 21, art. 2, Const. 1875, which provides that private property shall not be taken or damaged for public use without just compensation, has been amended by adding the words "or damaged" simply to provide for compensation when property is damaged as well as when it is taken for public use, and, since they were added, it has been the settled law that when property is damaged by establishing the grade of the street, or by raising or lowering the grade thereof, it is damaged for public use, but those words do not give an abutting

owner a right to recover unless he can show some direct physical disturbance of the right, either public or private, which he enjoys in connection with his property, and which gives an additional value to it, and that by reason of such disturbance he has sustained a special damage over and above that sustained by the public generally.

#### As actionable wrong.

In the clause of the Constitution providing that private property shall not be taken or damaged for public uses without just and adequate compensation being first paid, the word "damaged" is used in its usual sense, as a law term, and does not change the substantive law of damages, or create a cause of action where none previously existed; nor does it abrogate the principle expressed in the phrase "damnum absque injuria." It refers to actionable wrongs, and does not require compensation for depreciation in the value of private property caused by the lawful operation of a public work owned by a corporation vested with the power of eminent domain, unless a private corporation or private individual would be liable for similar acts under like circumstances; nor is a quasi public corporation liable where private property is depreciated in value as a result of the lawful use and enjoyment of the company's private property. To damage property, within the meaning of the Constitution, there must be some physical interference with property, or physical interference with the right or use appurtenant to property; and therefore a railway company is not liable to the owner of real property for diminution in the market value thereof resulting from the making of noise or from the sending forth of smoke in the prosecution of the company's lawful business. *Austin v. Augusta T. Ry. Co.*, 84 S. E. 852, 853, 108 Ga. 671, 47 L. R. A. 755.

#### Consequential injury.

The word "damages," as used in statutes relating to condemnation proceedings, includes only damage that is direct and proximate, as distinguished from that which is remote and consequential, and only that which is special and peculiar to the petitioner and to those similarly situated, as distinguished from that which is common, affecting generally persons and property in the vicinity. *Baker v. Boston Elevated R. Co.*, 66 N. E. 711, 712, 183 Mass. 178.

"Damaged," as used in the Constitution of 1870, providing that private property shall not be taken or damaged for public use without just compensation, means a substantial injury caused by a public improvement, and does not require such injury to be caused by trespass, or an actual, physical invasion of the owner's real estate. It includes an injury caused by such improvement, though it is only consequential. The construction of an

improvement in such a way as to cause property to be flooded by freshets, or to cut off the access to a certain street, is a damage, within the meaning of such clause. *City of Chicago v. Taylor*, 8 Sup. Ct. 820, 823, 125 U. S. 161, 31 L. Ed. 638.

"Damaged," as used in Const. 1867, art. 1, § 21, providing that the property of no person shall be taken or damaged for public use without just compensation therefor, includes all damages which affect the value of a person's property, resulting from the exercise of the right of eminent domain, which diminish the market value of private property. The fact that damages are consequential will not preclude a recovery if the construction and operation of the public improvement is the cause of the injury; and it is not necessary that the damages be caused by trespass, or an actual, physical invasion of the owner's real estate. The test is, excluding general benefits, is the property in fact damaged? If so, the owner is entitled to compensation. If the property is diminished in actual value by reason of a public improvement, it is, to the extent of the diminution, taken for public use, as much as if it was directly appropriated. *City of Omaha v. Kramer*, 41 N. W. 295, 296, 25 Neb. 489, 13 Am. St. Rep. 504.

Under Const. 1890, art. 8, § 17, declaring that private property shall not be taken or damaged for public use except on due compensation, a recovery may be had in all cases where private property has sustained substantial damage from any improvement public in its character; and it is not requisite to recovery that the damage be caused by a trespass or an actual invasion of the owner's real estate, but, if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party damaged may recover. *Chicago & W. I. R. Co. v. Ayres*, 106 Ill. 511; *Rigney v. City of Chicago*, 102 Ill. 64; *City of Elgin v. Eaton*, 83 Ill. 535, 25 Am. Rep. 412. And hence a city is liable for damages to abutting property for materially lowering the street grade, especially after valuable improvements had been put on the lot according to the prior, established grade. *City of Vicksburg v. Herman*, 16 South. 434, 435, 72 Miss. 211.

"Damaged," as used in Const. art. 1, § 14, providing that private property shall not be taken or damaged for public use without just compensation having been first made, refers to something more than a direct or immediate damage to private property, such as its invasion or spoliation. It should be construed in its ordinary and popular sense, and embraces more than the taking. This provision was intended to insure compensation to the owner as well where the damage was directly inflicted, or inflicted by want of care and skill, as where the damages are consequential. The provision includes damage to



private property, including land and whatever is attached to it. It does not extend to such damage as the owner injured sustained in common with the other abutters on the street or the general public, but only to that special injury which he receives over and above such common injury. *Reardon v. City and County of San Francisco*, 6 Pac. 317, 322, 66 Cal. 492, 56 Am. Rep. 109.

#### **Diminution in market value.**

"Damaged," as used in the Constitution, providing that private property shall not be taken or damaged for public or private use without just compensation, includes not only direct, physical obstruction or injury to the abutting premises, even though there be no actual appropriation of the ground itself—a kind or class of injuries for which a remedy existed at common law—but also includes the actual diminution in the market value of the premises for any use to which they may reasonably be put, occasioned by the construction and operation of a railroad through the adjacent street. *City of Denver v. Bayer*, 2 Pac. 6, 9, 7 Colo. 113.

#### **As injuriously affect.**

"Damaged," as used in the Bill of Rights (Const. 1875) § 21, declaring that the property of no person shall be taken or damaged for public use without just compensation, should be construed to include all damages arising from the exercise of the right of eminent domain, which cause a diminution in the value of private property. The words "or damaged" did not appear in the section of the Constitution of 1867. Under that Constitution, if any portion of a person's real estate was taken for public use, he could recover all the damages sustained by the taking, but, if none of his real estate was taken for public use, he could recover nothing, though his property had been greatly damaged by such use. The provision, therefore, is remedial in its nature, and the well-known rule that, in the construction of remedial statutes, three points are to be considered, namely, the old law, the mischief, and the remedy, and so to construe the act as to suppress the mischief and advance the remedy, is to be applied. 1 Bl. Comm. 87. Applying this rule to the provisions in question, it must be held to embrace all damages which affect the value of a person's property, and to include cases where the property of the claimant was not itself taken, but was merely damaged by the taking of other property. *McGavock v. City of Omaha*, 58 N. W. 543, 546, 40 Neb. 64.

#### **As injure.**

"Damaged," as used in Const. art. 1, § 17, providing that no person's property shall be taken, damaged, or destroyed for, or applied to, public use, without adequate compensation being made therefor, is to be construed in the same sense in which the word

"injured" is ordinarily understood. By damage is meant every loss or diminution of what is a man's own, occasioned by the fault of another, whether this results directly to the thing owned, or be but an interference with a right which the owner has to the legal and proper use of his own. *Gulf, C. & S. F. Ry. Co. v. Fuller*, 63 Tex. 467, 469.

"Damaged," as used in Const. 1875, art. 1, § 21, providing that the property of no person shall be taken or damaged for public use without just compensation therefor, should be construed as equivalent to "injuriously affect." The object of the Constitution is to grant relief in cases where there is no direct injury to the real estate itself, but some physical disturbance of a right which the owner possesses in connection with his estate, by reason of which he sustains special injury in respect to such property in excess of that sustained by the public at large. It is not necessary, to entitle a party to recover, that there should be a direct physical injury to his property if he has sustained damages in respect to the property itself, whereby its value has been permanently impaired or diminished. *Gootschalk v. Chicago, B. & Q. R. Co.*, 16 N. W. 475, 476, 14 Neb. 550.

In the case of *Rigney v. City of Chicago*, 102 Ill. 64, it was correctly held that the words "or damaged," in Const. 1875, art. 1, § 21, providing that the property of no person shall be taken or damaged for public use without just compensation therefor, were equivalent to the words "injuriously affected," in the English statute. *Gootschalk v. Chicago, B. & Q. R. Co.*, 16 N. W. 475, 479, 14 Neb. 550.

#### **Taken distinguished.**

The word "damaged," as used in the constitutional provision that no private property shall be taken or damaged for public or private use without just compensation having first been made, does not mean the same thing as "taken," and will not be limited to what was formerly covered by the word "taken" alone. *State v. Superior Court of King County*, 66 Pac. 385, 389, 26 Wash. 273 (citing *Brown v. City of Seattle*, 5 Wash. 35, 31 Pac. 313, 32 Pac. 214, 18 L. R. A. 161).

#### **DAMAGE FOR A WRONG.**

The word "damages" meaning a compensation, recompense, or satisfaction in money, and "wrong" meaning any deprivation of right, breach of contract, or injury done by one person to another, the words "damages for a wrong" mean money given for a breach of contract, as well as any other deprivation of right or injury to person or property, and include not only money due on contract, but money which one is entitled to recover of another for any reason whatsoever, and is a much broader and explicit expression than "money due on contract." *O'Connor v. Dila*,

26 S. E. 354, 355, 43 W. Va. 54; *Lovings v. Norfolk & W. Ry. Co.*, 35 S. E. 962, 967, 47 W. Va. 582, 81 Am. St. Rep. 788.

### DAMAGE RECOVERED.

The phrase "damages recovered," as used in Rev. St. c. 191, § 4, providing that no more costs than damages shall be recovered in any action in the court of common pleas, unless the damages recovered exceed \$13.33, means the damages to which the plaintiff is ultimately found to be entitled on appeal or other proceeding of last resort. *Davis v. Clark*, 39 N. H. 62, 64.

### DAMAGE TO LAND.

The language "damages to land," as used in Rev. St. art. 1194, § 14, providing that suits for the recovery of damages to land must be brought in the county in which the land may lie, has been construed to mean an injury to the possession or to the freehold or estate, so that burning of grass growing on land, by fire, does not constitute damages to land. *Knight v. Houston & T. C. Ry. Co.*, 55 S. W. 558, 98 Tex. 417.

### DAMAGE TO THE PERSON.

Where a statute (Acts 1842, c. 89, § 1) provides that an action of trespass on the case for damage to the person shall survive, the term "damage to the person" should be limited to injuries of a physical character, and therefore would not include the damages resulting from a breach of promise of marriage. *Smith v. Sherman*, 58 Mass. (4 Cush.) 408, 418.

Gen. St. Mass. c. 127, § 1, and c. 128, § 1, declare that actions of tort for assault, battery, imprisonment, or other "damage to the person," survive, and may be prosecuted by the executor or administrator of the party injured. Held, that the phrase would not extend to torts not directly affecting the person, but only the feelings or reputation, such as a breach of promise, slander, or malicious prosecution, but include only every action, the substantial cause of which is a bodily injury. *Norton v. Sewall*, 106 Mass. 143, 145, 8 Am. Rep. 298.

### DAMAGE TO PERSONAL ESTATE.

"Damage to personal estate," as used in Pub. St. c. 165, § 1, providing that actions for "damages done to personal estate" shall survive, does not apply to merely impoverishing a man's estate generally, but means damage to some specific property. *Cutter v. Hamlen*, 18 N. E. 397, 147 Mass. 471, 1 L. R. A. 429.

### DAMN.

"Damn" means "to deem, think, or judge any one to be guilty, to be criminal; to give

judgment, or sentence, or doom of guilt; to adjudge or declare the penalty or punishment." *Blaufus v. People*, 69 N. Y. 107, 111, 25 Am. Rep. 148.

"Damned" is held to import an imprecation of divine vengeance, or to imply divine condemnation, so as to constitute profanity, though not used in connection with the name of the Deity. *State v. Wiley*, 24 South. 194, 76 Miss. 282, 71 Am. St. Rep. 531 (citing *Holcomb v. Cornish*, 8 Conn. 375).

The word "damned" when used in a sense importing an imprecation of future divine vengeance, is profane, whether the name of the Deity be called or not; and the words "Arrest, and be damned," spoken to a woman, and used in a manifestly irreverent sense, relative to the Deity, are indictable under Act Dec. 29, 1890, making it a misdemeanor to use profane language in the presence of a woman. *Foster v. State*, 25 S. E. 613, 99 Ga. 56.

Evidence that a person accused of cursing used the word "damn," or something to that effect, is insufficient to sustain a conviction. *Carr v. City of Conyers*, 10 S. E. 630, 631, 84 Ga. 287, 20 Am. St. Rep. 357.

### DAMNED SON OF A BITCH.

The term "damned son of a bitch" is not an insulting one, used toward a female relative, but is rather a sudden expression of anger and contempt, and, when used, no one understands it to be directed at the mother of the person to whom used. *Simmons v. State*, 5 S. W. 208, 209, 23 Tex. App. 658.

### DAMNIFIED.

A surety is damnified when a judgment is obtained against him. *McLean v. Lafayette Bank* (U. S.) 16 Fed. Cas. 264, 278.

### DAMNOSA HÆREDITAS.

Property of a bankrupt, which, so far from being available, would be a charge to the creditors, has been called by Lord Kenyon "damnosa hæreditas." *Provident Life & Trust Co. v. Fidelity Ins. Trust & Safe Deposit Co.*, 52 Atl. 34, 37, 203 Pa. 82.

### DAMNUM ABSQUE INJURIA.

"Damnum absque injuria" means a loss without an injury. It is a phrase used to describe a loss arising from acts or conditions which do not create a ground of legal redress. *Marbury v. Madison*, 5 U. S. (1 Cranch) 137, 164, 2 L. Ed. 60; *Hession v. City of Wilmington* (Del.) 27 Atl. 830, 834; *Parker v. Griswold*, 17 Conn. 288, 299, 42 Am. Dec. 739; *National Exch. Bank v. Sibley*, 71 Ga. 726, 734; *Pennsylvania R. Co. v. Lippin-*

cott, 116 Pa. 472, 484, 9 Atl. 871, 2 Am. St. Rep. 618.

"Damnum" means only harm, hurt, loss, or damage, while "injuria" comes from "in," against, and "jus," right, and means something done against the right of a party, producing damage, and has no reference to the fact or amount of damage. Unless a right is violated, though there be damage, it is damnum absque injuria. *West Virginia Transp. Co. v. Standard Oil Co.*, 40 S. E. 591, 592, 50 W. Va. 611, 56 L. R. A. 804, 88 Am. St. Rep. 895.

Damages not directly consequent upon the taking of property by the power of eminent domain, but incident to or consequent upon the construction or operation of a public improvement in a prudent and skilled manner, are damnum absque injuria, unless such injuries are to be compensated by the terms of the statute under which the work was prosecuted. *High Bridge Lumber Co. v. United States (U. S.)* 69 Fed. 320, 328, 16 C. C. A. 460.

"Damnum absque injuria" means a loss which does not give rise to an action for damages against the person causing it, as where a person blocks up the windows of a new house overlooking his land, or injures the person's trade by setting up an establishment of the same kind in the neighborhood. It arises where there is damage done without any wrong or a violation of any right of the plaintiff, but the term does not apply, in a legal sense, in the case of a violation of a right, where no perceptible damage follows, which cannot be established as a matter of fact, or as defined by "injuria sine damno," since actual perceptible damage is not indispensable to the foundation of an action; the plaintiff in such a case being entitled to recover nominal damages. *Irwin v. Askew*, 74 Ga. 581, 585 (citing *National Exch. Bank v. Sibley*, 71 Ga. 726, 734).

The maxim "damnum absque injuria" applies only where a wrong is done a party for which the law provides no remedy, and does not affect a right of a riparian owner to redress for the wrongful diversion of a part of the flow of a nonnavigable stream at a point above his mill, and drawn by a wafer company which uses it to supply a village with water, where such diversion affects injuriously the rights of the riparian owner. *Gilzinger v. Saugerties Water Co.*, 21 N. Y. Supp. 121, 122, 66 Hun, 173.

Where an appreciable damage and loss was occasioned by some act of another, and yet the law gives no redress, the phrase "damnum absque injuria" is applied. *Chase v. Silverstone*, 62 Me. 175, 176, 16 Am. Rep. 419.

A lease of property adjacent to a railroad, apart from misuse, is "damnum absque injuria." *Hasbrouck v. New York, L. E. & W. B. Co. (Pa.)* 1 C. P. Rep. 156.

A bill in equity will lie to restrain the owner of a servient tenement from digging a well so near a spring whose supply depends upon a constant and regular subterranean stream as to divert the water of such spring, to the injury of the owner of the dominant tenement, who had a reserved right to use the water of the spring, as the rule of "damnum absque injuria" would not apply, unless it is made to appear that the spring depended for its supply on percolations through the lands of the complainant. *Lybe v. Herr (Pa.)* 1 Kulp, 182, 183.

## DANGER.

See "Apparent Danger"; "Immediate Danger"; "Latent Dangers"; "Patent Dangers"; "Real Danger"; "Reasonable Danger"; "Unavoidable Danger."

Obvious dangers, see "Obvious Riska."

As used in an indictment charging that the defendant put one in bodily fear and danger of his life, "danger" is equivalent to "jeopardy." "The word 'jeopardy' is defined to be danger; exposed to loss or injury; peril. Jeopard is to put in danger; to expose to loss or injury. Jeopardize is putting in danger." *United States v. Mays*, 1 Idaho, 763, 770.

## DANGERS OF NAVIGATION.

"Dangers of navigation" and "perils of the sea" are generally synonymous, and refer to accidents peculiar to that particular kind of transportation, not occasioned by negligence, and not preventable by the exercise of due care. *Jones v. Pitcher (Ala.)* 3 Stew. & P. 185, 186; 24 Am. Dec. 716.

"Dangers of navigation," as used in a bill of lading relieving the carrier from liability for the losses caused by dangers of navigation, means only those dangers which are inevitable, and does not excuse the carrier from liability for losses occasioned by his own negligence. *The City of Norwich (U. S.)* 5 Fed. Cas. 780, 781.

It is well settled that dangers of navigation, in a bill of lading, mean latent dangers, and not such as are or ought to be patent, and are to be avoided by skill, judgment, and foresight, by persons engaged in navigation. *Costigan v. Michael Transp. Co.*, 38 Mo. App. 219, 229 (citing *Hill v. Sturgeon*, 28 Mo. 323, 327).

An insurance against the "perils of navigation" covers those caused in the navigation of the boat and flowing from the ordinary perils, which come from navigating, including the manner of approaching the land, as well as moving down the stream. *Seaman v. Enterprise Fire & Marine Ins. Co. (U. S.)* 21 Fed. 778, 783.

**Bilging in canal lock.**

"Dangers of navigation," as used in a contract exempting a carrier from the dangers of the navigation of a public canal, are such as are incident to it when the trip is made in conformity to the public regulations, of which the carrier is bound to take notice; and hence damage from bilging in a lock, which was entered in contravention to the rules, is not included therein. *Atwood v. Reliance Transp. Co. (Pa.)* 9 Watts, 87, 88, 34 Am. Dec. 503.

**Explosion.**

The bursting of a boiler is a peril of the river, within the meaning of a policy of insurance of a steamboat insuring against any perils of rivers, fires, enemies, pirates, rovers, and stealing thieves and all other perils, loss, and misfortunes which should come, to the damage of such steamboat, according to the general laws of insurance. *Citizens' Ins. Co. v. Glasgow*, 9 Mo. 411, 412.

The explosion of a boiler on a steam vessel is not a "peril of navigation," within the term as used in the exception in bills of lading. *The Mohawk*, 75 U. S. (8 Wall.) 153, 162, 19 L. Ed. 403.

**Fire.**

The term "perils of navigation" includes fires not caused by the negligence of a shipowner or his servants. *Walker v. Western Transp. Co.*, 70 U. S. (3 Wall.) 150, 154, 18 L. Ed. 172.

**Impassability of canal.**

"Dangers of navigation," as used in a bill of lading issued by a canal boat, excepting the boat from liability for loss occasioned by dangers of navigation, did not include a loss occasioned by the fact that the canal became impassable by inevitable accident or otherwise. *Hand v. Baynes (Pa.)* 4 Whart. 204, 214, 33 Am. Dec. 54.

**Running aground.**

Dangers of navigation, within an exception contained in a bill of lading, do not include a loss of a part of the cargo by jet-tison, resorted to in order to lighten the ship after she had run aground, in consequence of the captain's negligence in proceeding into port at night in a fog, where there was proper ground to doubt whether the port was the one which he supposed it to be, and he could safely have waited outside until morning, or could have signaled a tugboat to pilot him in. *The Portsmouth*, 76 U. S. (9 Wall.) 682, 685, 19 L. Ed. 754.

**Shallowness of harbor.**

The term "dangers of lake navigation" includes all the ordinary perils which attend navigation and the like, and, among others, that which arises from the shallowness of the

water at the entrance of a harbor. *Western Transp. Co. v. Downer*, 78 U. S. (11 Wall.) 129, 133, 20 L. Ed. 160; *Insurance Co. of North America v. Lake Erie & W. R. Co.*, 53 N. E. 382, 383, 152 Ind. 333.

**Snags.**

In an express company's receipt, reciting the receipt of certain goods to be forwarded to a certain place, perils of navigation and transportation excepted, the term "perils of navigation" embraces more than the act of God, but goes no further than to exempt the carrier from such liabilities as could not be foreseen or avoided in the exercise of care and prudence. The exception does not excuse the carrier for negligently running into snags in a river. The proper construction is synonymous with that which is put upon the words "perils of the sea" or "dangers of the lake" in bills of lading. *Christenson v. American Exp. Co.*, 15 Minn. 270, 280 (Gil. 208, 213), 2 Am. Rep. 122 (citing *Fairchild v. Slocum* [N. Y.] 19 Wend. 329, 332; *Whitesides v. Thurkill*, 20 Miss. [12 Smedes & M.] 599, 51 Am. Dec. 128; *Hays v. Kennedy*, 41 Pa. [5 Wright] 378, 80 Am. Dec. 627; *Edw. Bailm.* 492-496).

"Dangers of navigation," as used in a bill of lading excepting from the carrier's liability for loss such losses as might be caused by the dangers of navigation and all other known and unknown obstructions, includes a loss caused without negligence on the part of the carrier's servants by striking a tree under water, which, unknown to them, had shortly before fallen into the river. *Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co.*, 7 Sup. Ct. 550, 120 U. S. 166, 30 L. Ed. 621.

**Vermin on shipboard.**

"Dangers of navigation," as used in a bill of lading exempting a carrier from loss occasioned by the dangers of navigation, does not include a damage to the cargo caused by vermin on board the ship. *The Miletus* (U. S.) 17 Fed. Cas. 288, 289.

**DANGERS OF THE RIVER.**

"Dangers of the river" are such dangers as cannot be guarded against by human skill or foresight. *Johnson v. Friar*, 12 Tenn. (4 Yerg.) 48, 51, 26 Am. Dec. 215; *Jones v. Pitcher (Ala.)* 3 Stew. & P. 135, 177, 24 Am. Dec. 716; *Turney v. Wilson*, 15 Tenn. (7 Yerg.) 840, 843; *Gordon v. Buchanan*, 18 Tenn. (5 Yerg.) 71, 82; *Grey's Ex'r v. Mobile Trading Co.*, 55 Ala. 387, 398, 28 Am. Rep. 729; *Hill v. Sturgeon*, 28 Mo. 323, 327.

The words "dangers of the river" mean only the natural accidents incident to river navigation, and do not embrace such as may be avoided by the exercise of that skill, judgment, or foresight which are demanded from persons in a particular occupation.

Hill v. Sturgeon, 35 Mo. 212, 213, 86 Am. Dec. 149.

The phrase "dangers of the river," when used in a bill of lading, has no such plain, certain meaning as will preclude the admission of parol testimony to show, according to the usage and custom of merchants, what casualties such phrase includes. It may be shown by parol testimony that the phrase includes casualties other than those arising from the element of water. *Sampson v. Gazzam* (Ala.) 6 Port. 123, 132, 30 Am. Dec. 578; *Gordon v. Little* (Pa.) 8 Serg. & R. 533, 551, 11 Am. Dec. 632.

Where the force of the current of the river at a certain point in the time of a freshet, and the increased danger arising from a tree on the bank, were well known to the skipper, loss arising from the boat being swept under the tree and a portion of the cargo brushed off was not a "danger of the river"; for there was no tempest or irresistible impulse of natural causes, but a fixed and well-known danger, which every man accustomed to the navigation would calculate upon meeting, if he proceeded on the voyage at such a time. *Williams v. Branson*, 5 N. C. 417, 419, 4 Am. Dec. 562.

The exception in a bill of lading of the "dangers of the river which are unavoidable," narrows down the liability of the owner of the boat. Many disasters which would not come within the definition of the act of God would fall within the exception of this receipt, such, for instance, as losses occasioned by hidden obstructions in the river, newly placed there, and of a character that human skill and foresight could not have avoided. *Gordon v. Buchanan*, 13 Tenn. (5 Yerg.) 71, 82.

The words "dangers of the river" mean "all hidden obstructions in the river," as rocks, logs, sawyers, and the like, and which could not be foreseen or avoided by human prudence or foresight. *Turney v. Wilson*, 15 Tenn. (7 Yerg.) 340, 343.

A policy insuring a vessel, the dangers of the river only excepted, does not seem to be sufficiently broad to cover any casualty which is not peculiar to the navigation of that river. It is like the exceptions in bills of lading given by vessels navigating the sea, in which "perils of the sea" are the words employed, by which natural accidents peculiar to that element are meant, accidents which do not happen by the intervention of man, and which cannot be prevented by human prudence. *Gilmore v. Carman*, 9 Miss. (1 Smedes & M.) 279, 304, 40 Am. Dec. 96.

#### Careening of boat.

Where cotton is thrown into a river by the careening of a steamboat on which it was loaded, the injury to the cotton was caused by the perils of the river, within the

meaning of an insurance policy providing that the liability and perils assumed by the company are of the rivers, fires, jettisons, and other perils and losses caused by reason of such dangers. *Crescent Ins. Co. v. Vicksburg, Y. & S. R. Packet Co.*, 13 South. 254, 255, 69 Miss. 208, 30 Am. St. Rep. 537.

Dangers of the river, insured against in a marine policy, include a loss by collision. *Van Horn v. Taylor* (La.) 7 Rob. 201, 202, 41 Am. Dec. 279.

#### Collision.

A loss by collision without fault of the carrier boat is within a bill of lading excepting the carrier from liability from unavoidable dangers of the river. *Hayes v. Kennedy* (Pa.) 2 Pittsb. R. 262, 263; *The Favorite* (U. S.) Fed. Cas. 1103; *Whitesides v. Thurlkill*, 20 Miss. (12 Smedes & M.) 599, 600, 51 Am. Dec. 128; *Jones v. Pitcher* (Ala.) 3 Stew. & P. 135, 176, 24 Am. Dec. 716.

#### Fire.

Dangers of the river are those known dangers which are incident to the river, and include dangers by fire. *The Belfast*, 40 Ala. 184, 188, 88 Am. Dec. 761. As used in a bill of lading exempting the carrier therefrom, "dangers of the river" meant, not only dangers arising from the navigation, but dangers by fire. *Hibler v. McCartney*, 31 Ala. 501, 536.

In construing a bill of lading for the transportation of goods on a steamboat navigating the Mississippi, providing that the carrier should not be liable for losses occasioned by the perils of the river, it was held that the term "perils of the river" did not include fire, although the boat was consumed without any negligence or fault of the owners or their agents or servants. *Garrison v. Memphis Ins. Co.*, 60 U. S. (19 How.) 312, 314, 15 L. Ed. 656.

It is settled in this state that it is permissible for the owner of a steamboat, when sued for the loss of goods by fire, to show by parol that by custom and usage the words "dangers of the river" in a bill of lading include dangers by fire. *McClure v. Cox*, 32 Ala. 617, 621, 70 Am. Dec. 552.

Dangers of the river are dangers such as collisions, rocks, snags, etc., and do not include a loss by fire. *Garrison v. Memphis Ins. Co.*, 60 U. S. (19 How.) 312, 314, 15 L. Ed. 656.

#### Leakage.

The phrase "dangers of the river," as used in a bill of lading relieving a carrier from liability for losses occasioned thereby, means such inevitable dangers only as result from a known cause. An unknown cause, producing a leaky boat, is not within the meaning of the phrase. *Louisville & N.*

*R. Co. v. Manchester Mills*, 14 S. W. 814, 316, 88 Tenn. (4 Pickle) 653 (citing *Turney v. Wilson*, 15 Tenn. [7 Yerg.] 340).

"A loss by perils of the sea or dangers of river navigation includes such losses only to the cargo as are of an extraordinary nature, or arise from irresistible force, or from inevitable accident, or from some overwhelming power, which cannot be guarded against by the ordinary exertions of human skill and prudence. If the loss occurs by a peril which might have been avoided by the exercise of any reasonable skill or diligence at the time when it occurred, it is not deemed to be, in the sense of the phrase, such a loss by the perils of the sea or the dangers of the river as will exempt the carrier from liability, but rather a loss by his gross neglect. A loss from the effect of storm and tempest in straining the ship, or causing her to spring a leak or ship a sea, whereby damage or injury is done to the goods on board, are losses perfectly attributable to the perils of the sea, although in a mitigated sense they may be said to be ordinary accidents." *The Northern Belle* (U. S.) 18 Fed. Cas. 349, 350.

#### Low water.

Low water is not to be classed among the "dangers of the river" which absolve a carrier from his obligation. *Mahon v. The Olive Branch*, 18 La. Ann. 107, 108

#### New and unknown reefs.

An exception in a bill of lading, exempting the carrier from losses caused by the dangers of the river, fire, and collision, includes a loss caused without negligence on the part of the carrier's agents or servants by running into a sand reef recently formed in the channel of the river, which they had no reason to suppose was there. *Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co.*, 7 Sup. Ct. 550, 120 U. S. 166, 30 L. Ed. 621.

"The phrase 'dangers of the river,' as used in bills of lading, includes dangers arising from unknown reefs, which have suddenly formed in the channel, and are not discoverable by care and skill." *Hibernia Ins. Co. v. St. Louis & N. O. Transp. Co.* (U. S.) 17 Fed. 478.

#### DANGERS OF THE SEA.

See "Perils of the Sea."

#### DANGEROUS.

The word "dangerous" means "attended with danger; perilous; full of risk." *West v. Ward*, 42 N. W. 309, 310, 77 Iowa, 323, 14 Am. St. Rep. 284.

The word "dangerous" is the opposite of the word "safe." When a given place in a highway ceases to be safe, it becomes

dangerous. *Coates v. Town of Canaan*, 51 Vt. 131, 137.

"Dangerous" is defined by Webster as "attended or beset with danger; full of risk; perilous; hazardous; unsafe." An instruction leaving the jury to determine whether a brakeman compelled a trespasser to leave the train when it was dangerous to do so was not erroneous, as permitting a verdict without reference to degree of danger or whether the train was in motion or not. *Texas & P. Ry. Co. v. Mother*, 24 S. W. 79, 82, 5 Tex. Civ. App. 87.

#### As defective.

A place in a highway which is so "dangerous" that it would be improper and negligent to attempt to pass over it cannot be construed to mean a place not perfectly safe, since the mere fact that a street is defective does not necessarily show that an attempt to pass over it is negligence. *Fox v. City of Chelsea*, 50 N. E. 622, 623, 171 Mass. 297.

The words "unsound and dangerous," as applied to a city sidewalk, may mean so rotten as to be dangerous. Therefore a notice specifying that the walk was "unsound and dangerous" was held to sufficiently notify the city that the walk was defective. *Van Frachen v. City of Ft. Howard*, 60 N. W. 1062, 1063, 88 Wis. 570.

#### DANGEROUS BUSINESS.

Other dangerous trade or business, see "Other."

A business is dangerous, within the meaning of a covenant not to erect on certain lands manufactories for use in a dangerous trade, where a paraffine oil mill is erected, in which the furnace and stills are kept at an unusual and extreme heat, which, with a lurid flame from the smokestack, give to all persons in the neighborhood reasonable apprehension of danger. *Atlantic Dock Co. v. Libby*, 45 N. Y. 499, 508.

A distillery, used for the manufacture of resin oil, was a dangerous business, within the covenants of a deed prohibiting the use of the premises for such a purpose. *Atlantic Dock Co. v. Leavitt*, 50 Barb. 135, 141, 54 N. Y. 35, 13 Am. Rep. 556.

#### DANGEROUS CONDITION

The dangerous condition of a street means something more, when applied to a building excavation therein, than to the accumulation of materials in the neighborhood of a building undergoing erection or repair, or the excavation, more or less deep, which is needed in order to put down a sidewalk. A temporary state of disorder is absolutely inseparable from improvements of certain kinds. A street or sidewalk is rendered impassable or partially impassable

during the process of work, and all that can be demanded of a city under such circumstances is the taking of due care or the enforcement of regulations made for securing passengers of ordinary prudence from danger. *Schweickhardt v. City of St. Louis*, 2 Mo. App. 571, 580.

#### DANGEROUS AND CONTAGIOUS DISEASE.

The term "dangerous contagious disease," as used in the chapter relating to the public health in cities, shall be construed and understood to mean such diseases as the state board of health shall designate as contagious and dangerous to the public health. *Ballinger's Ann. Codes & St. Wash.* 1897, § 1238.

#### DANGEROUS EXPOSURE.

Dangerous exposure, sufficient to render a vessel being so exposed in fault for a collision, means "not a mere possibility of an injury through some mischance not reasonably likely to occur, but an exposure that is naturally liable to receive or inflict the injury in the ordinary chances, mistakes, or hazards of navigation, such as are to be reasonably apprehended as liable to arise." Per *Brown, J.*, in *The Mary Powell* (U. S.) 31 Fed. 622, 624 (cited in *The Michigan* [U. S.] 52 Fed. 501, 504).

#### DANGEROUS INSTRUMENT.

An iron flywheel, a few feet in diameter and a few inches in thickness, is not a dangerous instrument, though one part may be weaker than another. Dangerous instruments are instruments and articles in their nature calculated to do injury to mankind, and generally intended to accomplish that purpose. They are such as are essentially and in their elements instruments of danger. The flywheel, not being in its nature a source of danger, cannot be called a dangerous instrument. That an injury actually occurred by the bursting of the wheel does not in the least alter its character. *Loop v. Litchfield*, 42 N. Y. 351, 359, 1 Am. Rep. 513.

#### DANGEROUS MACHINE.

A locomotive charged with steam to propel trains of cars is a dangerous machine, and the duty imposed upon a railroad company which it owes to its employes is that such locomotive shall be kept and maintained in a safe and proper condition. *Texas & P. R. Co. v. Barrett* (U. S.) 67 Fed. 214, 218, 14 C. C. A. 373.

The phrase, "dangerous and enticing machine," within the rule that a dangerous and enticing machine should not be left where the natural and probable results would be that it would cause injury to children, in-

cludes a lump of common gunpowder, containing pieces of brass. *Travell v. Bannerman*, 75 N. Y. Supp. 866, 867, 71 App. Div. 439.

#### DANGEROUS MACHINERY.

Whether the term "dangerous machinery" includes revolving shafting is a question which may be made the subject of expert testimony. *Pullman's Palace Car Co. v. Harkins* (U. S.) 55 Fed. 932, 935, 5 C. C. A. 326.

#### DANGEROUS WEAPON.

See "Assault with Dangerous Weapon"; "Sharp Dangerous Weapon."  
Other sharp or dangerous weapon, see "Other."

"Dangerous weapon," as used in Rev. St. § 794, providing that whoever shall with a dangerous weapon inflict a wound, etc., shall be punished, etc., means a weapon which may be dangerous "by its use or in itself." *State v. Scott*, 3 South. 83, 84, 39 La. Ann. 943.

✕ "Dangerous weapon," as used in 4 Stat. 121, providing a punishment for making an assault with a dangerous weapon, means "a weapon which is dangerous to life in the manner in which it is used in the assault." *United States v. Small* (U. S.) 27 Fed. Cas. 1128.

"A dangerous weapon is one liable to produce death or great bodily harm." *United States v. Reeves* (U. S.) 38 Fed. 404, 406. Some weapons under particular circumstances are so clearly lethal that the court may declare them to be such as a matter of law. Of this class are guns, swords, knives, pistols, and the like, when used within striking distance of the victim. All others are lethal or not, according to their capability to produce death or great bodily harm in the manner in which they are used, and of this the jury must always be the judges. An unloaded gun in the hands of a defendant four or five rods from the prosecuting witness is not a dangerous weapon. *State v. Godfrey*, 20 Pac. 625, 626, 628, 17 Or. 300, 11 Am. St. Rep. 830.

✕ A dangerous weapon is one that is dangerous to life, and this must often depend upon the manner of using it, and the question should go to the jury. In many cases the court may declare that a particular weapon was or was not a dangerous weapon, and when practicable it is the duty of the court to do so; but where the weapon might be dangerous or not according to the manner in which it was used or the part of the body struck, the question must be left to the jury. *State v. Hammond*, 86 N. W. 627, 629, 14 S. D. 545.

While "deadly" and "dangerous" are not equivalents, "deadly" is more than the equivalent, and includes the full signification of dangerous. A dangerous weapon may possibly not be deadly, but a deadly weapon, one which is capable of causing death, must be dangerous. *State v. Lynch*, 83 Atl. 978, 979, 88 Me. 195.

A dangerous weapon includes a saw or dirk in the hands of a robber, by means or under terror of which a person is robbed of the mail, within the meaning of an act punishing robbery of the mail, though it is not drawn or pointed at the breast of the driver at the time, and a pistol in the hands of the robber, by means of which the carrier is robbed of the mail, is a dangerous weapon. *United States v. Wood* (U. S.) 28 Fed. Cas. 754, 755.

#### Ax.

The term "dangerous weapon," within the meaning of a statute providing that it shall be criminal to make an assault with intent to kill with a dangerous weapon, etc., includes an ax. In so holding, the court cites *State v. Jacob*, 10 La. Ann. 141, in which a pocketknife was held to be a dangerous weapon within the meaning of the statute. *State v. Hertzog*, 41 La. Ann. 775, 777, 6 South. 622, 623.

#### Knife.

A jackknife may be regarded as a "dangerous" weapon; whether it is such depending on circumstances. *Commonwealth v. O'Brien*, 119 Mass. 342, 347, 20 Am. Rep. 325.

On trial for assault with a dangerous weapon, an instruction that, if the knife used by defendant was shown by the evidence to be an ordinary pocketknife, such as is commonly used by planters for proper purposes, and was not specially provided by the accused for the occasion, it was not a dangerous weapon within the meaning of the law, was properly refused. *State v. Jacob*, 10 La. Ann. 141, 142.

#### Pistol.

A loaded pistol is a dangerous weapon, so that one who fires a pistol at another who is within shooting distance, or in the direction where he is standing, merely with intent to frighten him, is guilty of an assault with a dangerous weapon. *State v. Baker*, 38 Atl. 653, 654, 20 R. I. 275, 78 Am. St. Rep. 863.

A dangerous weapon is one liable to produce death or great bodily injury. A loaded pistol is not only a dangerous, but a deadly, weapon. *United States v. Williams* (U. S.) 2 Fed. 61, 64.

A pistol is a dangerous weapon, within the meaning of the statute providing for the

punishment of those who rob the United States mail by putting in jeopardy the life of the person having charge thereof by the use of dangerous weapons. *United States v. Wilson* (U. S.) 28 Fed. Cas. 699, 708.

"Dangerous weapon," as used in Act Cong. March 3, 1825, § 22, requires the weapon to have been dangerous to life as actually used, so that a small pistol, when loaded, while undoubtedly a dangerous weapon, would not be dangerous, if not loaded, when used only to push and strike with. So the thing said to be used may, in the hand of a strong man, be capable of endangering the life by a blow on the head, but not dangerous to life if the arm or leg is struck with it. *United States v. Small* (U. S.) 27 Fed. Cas. 1128.

"In one sense a pistol, even unloaded, is a dangerous weapon as a matter of law; but whether it is a dangerous weapon, within the meaning of the statute against carrying concealed weapons, is to a great extent a question of fact, depending on the proposition whether at the date of the alleged offense it was carried for use as a weapon." *State v. Larkin*, 24 Mo. App. 410, 412.

#### Razor.

Rev. St. § 932, providing a punishment for any one who shall carry concealed certain specified weapons, or other dangerous weapons, does not include a razor. *State v. Nelson*, 38 La. Ann. 942, 944, 58 Am. Rep. 202.

#### Stone.

"A dangerous weapon is one likely to produce death or great bodily harm. A stone may or may not be a dangerous weapon, depending upon its size and other circumstances." *State v. Dineen*, 10 Minn. 407, 411 (Gil. 325, 327).

#### Timber.

"Dangerous weapon," as used in Acts No. 43 and 44 of 1890, which impose punishment on any one who shall shoot, stab, cut, strike, or thrust any person with a dangerous weapon, etc., means any weapon which is likely to produce death or great bodily injury, and includes a large piece of timber. *State v. Alfred*, 10 South. 887, 44 La. Ann. 582.

## DARK BAY.

The term "dark bay mare mule," in an indictment charging that defendant obtained credit by false representations in mortgaging a dark bay mare mule, is not so descriptive of a mouse-colored mare mule that evidence of such representations as to the latter mule will sustain a conviction. *Berrien v. State*, 9 S. E. 609, 83 Ga. 381.



## DARKNESS.

"Darkness" is sometimes defined as an absence of light, so that, where a complaint alleged that an injury was caused on account of the "darkness" at an excavation, defendant, under a general denial, could have introduced testimony showing that a light was maintained at this excavation; the question of light or darkness being put in issue by the complaint and denial. *Collett v. Northern Pac. Ry. Co.*, 63 Pac. 225, 227, 23 Wash. 600.

## DATE.

"The primary signification of the word 'date' is not time in the abstract, nor time taken absolutely, but, as its derivation plainly indicates, time given or specified; time in some way ascertained and fixed. This is the sense in which the word is commonly used. When we speak of the date of a deed, we do not mean the time when it is actually executed, but the time of its execution as given or stated in the deed itself. The date of an item or of a charge in a book account is not necessarily the time when the article charged was in fact furnished, but simply the time given or set down in the account in connection with such charge." As used in *Nix. Dig.* p. 527 (revised page 671), providing that a mechanic's lien cannot be enforced unless the summons on the suit for that purpose shall be issued within one year from the "date" of the last work done or materials furnished in such claim, "date" must be taken to mean the time when such work was done or materials furnished as specified in the plaintiff's written claim. *Bement v. Trenton Locomotive & Machine Mfg. Co.*, 82 N. J. Law (3 Vroom) 513, 515.

The word "date," in 55 Geo. III, c. 185, requiring certain bills, not exceeding two months after date, to bear a certain stamp, means the period of payment expressed on the face of the bill. *Upstone v. Marchant*, 2 Barn. & C. 10, 11.

In Comp. St. c. 80, art. 1, § 16, providing that forfeiture of sales of educational lands may be entered after 90 days from the date of such published notice, the word "date" means the appointed time at which the event or publication takes place, and not the date inserted in the public notice. *State v. Henton*, 67 N. W. 443, 445, 48 Neb. 488.

Laws 1880, c. 550, § 6, providing that the commissioners of assessment appointed to determine what relief should be awarded in respect to each lot or parcel of land affected by the improvement should in each case file a certificate, and that from the filing of the certificate the amount fixed thereby, with interest from the date thereof, should be the extent of the lien, should be construed to mean the date of the filing of the certifi-

cate; for it is the filing which gives the decision of the commissioners its vitality, authority, and force, and not the written statement on the certificate as to when it was made or written. The word "date" does not always mean such statement, but as frequently means the time when an event has happened, as, for instance, the date of a battle, a birth, a death, etc. *Smith v. City of New York*, 4 N. Y. Supp. 449.

### As day, month, and year.

A complete date always includes the year, month, and day, so that where a testator, in an olographic will, only wrote the month and day of the month in his own handwriting, the year being printed on the paper used, the requirement that an olographic will, including date, must be entirely in the handwriting of testator, was not complied with. *Succession of Robertson*, 21 South. 586, 587, 49 La. Ann. 868, 62 Am. St. Rep. 672.

"Date" means the same in its legal as in its ordinary sense, and imports the day of the month, the month, and the year; the day of the month being as essential a part of the date as the month or the year. A requirement that a will be dated extends to every part of the date. *Heffner v. Heffner*, 20 South. 281, 48 La. Ann. 1068.

A note dated March 4, 1885, promising to pay "on the 5th of March after date," should be construed as maturing on the 5th of March, 1886, rather than on the 5th of March, 1885, as the date of the note included the month and year, as well as the date on which it was executed. *Neal v. Reams*, 14 S. E. 617, 88 Ga. 298.

"Date," as used in Act 1872, § 10 (St. 1872, p. 813), requiring a date to be affixed to the warrant issued by the superintendent of streets, authorizing the collection of street assessments by the contractor doing the work, includes the month and day of the month, as well as the year. *Shipman v. Forbes*, 32 Pac. 599, 97 Cal. 572.

### As referring to fraction of day.

In Gen. St. 1894, § 5309, providing that service of summons upon the garnishee shall bind all property in his hands at the date of such service, the date means time of the service of summons, and will not be construed to mean during the day of such service. *McLean v. Sworts*, 71 N. W. 925, 926, 69 Minn. 128, 65 Am. St. Rep. 556.

"Prior in date," as used in a policy of insurance, referring to other policies on the same risk, the expression was equivalent to "prior in time," and therefore fractions of days might be considered in deciding the priority. *Brown v. Hartford Ins. Co. (Conn.)* 3 Day, 58, 67.

The date of the deed is not the hour or minute when the deed was executed, but a

memorandum of the day when the deed was delivered. This day in a legal sense is an indivisible point of time, there being no fraction of a day. On this principle the day on which the instrument is dated, in the computation of time, is excluded. *Oatman v. Walker*, 33 Me. 67, 71.

#### As figures or words.

The date of the commission of an offense, as set forth in the indictment, is the allegation of the day of the month and the year in words at length, and not the representing of such time by the use of figures. *Finch v. State (Ind.)* 6 Blackf. 533.

#### Of appointment.

The phrases "after date of appointment" and "from such date," in Rev. St. § 1556 [U. S. Comp. St. 1901, p. 1067], relative to the annual pay of assistant surgeons in the navy, and providing for increases thereof after the expiration of so many years after date of appointment, or from such date, refers, not to the original entry of the officer into the service as an assistant surgeon, but to the notification by the Secretary of the Navy that he has passed his examination for promotion to the grade of surgeon. *United States v. Moore*, 95 U. S. 760, 761, 24 L. Ed. 588.

#### Of bankruptcy.

"Date of bankruptcy," as used in the bankruptcy act, with reference to time, shall mean the date when the petition was filed. U. S. Comp. St. 1901, p. 8419.

#### Of deed.

A statute requiring a mortgage to be recorded within a certain number of days from its date refers to the date of the delivery of the deed, and not to the date stated in the testimony clause. *Orcutt v. Moore*, 134 Mass. 48, 52, 45 Am. Rep. 278.

When there is no date in a deed, or an impossible date, a reference in the deed to its date is construed to mean delivery. But, where there is a sensible date, that word in other parts of the deed means the day of the date, and not of the delivery. All the authorities give a definite meaning to the word "date" in general, but show that it may have a different meaning when that is necessary, ut res valeat. *Styles v. Wardle*, 4 Barn. & C. 908.

#### Of foreclosure sale.

The "date of the foreclosure sale," in an agreement between a judgment creditor and an insolvent railway for reorganization, the creditors assigning their judgment to the reorganizers in consideration of first mortgage bonds of the new company, it being provided that such bonds should be delivered within six months after the date of the foreclosure sale, meant the date when

the sale was completed, and not merely the date when the property was bid off, or the date of the confirmation. *Houston, E. & W. T. Ry. Co. v. Keller*, 90 Tex. 214, 220, 37 S. W. 1062, 1065.

#### Of issue.

The expression "date of issue," as used in Act Wash. March 29, 1890, requiring bonds by a city to bear the date of their issue, should be construed in the sense in which it is used in financial parlance, in which, when applied to notes, bonds, etc., of a series, it usually means the arbitrary date fixed as the beginning of the term for which they are to run, without reference to the precise time when convenience or the state of the market may permit of their sale or delivery. *Yesler v. City of Seattle*, 25 Pac. 1014, 1019, 1 Wash. St. 308; *Gage v. McCord (Ariz.)* 51 Pac. 977, 979.

In Act Cong. March 7, 1861, § 16 (12 Stat. 246), providing that all patents hereafter granted shall remain in force for the term of 17 years from the date of issue, and all extensions of such patents are hereby prohibited, date of issue means the time from which they date, which may be any time within six months prior to the actual issue, and does not mean the date when such patents were actually issued. *De Flores v. Raynolds (U. S.)* 8 Fed. 434, 442.

#### Of original importation.

Rev. St. § 2970, providing that any merchandise deposited in bond in any public or private bonded warehouse may be withdrawn for consumption within one year from the date of the original importation, means the date of the arrival of the goods at the interior port of destination. *Farwell v. Spalding (U. S.)* 24 Fed. 18.

#### Of sale.

"Date of sale," as used in a statute requiring all actions to redeem land from a tax sale to be made within five years after the date of sale, means the date on which the land is sold, and does not mean the date on which possession is taken under such sale. *Mitchell v. Etter*, 22 Ark. 178, 181.

#### DATED ON THE GROUND.

A notice of location of a placer mining claim, which contains the name of the locators, the date of location, and a sufficient description, all as required by Rev. St. § 2324 [U. S. Comp. St. 1901, p. 1426], is not invalidated by the fact that the date is preceded by the words "dated on the ground"; for such words neither add to nor take away from the notice any essential requisite thereof, and constitute a mere surplusage of words. *Preston v. Hunter (U. S.)* 67 Fed. 996, 998, 15 C. C. A. 148.

## DAUGHTER.

A daughter is an immediate female descendant, and not an adopted daughter, a stepdaughter, or a daughter-in-law; and hence an indictment charging incest with defendant's daughter is sufficient. *People v. Kaiser*, 51 Pac. 702, 703, 119 Cal. 456.

The words "daughter of B.," in a notice by a town furnishing support to paupers to the town liable therefor, that the former has furnished the support to B. and the daughter of B., is not a sufficient designation of the daughter. *Chichester v. Pembroke*, 2 N. H. 530, 531.

### All descendants in direct line.

The word "daughters," though generally applicable only to the children of the first degree, is sometimes used to signify all the descendants in the direct line. *Civ. Code La.* 1900, art. 3556, subd. 27.

### Daughter of full age.

Under Gen. St. 1878, c. 66, § 83, providing that a father, or, in case of his death or desertion of his family, the mother, may prosecute as plaintiff for seduction of the daughter, the word "daughter" does not mean the same as child, or minor child, but will include a daughter of full age. *Schmit v. Mitchell*, 61 N. W. 140, 59 Minn. 251.

### Grandchild.

"Daughter," as used in a will devising property to testator's sons in trust for his "daughter," should be construed in a representative sense, meaning daughter and her children. *Buchanan v. Lloyd*, 41 Atl. 1075, 1077, 88 Md. 642.

A testator devised a remainder of his estate to the sons and daughters of A. At the date of the will some were dead and some were living. Held that, though the testator was aware of this fact, their deaths not having been alluded to in the will, and they being therein regarded as alive, and the instrument showing that its object was to provide a share of the testator's bounty for the children of those deceased, the words "sons and daughters of A." did not mean those merely who were alive at the death of the testator, but included as well the descendants of A.'s children who were dead at that time, who were entitled to the share which their ancestors, if living, would have taken. *Jamison v. Hay*, 46 Mo. 546.

The general rule is that when an express limitation to a particular class of issue by an appropriate term of designation, as "son" or "daughter," is followed by the words, "In default of issue or other kindred thereto," introducing an ulterior devise, these words are referable to the object of that limitation, and not to an indefinite failure of issue. They ordinarily do not refer

to issue at large, and therefore do not commonly furnish ground for implication of an estate tail in the first degree. *Haldeman v. Haldeman*, 40 Pa. 29, 35.

### Illegitimate child.

"Daughter," as used in an indictment charging one with having carnal intercourse with his daughter, should be construed to include an illegitimate, as well as a legitimate, child. *State v. Laurence*, 95 N. C. 659.

When the word "daughter" is employed in a will, the presumption of law is that a legitimate child is intended. *Ward v. Epy*, 25 Tenn. (6 Humph.) 447, 450.

## DAY.

See "Civil Day"; "Clear Days"; "Election Day"; "Entire Day"; "Judicial Day"; "Law Day"; "Legal Day"; "Natural Day"; "Next Day"; "Nonjudicial Day"; "School Day"; "Sixth Day"; "Whole Day."

The term "day," as used in contradistinction to "night," in determining whether a breaking and entering had been in the nighttime, as required to constitute burglary, as said by Blackstone, "anciently was accounted to begin only at sunrise and to end immediately upon sunset; but the better opinion seems to be that, if there be daylight or crepusculum enough begun or left to discern a man's face withal, it is no burglary. But this does not extend to moonlight." *Nicholls v. State*, 32 N. W. 543, 545, 68 Wis. 416, 60 Am. Rep. 870 (citing 4 Bl. Comm. 224); *Klieforth v. State*, 59 N. W. 507, 508, 88 Wis. 163, 43 Am. St. Rep. 875; *State v. McKnight*, 16 S. E. 319, 320, 111 N. C. 690.

Under the rule as to the entry of actions, requiring that no civil action shall be entered after the second day of the term, and requiring all pleas in abatement to be filed within the first four days of the term, the practice has been to consider the court open for such entry of actions and filing of pleas during the entire days named, without reference to the adjournments of court, except when the session shall terminate within such time. *Colby v. Knapp*, 13 N. H. 175, 177.

### As eight hours.

In all contracts hereafter made between any owner, lessee, or operator of any coal mine, with any miner or laborer for his services as such, the word day, when used, shall be construed to be eight hours. *Rev. St. Wyo.* 1899, § 2587.

### As indivisible point of time.

A day is an indivisible point of time, except where it must be cut up to prevent injustice. In the sense of the statute relat-

ing to the computation of time—that is, of the days within which a certain act must be performed—it has neither length nor breadth, but simply position, without magnitude. If the time for redemption is fixed at one day after a sale, that day could not be the day of the sale. The time mentioned must be the following day. *Edmundson v. Wragg*, 104 Pa. St. 500, 502, 49 Am. Rep. 590; *Maxwell v. Jacksonville Loan & Improvement Co.* (Fla.) 84 South. 255, 265.

A “day,” in legal consideration, is punctum temporis, and the law knows no fraction of it; and yet, when justice requires, this maxim yields, and the exact time when an act was performed may be shown by parol evidence. *Brainard v. Bushnell*, 11 Conn. 16, 17, 24.

A day is in law and in fact some period of a year which is the shortest ordinarily recognized at common law. *Attorney General v. Borough of Anglesea*, 33 Atl. 971, 58 N. J. Law (20 Vroom) 372.

A day is a continuous period of 24 hours commencing at midnight, as the unit of measure, and in law no notice of fractions therein is taken; but it is considered more accurately as a point, and therefore indivisible. The legal fiction that a day is an indivisible point of time is not always adhered to. Ordinarily it works no injustice, but is useful for convenience, and often necessary for certainty of computation. *Cummins v. Holmes*, 11 Ill. App. (11 Bradw.) 158, 161.

In a computation of time within which legal obligations must be performed, is the entire 24 hours, beginning at 12 o'clock p. m., and extending until 12 o'clock the next night. Fractions of a day in statutes or legal proceedings, or in contracts, are not generally considered. However, when the rights of parties depend on the precedence of time in the same day, or upon the given hour or fraction of a day, it may be alleged or proved as any other fact. *Towell v. Hollweg*, 81 Ind. 154, 158.

It is a well-known rule of the common law that a day comprises 24 hours, extending from midnight to midnight, including morning, evening, and night, and is called a “natural day.” When a day is spoken of in law, it comprehends that period of time. When an act is to be done on a particular day, it may be done at any time between those hours; and, of course, a prohibition to do an act on a particular day must comprise the same period. Lord Coke says of “days”: “Some are natural, and some are artificial.” The natural day consists of 24 hours, and comprehends the solar day and the night, and therefore, in indictments of burglary and the like, we say “in the night” of the same day. *Fox v. Abel*, 2 Conn. 541, 542 (citing Co. Litt. 135).

In a contract providing that a certain act must be performed within eight days, fractions of days are not to be regarded; but the term means full days, and therefore the day on which the act is done is to be counted as a whole day. *Brown v. Buzan*, 24 Ind. 194, 195.

Code Civ. Proc. § 3251, relating to the taxation of costs by the clerk, and providing that the costs are “for the trial of an issue of fact \$30, and, when the trial necessarily occupied more than two days, \$10 in addition thereto,” does not mean that, in computing the time, fractions of days are to be considered as whole days, so as to entitle the defendants to the extra costs for a trial commenced in the evening of one day and continued to the morning of the second day thereafter, but meant the time actually employed in the trial of the case, in the same manner as if speaking of a day’s work or labor. *Washburne v. Oliver* (N. Y.) 62 How. Prac. 482, 483.

The law ordinarily takes no notice of portions or fractions of a day. It is only where the precise hour becomes material, as, for instance, in ascertaining the priority of liens, that a different rule obtains. *Haden v. Buddensick* (N. Y.) 49 How. Prac. 241, 246.

Act March 12, 1875 (1 Rev. St. 1876, p. 467), declares that the sheriffs of the several counties of the state shall tax and charge for boarding each prisoner 60 cents per day. Held that the word “day,” in this connection, was not used to designate an indivisible unit of time to be so paid for, nor was such statute an example of the rule that the court would not take judicial notice of divisions or fractions of a day, so as to authorize the sheriff to charge full fees for the board of a prisoner during the third or half of a day, but the word “day” was used as a divisible unit, from which the actual amount due the sheriff might be ascertained by computation. *Pressley v. Marion County Com’rs*, 80 Ind. 45, 47.

As used in Code Civ. Proc. tit. 7, § 6, providing for the attachment of range stock running and roaming at large, and defining what shall constitute a sufficient service of process between the 1st day of November and the next succeeding 15th day of May, and that certain copies and notices shall be filed with the recorder of the county wherein such property is running at large, should be construed to include any hour of the 24 hours of a day, so that a filing in the office of the recorder on the 14th day of May, in the nighttime, at 10:30 p. m., was such a filing on the 14th day as to be deemed public records and to import notice. Blackstone gives this definition: “In the space of a day the 24 hours are generally reckoned; the law generally rejecting all fractions of a day in order to avoid disputes.” *Harmon v. Com-*

stock Horse & Cattle Co., 23 Pac. 470, 472, 9 Mont. 243.

A day, in law, imports the entire day; but that a day in law is not divisible is a mere fiction, only observed for the purpose of justice, and never adhered to when it would work mischief. When rights attach from the orders of court, the event must be regarded, and not the name of that fraction of time called a day; and under a statute providing that the lands and tenements of a debtor shall be open for any judgment against the debtor from the first day of the term at which judgment is rendered, the word "term" is inclusive, and includes the first day, so that a debtor against whom a judgment is rendered in the fore part of the first day of the term cannot dispose of his land in the fore part of the day, so as to put it beyond the reach of his creditors. *Follett v. Hall*, 16 Ohio, 111, 112, 47 Am. Dec. 365.

Acts 1874-75, c. 24, § 2, providing that any railroad company allowing any freight received for shipment to remain unshipped for more than five days, in the absence of an agreement between the company and shipper fixing the time of shipment, shall forfeit a certain sum for each day the freight remains unshipped, means each whole day—a legal day being 24 hours; and hence the company is not liable until the full expiration of the sixth day after the delivery. *Keeter v. Wilmington & W. R. Co.*, 86 N. C. 346, 347.

#### As from midnight to midnight.

"A day is the space of 24 hours, from midnight to midnight." *State v. Brown*, 22 Minn. 482, 483; *Shaw v. Dodge*, 5 N. H. 462, 463; *Pulling v. People* (N. Y.) 8 Barb. 384, 386; *Schwab v. Mayforth* (N. Y.) 1 City Ct. R. 177, 178.

The word "day," in common parlance, and as relating to the time within which statutes must be acted on by the Governor, means a civil day of 24 hours, beginning and ending at midnight. *Opinion on Soldiers' Voting Bill*, 53 N. H. 607, 610; *Corwin v. Comptroller General*, 6 S. C. (6 Rich.) 390, 396; *People v. Hatch*, 33 Ill. 9, 187.

A day is the period of time between any midnight and the midnight following. *Pol. Code Cal.* 1903, § 3259; *Pol. Code Mont.* 1896, § 3144; *City of Eureka v. Diaz*, 89 Cal. 467, 470, 26 Pac. 961, 962; *El. M. Derby & Co. v. City of Modesto*, 38 Pac. 900, 901, 902, 104 Cal. 515.

A day, in its natural sense, consists of 24 hours, or the space of time which elapses while the earth makes a complete revolution upon its axis. *Bouv. Law Dict.*; *Abb. Law Dict.*; *Black, Law Dict.* As used in *Const.* art. 41, requiring that, as soon as bills are signed by the Speaker of the House and Pres-

ident of the Senate, they shall be taken at once and on the same day to the Governor by the clerk of the House of Representatives or the Secretary of the Senate, etc., the day begins at 12 o'clock midnight, and extends through 24 hours to the next 12 o'clock midnight. *State ex rel. State Pharmaceutical Ass'n v. Michel*, 27 South. 565, 567, 52 La. Ann. 936, 49 L. R. A. 218, 78 Am. St. Rep. 364.

A day, as used in commercial law, relating to commercial paper, is a unit of time, and means the entire 24 hours, commencing at 12 o'clock p. m. and expiring with the next 12 o'clock p. m. *Benson v. Adams*, 69 Ind. 353, 354, 35 Am. Rep. 220.

Day, generally, in legal signification, includes the time elapsing from one midnight to the succeeding one, and, as used in a statute prohibiting the sale of intoxicating liquors to another on "election days" means from midnight preceding the opening of the polls until the succeeding midnight. *Rose v. State*, 33 S. E. 439, 441, 107 Ga. 697; *Kane v. Commonwealth*, 89 Pa. 522, 525, 33 Am. Dec. 787; *Janks v. State*, 15 S. W. 815, 816, 29 Tex. App. 233; *Haines v. State*, 7 Tex. App. 30, 33.

"Day" as used in *Rev. St.* 1874, c. 46, § 113, requiring the filing of the statement of an election contest within 30 days after the person whose election is contested is declared elected, means the ordinary day of 24 hours and does not expire till midnight. *Zimmerman v. Cowan*, 107 Ill. 631, 636, 47 Am. Rep. 476.

A day, according to the statutory division of time, consists of 24 hours, and commences and ends at midnight, and is an adoption of the natural day, as distinguished from the artificial day, from sunrise to sunset. *Campbell v. International Life Ins. Soc. of London*, 17 N. Y. Super. Ct. (4 Bosw.) 298, 310.

Under the term "day," as employed in the phrase "first day of the week," as used in the chapter relating to crimes against the person and against public decency and good morals, is included all the time from midnight to midnight. *Gen. St. Minn.* 1894, § 6512; *Rev. St. Okl.* 1903, § 1962; *Rev. Codes N. D.* 1899, § 6839; *Pen. Code S. D.* 1903, § 41.

The word "day" in a statute means the entire 24 hours, which commences at 12 o'clock p. m., and ends at 12 o'clock p. m., running from midnight to midnight. *Sexton v. Goodwine* (Ind. App.) 68 N. E. 929.

The only standard of time in the computation of a day, or the hours of a day, recognized by the law of Georgia, is the meridian of the sun; and a legal day begins and ends at midnight, the mean time between meridian and meridian, or 12 o'clock p. m. (post me-

ridian); 12 hours after meridian. *Henderson v. Reynolds*, 84 Ga. 159, 162, 163, 10 S. E. 734, 7 L. R. A. 327.

When the Legislature used the term "day" in St. Dec. 24, 1799, prohibiting labor, business, or work of a secular nature, etc., "on the first day of the week, commonly called the 'Lord's Day,'" it is to be presumed that they intended it to be understood in its common acceptation; that is, a civil day, embracing 24 hours, and ending at midnight. *Shaw v. Dodge*, 5 N. H. 462, 465.

#### Portion of two days included.

"The word 'day' in law embraces the entire day; but that a day in law is not divisible is a mere fiction, only observed for the purpose of justice and never adhered to when it would work mischief." As used in a contract for the sale of a reaping machine, authorizing a test by using it for one day, it is to be understood with reference to the usage of farmers in working with such machines and is not to be limited to one calendar day, but may include a portion of two such days. *Fuller v. Schroeder*, 31 N. W. 109, 117, 20 Neb. 631.

An act prohibiting the sale of seed cotton "between the hours of sundown and sunrise of any day" means the time between sunset of one day and sunrise of the next succeeding day, and not a day beginning and ending at 12 o'clock night, though such is the legal significance of the term "day." *State v. Padgett*, 18 S. C. 317, 321.

An ordinance providing that it should be unlawful to keep any saloon, barroom, or dramshop open, or to sell or give away any intoxicating drinks therein, "between the hours of 11 o'clock p. m. and 5 o'clock a. m. of each and every day," means the period in every day between the hours of 11 p. m. and 5 a. m., and is the same period, whether designated as the period between 11 p. m. and 5 a. m., or between 5 a. m. and 11 p. m., of each and every day, and does not mean the period from 11 o'clock p. m. until 5 a. m. the following day. The term "day" has a well-known signification, and is defined by the Code to be the period of time between any midnight and the midnight following. *City of Eureka v. Diaz*, 26 Pac. 961, 962, 89 Cal. 467.

#### Sunday excluded.

Within the meaning of the rule that the prior indorser must have notice of the protest of a bill of exchange the next day, the next business day is meant. *Davis v. Hanly*, 12 Ark. (7 Eng.) 645, 650.

The Chicago city charter requires objections to special assessments to be filed at least one day prior to the meeting of the common council, at which the confirmation of the assessment will be applied for. Held,

that the word "day", as there used, was used to express an intention that an entire day should intervene between the last day of publication of the notice of confirmation and the action of the council, and that that day should be a business day, and not Sunday, so that, where the last day of publication was on Saturday, and the council confirmed the assessment on the following Monday, the intervening Sunday being dies non juridicus, the parties interested had no opportunity, such as the law contemplated, to file their objections, and the assessment confirmed was invalid. *Burton v. City of Chicago*, 53 Ill. 87.

Sunday is not a day, within Sp. Laws 1871, c. 32, § 26, requiring publication of a notice of assessment for local improvements for a certain number of "days." *Sewall v. City of St. Paul*, 20 Minn. 511, 521 (Gil. 459, 467).

Act 1862 provides that the supervisors may do street work after notice of their intention to do so in the form of a resolution, describing the work and signed by their clerk, has been published for a period of 10 days. Held, that the 10 days mentioned in the act did not exclude Sundays by any exception, and hence Sundays should be counted in computing the time prescribed. *Taylor v. Palmer*, 31 Cal. 240, 241, 244; *Miles v. McDermott*, 31 Cal. 270, 271.

"Days," as used in Const. art. 4, § 5, providing that the Legislature shall not remain in session longer than 50 "days," means working days; and hence Sundays are to be excluded from the computation by which the end of the session is to be determined. *Ex. parte Cowert*, 9 South. 225, 226, 92 Ala. 94.

Acts 1874-75, c. 240, § 2, making it unlawful for any railroad company to allow any freight received for shipment to remain unshipped for more than five days, unless otherwise agreed between the company and the shipper, means five full running days, including Sunday, whenever it intervenes. *Keeter v. Wilmington & W. R. Co.*, 86 N. C. 346, 347.

"Days," within a statute authorizing motion for new trial in four days, does not include Sunday. *National Bank of the Metropolis v. Williams*, 46 Mo. 17, 19.

Within a statute limiting time for appeals from justices' courts to six days, Sundays are included. *Patchin v. Bonsack*, 52 Mo. 431, 434.

The days within which appeals are allowed to be entered do not include Sundays. *Neal v. Crew*, 12 Ga. 93, 94.

Where a loading or unloading is required by charter party to be within a certain number of days generally, or so many working days, they do not include Sundays or custom

house holidays, but days otherwise, where the words are running days. *Field v. Chase* (N. Y.) *Lalor*, Supp. 50, 52.

Rev. St. c. 24, art. 9, § 27, providing that the commissioners appointed to make a special assessment shall give notice of the time at which a final hearing will be had on such assessment roll by publishing the same at least "five successive days" in a daily newspaper, if one is published in the city or village, should be construed to include Monday as successive to Saturday; Sunday not being a judicial day. *McChesney v. People*, 34 N. E. 431, 145 Ill. 614.

Where Rev. St. 1892, c. 24, art. 9, § 28, requires the commissioners appointed to make a special assessment to cause at least 10 days' notice to be given by posting notices, in computing the time thereunder the Sundays intervening between the day of posting and the day of the hearing are to be counted as days. *Gordon v. People*, 39 N. E. 560, 561, 154 Ill. 664.

#### As twenty-four hours.

The whole time of the term of a court is not to be considered as one day. In England, for some purpose, it was so considered, but by our legislation natural days are to be regarded. In every instance in our laws where the word "day" is mentioned, a natural day is meant. *Friar v. Ray*, 5 Mo. 510, 512.

In an agreement by which plaintiff contracted to transport coal by a canal from W. to S., consigned to defendant, who was to have three full working or week days after the arrival of the boat in which to discharge the cargo, and to pay the master for any time, exclusive of Sundays, that the boat was detained after the expiration of said three days, the word "days" was held not to be restricted to working days of 10 hours each, but, in estimating the damages for detention, twenty-four hours was to be reckoned as a day. *Wiles v. New York Cent. & H. R. R. Co.* (N. Y.) 4 *Thomp. & C.* 264, 266.

"Day," as used in the election law, providing that election officers for each day actually necessarily devoted by them to the discharge of their duties, shall receive \$2 per day, will be held to mean the ordinary legal day of 24 hours, and not the ordinary working day. *People v. Town Board of West Turin*, 59 N. Y. Supp. 234, 235, 27 Misc. Rep. 470.

As used in 2 Rev. St. 1876, p. 162, providing that every action shall stand for issue and trial at the first term after it is commenced, when the summons has been served on the defendant 10 days or publication has been made for 30 days before the first day of the term; the phrase "10 days" has no peculiar or technical meaning in law but is used in its ordinary sense. The word "day" in its legal, as well as in its plain or ordinary and usual, sense, means a period of time con-

sisting of 24 hours, and including the solar day and the night. *Helphensteine v. Vincennes Nat. Bank*, 65 Ind. 582, 589, 32 Am. Rep. 86.

In its ordinary sense a day is that space of time in which the earth makes one revolution on its axis. The astronomical day is from noon to noon. The civil day is from midnight to midnight. In the sense of the law, a day includes the whole 24 hours; the law generally rejecting all fractions of a day, in order to avoid disputes. 2 Bl. Comm. 141; *Bouv. Law Dict.* tit. "Day." The effect is to render the day a sort of indivisible point, so that any act done in the compass of it is no more referable to one than to any other portion of it; but the act and the day are co-extensive, and therefore the act cannot be said to be passed until the day is passed. *Lester v. Garland*, 15 Ves. 257. The word "day," when used in a contract or a statute, unless it is some way restricted, means the whole 24 hours. *Miner v. Goodyear India Rubber Glove Mfg. Co.*, 26 Atl. 643, 62 Conn. 410.

"Days," as used in the Constitution, giving the Governor 10 days, exclusive of Sundays, in which to examine and consider an act of the Legislature before signing, the term days was used in its popular and legal sense, meaning that the Governor must have the full period of 10 days of 24 hours each, excluding Sundays, within which to perform his constitutional duty. *Broughton v. Haywood*, 61 N. C. 380, 383.

The promisor in a contract for the payment of money on a designated day has the whole of that day in which to pay it, and no cause of action arises until it has fully expired, even on demand made on that day. *Knowlton v. Tilton*, 38 N. H. 257, 263 (citing *Webb v. Fairman*, 3 Mees & W. 474).

#### As working day.

In a contract that a company would construct a factory capable of manufacturing a certain number of cans per day, the word "day" will be construed to mean the ordinary working day, and not twenty-four hours. *Fay & Egan Co. v. Brown*, 71 N. W. 895, 897, 96 Wis. 434.

Code, § 268, providing that the compensation of porters in the Senate shall be at the rate of \$4 per day, means whatever period of the 24 hours the legislators choose to remain in session. *Robinson v. Dunn*, 19 Pac. 878, 77 Cal. 473, 11 Am. St. Rep. 297.

The term "day," as used in a contract providing for a payment of so much a day, means a working day. *McClusky v. Klosterman*, 25 Pac. 366, 370, 20 Or. 108, 10 L. R. A. 785.

The term "day," in a contract of employment, means 10 hours' work, where it was the universal usage in the business in which

the employé was employed to call 10 hours' labor a day's work. *Hinton v. Locke* (N. Y.) 5 Hill, 437, 439.

Ordinarily day is the space of time which elapses while the earth makes a complete revolution on its axis, but artificially it is the time between the rising and setting of the sun. And in Code, § 3825, providing that the commissioners of insanity shall be allowed at the rate of \$3 per day each, for the time actually employed in the duties of their office, the term is not to be so construed, and the statute entitles the commissioners to full compensation whenever they perform services on a given day, regardless of the number of hours spent in such employment. *White v. Dallas County*, 54 N. W. 368, 369, 87 Iowa, 563.

Where a statute provides that a county superintendent of schools shall receive \$5 per day for the time necessarily spent in the discharge of his duties, he is entitled to this daily compensation for each day on which it becomes necessary for him to perform any substantial official service, if he does perform the same, regardless of the time occupied in its performance, and the time so spent constitutes a day's service for the superintendent. *Smith v. Jefferson County Com'rs*, 13 Pac. 917, 920, 10 Colo. 17.

#### In computation of time.

The date of the act from which future time is to be ascertained is to be excluded from a computation, not only in regard to contracts, liens, and other instruments, but to statutes and the proceedings under them. *Weeks v. Hull*, 19 Conn. 376, 380, 50 Am. Dec. 249.

Code, § 3730, providing that the adverse party shall have five days' notice of the day a commission to take testimony will issue, does not mean five entire days' notice; but the mode of computing the time is to exclude the first and include the last day the commission is to issue. *Bonney v. Cocke*, 16 N. W. 139, 61 Iowa, 303.

A statute requiring creditors in insolvency proceedings to file their plea within 20 days after the debtor has filed his declaration means 20 days thereafter, computed by either excluding one day and including the other, or by including such first day and excluding the other. *State v. Jackson*, 4 N. J. Law (1 Southard) 323, 324.

A deed of trust requiring 30 days' notice of the sale of the property to be given means 30 days computed by excluding the day of publication and including the day of sale. *Magnusson v. Williams*, 111 Ill. 450, 454.

2 Gav. & H. St. p. 598, § 64, requiring an appeal to be taken from the justice of the peace within 30 days from the rendition of the judgment, means 30 days thereafter, computed by excluding the day of the rendition

of the judgment and including the day of taking the appeal. *Noble v. Murphy*, 27 Ind. 502.

In computing the time of delivering the list of the jury, the date of the delivery and the date of trial must both be excluded, where the statute provides that the person to be tried shall have two entire days to pass upon the list. *State v. McLendon* (Ala.) 1 Stew. 195, 197.

In computing time within which an act is to be done, the first day should be excluded and the last day included. *Hahn v. Dierkes*, 37 Mo. 574.

A contract to be performed in so many days, without saying more, excludes the day of the date of the contract from the computation. *Blake v. Crowninshield*, 9 N. H. 304, 307.

Acts 1874-75, c. 240, § 2, making it unlawful for any railroad company to allow freight to remain unshipped for more than "five days," unless otherwise agreed, means five full running days, exclusive of the day of delivery and the day of shipment; the law not taking notice of the fractions of a day. *Branch v. Wilmington & W. R. Co.*, 88 N. C. 570, 572.

A calendar day includes the time from midnight to midnight. Sunday, or any day of the week specifically mentioned, means a calendar day. A number of days specified as a period from a certain day within which, or after or before which, an act is authorized or required to be done, means such number of calendar days, exclusive of the calendar day from which the reckoning is made. Sunday or a public holiday, other than a half holiday, must be excluded from the reckoning, if it is the last day of any such period, or if it is an intervening day of any such period of two days. In computing any specified number of days, weeks, or months from a specified event, the day upon which the event happens is deemed the day from which the reckoning is made. The day from which any specified number of days, weeks, or months of time is reckoned shall be excluded in making the reckoning. *Laws N. Y. 1892, c. 677, § 27.*

#### DAY BY DAY.

A charter party providing for demurrage for "every day, day by day," is to be construed as referring to running days, and not working days, and all days are to be counted, including rainy days, Sundays, and other holidays. *The Oluf* (U. S.) 19 Fed. 459.

#### DAY CERTAIN.

The phrase "on a day certain," as used in St. 6 & 7 Vict. c. 20, § 16, ordering that every mandamus shall be tested and made returnable on a day certain before the queen.



etc., means a day in term. *Reg. v. Conyers*, 8 Q. B. 981, 991.

### DAY IN COURT.

The term "day in court" means the day on which a cause is reached for trial in pursuance of the forms and methods prescribed by law. It does not mean any day during a series of years, as there must necessarily be some end to every litigation. *Ketchum v. Breed*, 28 N. W. 271, 274, 68 Wis. 85.

The term "day in court," in the rule of the law that no one shall be personally bound until he has had his day in court, means until he has been duly cited to appear and has been afforded an opportunity to be heard. *Ferry v. Miltimore Elastic Steel Car Wheel Co.*, 45 Atl. 1085, 1086, 71 Vt. 457, 76 Am. St. Rep. 787.

### DAY LABORER.

"A day laborer is one who performs day labor or performs labor by the day." *Groves v. Kansas City, St. J. & C. B. R. Co.*, 57 Mo. 304, 307.

"A day laborer is one whose engagement to labor is but a day long. At the end of each day both he and his employer are free." The term is used in such sense in Act Ga. 1845, providing that all day laborers shall be exempt from a process and liability of garnishment on their daily, weekly, or monthly wages, whether in the hands of employers or others. *Caraker v. Matthews*, 25 Ga. 571, 576.

#### Commercial traveler.

A commercial traveler, whose business it is to travel and sell goods for his employer, though employed and paid for his services by the day, is not a day laborer, within Code Ga. § 3554, exempting from garnishment the wages of a day laborer. *Briscoe v. Montgomery*, 20 S. E. 40, 41, 93 Ga. 602, 44 Am. St. Rep. 192.

#### Conductor.

A conductor of a passenger or freight train, who is not employed for the purpose of doing manual labor, but whose duty it is to have general control and superintendence of the train and its running and management, and supervision of the passengers and baggage, is not "a journeyman, mechanic, or a day laborer," within Code, § 3554, exempting from garnishment the wages of a journeyman, mechanic, or day laborer. *Miller v. Dugan*, 77 Ga. 886, 888, 4 Am. St. Rep. 90.

#### Engineer.

Within the meaning of Code, § 3554, which declares that all journeymen, mechanics, and day laborers shall be exempt from the process and liabilities of garnishment, etc., includes a locomotive engineer; hence

such engineer would be within the protection of the statute. *Sanner v. Shivers*, 76 Ga. 335, 336.

#### Superintendent of factory.

Within Code, § 3554, which exempts from liability and the process of garnishment the wages of "journeymen, mechanics, and day laborers," the boss or director of an entire department of an extensive factory, who employs and discharges the hands that work under him, but does no manual labor, merely directing the work of the operatives under him, is not a day laborer, though the words have been construed to include the overseer of a plantation, who not only directed the operations of the hands employed, but labored with them, and also clerks employed in stores. *Kyle v. Montgomery*, 73 Ga. 337, 343.

### DAYLIGHT.

Daylight, in the law relating to burglary, means the light caused by the coming or rising sun. *People v. Gibson*, 25 N. W. 816, 817, 58 Mich. 868.

The term "daylight," in an insurance policy providing that kerosene for lights shall be drawn by daylight only, does not denote daytime as opposed to nighttime, but is intended to prevent the use of any artificial light, from which the oil might catch fire. *Gunther v. Liverpool, L. & G. Ins. Co.*, 10 Sup. Ct. 448, 449, 134 U. S. 110, 83 L. Ed. 857.

### DAY OF DATE.

In construing a deed requiring certain memorials to be enrolled within 20 days of the execution, and to contain the day the deed bears date, Lord Eldon says: "The 'day of the date' of a deed is, I apprehend, the date of the execution; and there would be great singularity in the law if these words, 'the date of the execution' and 'the day the deed bears date,' have not the same meaning." *Underhill v. Horwood*, 10 Ves. 206, 223.

### DAY OF SALE.

Date of sale, see, also, "Data."

"Day of sale," as used in a statute limiting an action for the recovery of real property sold for taxes to five years from the day of sale, will not be construed to mean the day on which the property was struck off by the treasurer to the bidder, but the day of the completion of the sale by the delivery and recording of the tax deed. *Eldridge v. Kuehl*, 27 Iowa, 160, 173, 175.

The words "day of sale," in Act April 8, 1869, § 138, fixing a period of limitation for actions to test the validity of a tax

sale, which begins to run from the "day of the sale," means the day on which the property is stricken off by the officer making the sales. In *Wain v. Shearman* (Pa.) 8 Serg. & R. 357, 11 Am. Dec. 624, and in *Eldridge v. Kuehl*, 27 Iowa, 160, similar statutes were construed to mean the completed sale, when the purchaser received his deed. But in *Mitchell v. Etter*, 22 Ark. 178, where the five-year limitation statute in regard to judicial and tax sales was under discussion, such construction was declared to be at war with both the letter and spirit of the enactment. *Radcliffe v. Scruggs*, 46 Ark. 96, 108.

### DAY OF TRIAL.

In Code Proc. § 427, regulating notice, etc., "day of trial" means the day fixed by law for the commencement of the term. *Green v. Charlotte, C. & A. R. Co.*, 6 S. C. (8 Rich.) 342, 344.

### DAY WORKMAN.

Within the meaning of Laws 1898, c. 186, providing that laborers and day workmen employed by the city of New York shall not be subject to competitive examination, includes a stream cleaner, whose duty requires him to keep clean the water running in streams, removing rubbish and other injurious materials therefrom, and to prevent pollution thereof. *People v. Dalton*, 68 N. Y. Supp. 258, 259, 49 App. Div. 71.

### DAY'S LABOR.

A day's labor of a laborer does not include the team which he drives. In a large sense the person whose teams are employed for another performs labor with them, whether he works himself or not; but in a stricter sense a day's labor of a man is that which he performs himself. This may include any mere implement of toll without which labor cannot be performed, but not the use of horse, any more than of steam, power. *Atcherson v. Troy & B. R. Co.* (N. Y.) 6 Abb. Prac. (N. S.) 329, 337.

### DAYS OF GRACE.

Days of grace are three days allowed to the maker or acceptor of a bill, draft, or note in which to make payment after the expiration of the time expressed in the paper. *Perkins v. Franklin Bank*, 38 Mass. (21 Pick.) 483, 485; *Bell v. First Nat. Bank*, 6 Sup. Ct. 106, 109, 115 U. S. 373, 29 L. Ed. 409 (quoting Chief Justice Shaw in *Perkins v. Franklin Bank*, 38 Mass. [21 Pick.] 483); *Mechanics' Bank of Baltimore v. Merchants' Bank of Boston*, 47 Mass. (6 Metc.) 13, 22; *Ferris v. Saxton*, 4 N. J. Law (1 Southard) 1, 19.

Days of grace are a certain number of days allowed the maker or acceptor of a

bill, draft, or note before he can be sued. Originally they were called days of grace because they were gratuitous, depending altogether on the will of the holder, and could not be claimed as a matter of right by the person bound to pay; and, although they still retain the name of grace, yet the custom of merchants recognized by law has long since reduced them to certainty, and given the acceptor or maker a title to claim them as a matter of right. *Thomas v. Shoemaker* (Pa.) 6 Watts & S. 179, 182.

The law merchant allowed three days after the date on which a note became payable in which it might be paid. By custom, however, these days became universally recognized, and, although still termed "days of grace," they are now considered, wherever the law merchant prevails, as entering into the constitution of every bill of exchange and negotiable note, both in England and the United States, and form so completely a part of it that the instrument is not due in fact or in law until the day of grace. *Fox v. Bank of Kansas City*, 1 Pac. 789, 791, 30 Kan. 441; *Blacker v. Ryan*, 65 Mo. App. 280, 241.

The usage of making the demand of payment of a promissory note or bill of exchange on the third day of grace has become so general that courts of justice will notice it ex officio, and, in the absence of any proof to the contrary, will presume that such was the understanding of all parties to the note when they put their names upon it. The allowance of any days of grace is in derogation of the common-law rule applicable to other contracts. They are emphatically the mere creatures of usage, varying in different countries to suit the views and convenience of men in business, originally gratuitous and not binding on the holder. When, therefore, the allowance of only three days of grace is said to be the law of the contract by bills of exchange and promissory notes, nothing more can be intended than that custom has so long sanctioned this rule that all dealers in paper of this description are understood to govern themselves by it. The law of the contract, properly speaking, is to pay when due, and that time is to be ascertained either from the contract per se, or that taken in connection with some known custom which the parties are presumed to have tacitly consented should be made a part of the contract; and where it is established that the custom of all the banks in Washington and Georgetown, from their first institution, had been to demand payment of notes due them on the fourth day after the time limited therein, and that this custom was known and well understood by an indorser of a note, such custom of allowing four days of grace is binding upon the parties. *Renner v. Bank of Columbia*, 22 U. S. (9 Wheat.) 581, 584, 586, 6 L. Ed. 166.

**DAYS' WORK.**

The term "days' work," as used in the constitution of an association of dredgers for the purpose of designating and maintaining a uniform scale of prices for dredging in New York Harbor and vicinity, to equitably distribute work, each member to be entitled to a certain percentage of the work done, figured on the basis of "days' work," means days actually worked by the machines of the several contractors; the capacity of the machines being, roughly speaking, gauged by their power. *Potter v. Morris & Cummings Dredging Co.*, 46 Atl. 537, 59 N. J. Eq. 422.

Act Cong. June 25, 1868 (15 Stat. 77), declaring "that eight hours shall constitute a day's work for all laborers, workmen, and mechanics now employed or who may hereafter be employed by or on behalf of the government of the United States," does not provide that the employer and the laborer may not agree with each other as to what time should constitute a day's work. There are some branches of labor connected with furnaces, steam, and gasworks where the labor and exposure of 8 hours a day would soon exhaust the strength of a laborer and render him permanently an invalid. The government officer is not prohibited from knowing these facts, nor from agreeing, when it is proper, that a less number of hours than 8 shall be accepted as a day's work. Nor does the statute intend that, where out of doors labor in the long days of summer may be offered for 12 hours at a uniform price, the officer may not so contract with the consenting laborer. The court said: "We regard the statute chiefly as in the nature of a direction from the principal to his agent that eight hours is deemed to be a proper length of time for a day's labor, and that his contracts shall be based upon that theory. It is a matter between the principal and his agent, in which a third party has no interest. We are of the opinion, therefore, that contracts fixing or giving a different length of time as a day's work are legal and binding upon the parties making them"—and held that, where a laborer in the habit of working for the government 12 hours a day at \$2.50 a day is informed by the proper authority that if he remains in the service at that compensation he must continue to work 12 hours a day, and he does so continue to work accordingly, he cannot afterwards recover for the additional time over 8 hours as a day's labor. *United States v. Martin*, 94 U. S. 400, 403, 404, 24 L. Ed. 128.

**DAYTIME.**

Daytime is the period between sunrise and sunset. *Pol. Code Mont.* 1895, § 8145; *Pol. Code Cal.* 1903, § 8260.

By the term "daytime," as used in the chapter defining and punishing burglary, is meant any time of the 24 hours from 30 minutes before sunrise to 30 minutes after sunset. *Pen. Code Tex.* 1895, art. 844.

Within St. 1874, c. 41, § 9, providing that prisoners having given bond are to have the liberty of the yard within the prison in the daytime, "daytime" has always been construed to mean that portion of the 24 hours in which a man's person and countenance are distinguishable. *Trull v. Wilson*, 9 Mass. 154.

A statute punishing the offense of breaking into a dwelling house in the daytime, no person being therein, requires proof that the breaking took place at a time of the day when there was sufficient daylight to distinguish a person's features. *Rex v. Tandy*, 1 Car. & P. 297.

Daytime means the time from the rising to the setting of the sun, and that portion of the time after the setting of the sun or before its rising during which there is sufficient natural light, other than moonlight, so that the countenance of a man may be distinguished. *Linnen v. Banfield*, 114 Mich. 93, 98, 72 N. W. 1, 2.

**DE BONIS NON.**

See "Administrator de Bonis Non."

**DE BONIS NON CUM TESTAMENTO ANNEXO.**

See "Administrator de Bonis Non cum Testamento Annexo."

**DE COMMUNICATO CAPIENDO.**

See "Writ de Communicato Capiendo."

**DE CORPORE COMITATUS.**

The phrase "de corpore comitatus" means from the body of the county; of the county; of the vicinage, originally, but as it appears in English statutes and in American laws and constitutions it means no more, as applied to jurors, than that they must come from some part of the county in which the action is laid, or where the crime is charged to have been committed. *State v. Kemp*, 34 Minn. 61, 63, 24 N. W. 349.

**DE FACTO.**

"De facto" means in law, as well as elsewhere, of fact; from, arising out of, or founded in fact; in deed; in point of fact; actually; really. *McCabon v. Leavenworth County Com'rs*, 8 Kan. 437, 442 (citing *Burr. Law Dict.*).

**DE FACTO ADMINISTRATOR.**

Any recognition by the probate court cannot make one an administrator de facto. No person can fill that position except after due appointment and qualification. *Pryor v. Downey*, 50 Cal. 388, 399, 19 Am. Rep. 656.

**DE FACTO BOARD OF DIRECTORS.**

Where seven persons, claiming to be directors of a corporation, met at a place other than that designated in the by-laws, and elected one of their number president, and it was afterwards decided that the election at which these directors were elected was illegal, but four of them, including the one elected president, were still directors by virtue of a previous valid election, but these alleged directors at the time they elected the president were not in possession of the company's office or records or seal or property, and had never done any official act prior to said meeting, it was held that such persons did not constitute a de facto board of directors. *Waterman v. Chicago & I. R. Co.*, 29 N. E. 689, 691, 139 Ill. 658, 15 L. R. A. 418, 32 Am. St. Rep. 228.

**DE FACTO CONTRACT OF SALE.**

A de facto contract of sale is one which has purported to pass the property from the owner to another, and where the owner of a chattel parts with that chattel to another, on a de facto contract, a purchaser from that other bona fide will obtain an indefeasible title. *Farmers' & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568, 575.

A contract of sale of goods to one who fraudulently personated and represented himself to be another—the goods being sold to such purchaser in reliance upon such representations by the seller, who believed that the purchaser was the person he represented himself to be—constitutes a de facto contract, and transfers the title in the goods delivered under such contract to such purchaser, so that the one purchasing from him will acquire a good title. *Edmunds v. Merchants' Dispatch Transp. Co.*, 135 Mass. 283, 284.

**DE FACTO CORPORATION.**

A de facto corporation is one existing under color of law. *Foster v. Hara*, 62 S. W. 541, 543, 26 Tex. Civ. App. 177.

A de facto corporation is a set of men claiming to be a legally incorporated company under an act of the Legislature, exercising all the powers and functions of a corporation, but without lawful authority in fact so to do. *Attorney General v. Stevens*, 1 N. J. Eq. (Saxt.) 369, 378, 22 Am. Dec. 526.

Where there has been a good-faith effort to organize a corporation under a statute au-

thorizing such incorporation, and corporate functions have been assumed and exercised, the organization becomes a de facto corporation. *Huntington Mfg. Co. v. Schofield*, 62 N. E. 106, 107, 28 Ind. App. 95.

A de facto corporation is one that exists under color of law. The mere fact that a town exercised jurisdiction outside of the limits of the territory incorporated does not render it a de facto corporation as to such territory. *Foster v. Hare*, 62 S. W. 541, 543, 26 Tex. Civ. App. 177.

There can be no de facto corporation unless the statute authorizes the formation of a de jure corporation. *State v. Stevens* (S. D.) 92 N. W. 420, 421.

In order to be a de facto corporation, there must be a right under the law to incorporate, and an attempt to comply with the law, but a failure to comply with some requirement thereof. *McLeary v. Dawson*, 87 Tex. 524, 538, 29 S. W. 1044. So, where articles of incorporation alleging that two of the incorporators are residents of the city are regularly filed in the office of the Secretary of State as required by law, and a certificate issued by the Secretary, and it afterwards appears that there were not two citizens of the state among the incorporators, as required by law, the corporation is de facto. *American Salt Co. v. Heidenheimer*, 15 S. W. 1038, 1039, 80 Tex. 344, 26 Am. St. Rep. 743.

Where a statute exists under which parties may lawfully incorporate, and an attempt is made to organize thereunder, and especially where the organization has assumed and for a long time has exercised all the corporate powers which the statute would have conferred, it has acquired a colorable right to exist, though it may be discovered that the incorporation was for some reason defective. It is a corporation de facto, and must be so regarded in a collateral proceeding. *Cedar Rapids Water Co. v. City of Cedar Rapids*, 91 N. W. 1081, 1088, 118 Iowa, 234.

A de facto corporation is one where the proceedings for its organization are irregular or defective, when by regularity of proceedings to incorporate it might be one de jure. Thus, where there was no law authorizing de jure municipal corporations, a de facto corporation could not exist. *City of Guthrie v. Wylie*, 55 Pac. 103, 106, 6 Okl. 61.

A de facto corporation exists where there is a law authorizing the creation of a corporation, and attempt to organize a corporation pursuant to it, and user as a corporation under such attempted organization. Color of apparent organization under some charter or enabling act does not mean that there should have been a full compliance with what the law requires to be done, nor a substantial compliance. The mere fact that

there is a law under which a corporation might be created, and that the parties have agreed among themselves to act and have acted as a corporation, is not sufficient to constitute them a corporation de facto. There must at least be a colorable compliance with a law under which a corporation de jure might be lawfully created by a substantial compliance with such law, and a user as a corporation under such attempted organization. *Johnson v. Okerstrom*, 73 N. W. 147, 149, 70 Minn. 303.

The expression "de facto corporation" is generally used to denote associations exercising corporate powers under color of more or less legal organization. Where there cannot be a corporation de jure, there cannot be one de facto. In order to constitute a corporation de facto, it is necessary that there should be either a charter or a law under which such a corporation could exist, with the powers it assumes to exercise, and a colorable compliance with the requirements of the charter of the law, and the user of the rights claimed under the same. *Brown v. Atlanta Ry. & Power Co.*, 39 S. E. 71, 73, 113 Ga. 462.

To constitute a de facto corporation, there are three requisites: (1) A charter or general law under which such a corporation as it purports to be might lawfully be organized; (2) an attempt to organize thereunder; and (3) the actual user of the corporate franchise. Hence a de facto corporation was constituted by a bona fide attempt to organize an irrigation district under the California irrigation act of March 7, 1887, providing for the creation of such districts as public municipal corporations, accompanied by an actual user of the corporate franchise. *Tulare Irrigation District v. Shepard*, 22 Sup. Ct. 531, 536, 185 U. S. 1, 48 L. Ed. 778.

A corporation de facto exists when, from irregularity or defect in the organization or constitution, or from some omission to comply with the conditions precedent, a corporation de jure is not created, but there has been a colorable compliance with the requirements of some law under which an association might be lawfully incorporated for the purposes and powers assumed, and a user of the rights claimed to be conferred by the law, when there is an organization with color of law, and the exercise of corporate franchises. *Owensboro Wagon Co. v. Bliss*, 31 South. 81, 132 Ala. 253, 90 Am. St. Rep. 907; *Snider's Sons Co. v. Troy*, 8 South. 658, 659, 91 Ala. 224, 11 L. R. A. 575, 24 Am. St. Rep. 887; *Stout v. Zulick*, 48 N. J. Law (19 Vroom) 599, 601, 7 Atl. 362; *McTighe v. Macon Const. Co.*, 21 S. E. 701, 705, 94 Ga. 306, 32 L. R. A. 208, 47 Am. St. Rep. 153.

A corporation de facto is an apparent corporate organization, asserted to be a cor-

poration by its members, and actually acting as such, but lacking the creative fiat of the law. In *Tayl. Priv. Corp.* 145, it is said that a de facto corporation may exist when a body of men are acting as a corporation under color of apparent organization, in pursuance of some charter or enabling act. Their organization may be imperfect, so that upon a quo warranto they could not show a sufficient compliance with the law to justify the exercise of corporate powers; but, as to parties dealing with them and as to each other, they are estopped to deny that they are what they hold themselves out to be. In a recent case in Minnesota (*Finnegan v. Noerenberg*, 53 N. W. 1150, 52 Minn. 239, 18 L. R. A. 778, 38 Am. St. Rep. 552) it was held that a de facto corporation exists when these three things concur, viz., a law under which the alleged corporation might be created, an attempt to organize under the law, and assumption and exercise of corporate powers under such attempted organization. In *Methodist Episcopal Union Church v. Pickett*, 19 N. Y. 482, only two things were held necessary, viz., the existence of a charter or law under which a corporation with the powers assumed might be lawfully created, and a user by the party to the suit of the right claimed to be conferred by such a charter or law. In *re Gibbs' Estate*, 27 Atl. 383, 384, 157 Pa. 59, 22 L. R. A. 276.

A de facto corporation is constituted by a user of corporate franchises, and by acts in the nature of corporate proceedings under the color of corporate organization, *Childs v. Smith* (N. Y.) 55 Barb. 45, 56; or where proceedings have been taken in professed compliance with some law authorizing the formation of a corporation, and there are acts of subsequent user, *Methodist Episcopal Union Church v. Pickett*, 19 N. Y. 482; or where there is a user of corporate franchises under color of an act authorizing the incorporation, *Bradley Fertilizer Co. v. South Pub. Co.*, 23 N. Y. Supp. 675, 676, 4 Misc. Rep. 172 (citing *Bank of Toledo v. International Bank*, 21 N. Y. 542).

In cases of corporations de facto there must have been at least an attempt made to organize under some law, and if no such attempt has been made, and yet the parties assume to act as if there had been, the concern is not a de facto corporation, and the parties connected with it are liable as copartners. *Bradley Fertilizer Co. v. South Pub. Co.*, 23 N. Y. Supp. 675, 676.

A de facto corporation is a corporation existing from the fact of its acting as such, though not in law a corporation. An association may not be able to justify itself when called on by the state to show by what authority it presumes to be and act as a corporation, but it may be so far a corporation that for reasons of public policy no one but the state will be permitted to question the lawfulness of its organization. Fa-

*negan v. Noerenberg*, 53 N. W. 1150, 1151, 52 Minn. 239, 18 L. R. A. 778, 38 Am. St. Rep. 552.

Where an association in fact existed as a corporation, acquiring property in that capacity, exercising powers and transacting business essential to accomplish the object and purpose of its creation, as expressed in the declaration intended as the articles of incorporation, and where it had the reputation of being a corporation, it was a corporation de facto. *Central Agricultural & Mechanical Ass'n v. Alabama Gold Life Ins. Co.*, 70 Ala. 120, 132, 133.

When parties associate themselves together for the purpose of organizing a corporation under some statute, and proceed in good faith to take all the steps professed necessary to complete such incorporation, and, on the faith of their actions and the law, engage in business as a corporation, there is a corporation de facto; and only the state can inquire, and that in a direct proceeding, whether the corporation be one de jure. *Pape v. Capitol Bank*, 20 Kan. 440, 445, 27 Am. Rep. 183.

Corporations may exist either de jure or de facto. If of the latter character, they are under the protection of the same law and are governed by the same legal principles as those of the former, so long as the state acquiesces in their existence and they exercise corporate functions. *Snider's Sons Co. v. Troy*, 91 Ala. 224, 8 South. 658, 11 L. R. A. 515, 24 Am. St. Rep. 887.

#### DE FACTO COURT.

A de facto court is a court that has been established by an act of Legislature apparently valid, which has gone into operation, and the office is filled and authority as a court exercised under the statute. *Burt v. Winona & St. P. R. Co.*, 18 N. W. 285, 287, 31 Minn. 472.

A de facto Court of Appeals cannot exist under a written Constitution which ordains one Supreme Court, and defines the qualifications and duties of its judges, and prescribes the mode of appointing them. Accordingly, where a Legislature attempted to abolish the constitutional Court of Appeals, and create in its stead a new court, such act did not create a de facto Court of Appeals, and there being no pretense that those assuming to act as such were added to the judges of the constitutional Court of Appeals, or were their successors, they were not de facto officers, even granting that there might be a de facto judge of the Court of Appeals. *Frame v. Trebble*, 24 Ky. (1 J. J. Marsh.) 205, 206.

#### DE FACTO DIRECTOR.

Those who usurp the office of directors and exercise the functions of the board of

directors under color of election or appointment in itself not legal become directors de facto; and the official acts of such board are valid, in reference to rights which innocent third parties or strangers to the corporation may thereby acquire. *Hulings v. Hulings Lumber Co.*, 18 S. E. 620, 624, 38 W. Va. 351.

#### DE FACTO DOMICILE.

In the French law the term "domicile," in the full sense of that term as there used, means something in the nature of nationality or citizenship, and can only be obtained by an authorization by a decree. French Civ. Code, art. 13. In the absence of such decree a foreigner resident in France remains an alien for some purposes, other than political, no matter how permanent the character of his establishment, or how fixed his intention of remaining. There is, however, a sort of domicile, recognized and called a "domicile de facto," which is substantially identical with our domicile. A person residing in France, though not a citizen, and never having taken any step to become a citizen, if his residence has been with intent to make France his home and fixed abiding place, is domiciled there de facto, and certain legal results follow. Among these is that after his decease the administration of his estate found in France is submitted to the tribunals of the place of his principal establishment in France, and the validity of his will, considered as to its form and manner of execution, is to be there determined. The French law does not impose any condition of nationality or residence in order that a will may be valid. In *re Cruger's Will*, 73 N. Y. Supp. 812, 815, 36 Misc. Rep. 477.

#### DE FACTO GOVERNMENT.

A government de facto, in the proper legal sense, is the government that unlawfully gets the possession and control of the rightful legal government, and maintains itself there by force and arms against the will of the rightful legal government, and claims to exercise the powers thereof. *Chisholm v. Coleman*, 43 Ala. 204, 213, 94 Am. Dec. 877.

A de facto government is any organized government established for the time over a considerable territory in exclusion of the regular government. A de facto government of this sort is not distinguishable in particular from other unlawful combinations. It is distinguishable in fact mainly by power and in territorial control, and by the policy usually adopted in relation to it by the national government. With respect to such a government, it is clear that none of its acts in hostility to the regular government can be recognized as lawful, yet it is equally clear that transactions between individuals which would be legal and binding under or-

duary circumstances cannot be pronounced illegal and of no obligation because done in conformity with laws enacted or directions given by the usurping power. *Thomas v. Taylor*, 42 Miss. 651, 704, 2 Am. Rep. 625.

"There is a description of government called by publicists a 'government de facto,' but which might be perhaps more aptly denominated a 'government of paramount force.' Its distinguishing characteristics are, first, that its existence is maintained by active military power within the territories and against the rightful authority of an established and lawful government; and, second, that while it exists it must necessarily be obeyed in civil matters by private citizens, who, by acts of obedience rendered in submission to such force, do not become responsible as wrongdoers for those acts, though not warranted by the laws of the rightful government. Actual governments of this sort are established over districts differing greatly in extent and conditions. They are usually administered directly by military authority, but they may be administered also by civil authority, supported more or less directly by military force. One example of this sort of government is found in the case of Castine, in Maine, reduced to British possession during the War of 1812. From the 1st of September, 1814, to the ratification of the treaty of peace, in 1815, according to the judgment of this court in *United States v. Rice*, 17 U. S. (4 Wheat.) 253, 4 L. Ed. 562, the British government exercised all civil and military authority over the place. The authority of the United States was extinguished, and the laws of the United States could no longer be rightfully enforced there. By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws, and such only, as it chose to recognize and impose. It is not to be inferred from this that the obligations of the people of Castine as citizens of the United States were abrogated. They were suspended merely by the presence, and only during the presence, of the paramount force. A like example is found in the case of Tampico, occupied during the war with Mexico by the troops of the United States. It was determined by this court in *Fleming v. Page*, 50 U. S. (9 How.) 614, 13 L. Ed. 276, that, although Tampico did not become a port of the United States in consequence of that occupation, still, having come, together with the whole state of Tamaulipas, of which it was part, into the exclusive possession of the national forces, it must be regarded and respected by other nations as the territory of the United States." *Thorington v. Smith*, 73 U. S. (8 Wall.) 1, 9, 19 L. Ed. 361.

A government de facto arises only where the established government has been subverted by successful rebellion, and the new government exercises undisputed sway for the time being over the entire country, or

where the people of any portion of a country, subject to the same government, throw over their allegiance to that government, and establish one of their own, and show not only that they have established a government, but also their ability to maintain it. This principle is founded on reason and the fitness of things, and it is therefore a rule of international law. The recognition of the government of a revolted state or province by a neutral power is casus belli for the sovereign claiming dominion over the revolted country, if such recognition precedes the exhibition by the newly formed government of its ability to maintain its independence. Where recognitions of revolted states have occurred without this manifestation of the ability to sustain their new condition, they have been simply interventions with the intention of war. *Smith v. Stewart*, 21 La. Ann. 67, 71, 39 Am. Dec. 709.

De facto governments are of two kinds. One of them is such as exists after it has expelled the regularly constituted authorities and established its own functionaries in their places, so as to represent in fact the sovereignty of the nation. Such was the government of England under the Commonwealth. As a rule, the rights acquired under such a government are respected after the restoration of the authorities which were expelled. The other kind of de facto government is such as exists where a portion of the inhabitants of a country have separated themselves from the parent state and established an independent government. If it succeeds, the validity of its acts from the commencement of its existence are upheld as those of an independent nation. If it fails, its acts are of no effect. Such was the case of the state governments under the old Confederation on their separation from the British crown. Under this principle, an enactment of the Confederacy cannot have its acts upheld as an act of a government de facto. The mere fact that it temporarily expelled the authorities of the United States from the territory over which it forcibly exercised a usurped dominion did not establish it as a de facto government of the first class, since the United States immediately resorted to like force, and continued to use it until their authority was re-established. *Williams v. Bruffy*, 96 U. S. 176, 185, 24 L. Ed. 716.

The term "de facto," as descriptive of a government, has no fixed and definite sense. It is perhaps more correctly used as signifying a government completely, though only temporarily, established in the place of the lawful or regular government, occupying its capital and exercising its power. The term, however, is often used, and perhaps more frequently, in a sense less precise, as signifying any organized government established for the time over a considerable territory in exclusion of the regular government. A de facto government of this sort is not distinguishable

in principle from other unlawful combinations. It is distinguishable in fact mainly by power and in territorial control, and by the policy usually adopted in relation to it by the national government. In the more correct sense of the word, it is held that the Confederate government was never a de facto government in any such sense that its acts are entitled to judicial recognition as valid. *Keppel v. Petersburg R. Co.*, 14 Fed. Cas. 337, 370.

### DE FACTO JUDGE'

Where the conditions on which a temporary judge might have been appointed existed, and one was duly elected, qualified, and took possession of the office, but without filing the official oath required, he was a de facto judge, and the proceedings of the court could not afterwards be questioned collaterally. *State v. Miller*, 20 S. W. 243, 244, 111 Mo. 542.

Where a person was appointed by the governor as district judge under a statute providing for the redistricting of the state, and for the appointment of an additional judge to hold office until the next general election, and for more than a year thereafter the appointee officiated as judge, and still acts as such in the locality assigned to him with the acquiescence of the people, the law originally creating the office of district judge being of unquestioned validity, he is a judge de facto, though the statute under which he was appointed be unconstitutional and void. *Walcott v. Wells*, 24 Pac. 367, 370, 371, 21 Nev. 47, 9 L. R. A. 313, 37 Am. St. Rep. 478. Where, on account of the illness of the incumbent, a person has been appointed an acting county judge by the commissioners of a county, qualifies for the position, and assumes the duties of the office, and is actually engaged in the discharge of the functions of the office, acquiesced in by the public during all of the time, he is a de facto judge. *Dredia v. Baache*, 83 N. W. 916, 918, 60 Neb. 655.

In order to be a de facto judge, there must be a regularly constituted office, and a vacancy therein, before one appointed or elected to fill such office shall be denominated a de facto officer. *Caldwell v. Barrett* (Ark.) 74 S. W. 748, 750.

### DE FACTO OFFICE.

Under a written constitution creating and defining the various offices of the state, there can be no such thing as a de facto office, and consequently no de facto officer, unless the office which he purports to hold is de jure. *Hildreth's Heirs v. McIntire's Devisee*, 24 Ky. (1 J. J. Marsh.) 206, 207, 19 Am. Dec. 61.

There is no such thing as an office de facto. *City of New York v. Flagg* (N. Y.) 6 Abb. Prac. 296, 302.

### DE FACTO OFFICER.

An "officer de facto" is one whose acts, though not those of a lawful officer, the law, upon principles of policy and justice, will hold valid so far as they involve the interest of the public and third persons, where the duties of the office are exercised, first, without a known appointment or election, but under such circumstances of reputation or acquiescence as were calculated to induce people to submit to or invoke his action, supposing him to be the officer he assumed to be; second, under color of a known and valid appointment or election, but where the officer had failed to conform to some precedent requirement or condition, as to take an oath, give a bond, or the like; third, under color of a known election or appointment, void because the officer was not eligible, or because there was a want of power in the electing or appointing body, or by reason of some defect or irregularity, want of power or defect being unknown to the public; fourth, under color of election or appointment by or pursuant to a public unconstitutional law before the same is adjudged to be such. *State v. Carroll*, 38 Conn. 449, 471, 9 Am. Rep. 409; *Norton v. Shelby County*, 6 Sup. Ct. 1121, 1127, 118 U. S. 425, 30 L. Ed. 178; *Continental Trust Co. v. Toledo, St. L. & K. R. Co.* (U. S.) 82 Fed. 642, 650; *Auditor General v. Menominee County Sup'rs* (Mich.) 51 N. W. 483, 491, 89 Mich. 552; *Ritchie v. Mulvane*, 17 Pac. 830, 838, 39 Kan. 257; *Richards v. Farmers' & Mechanics' Institute* (Pa.) 26 Atl. 210, 211, 35 Am. St. Rep. 848; *Walcott v. Wells*, 24 Pac. 367, 370, 21 Nev. 47, 9 L. R. A. 59, 37 Am. St. Rep. 478; *State v. Curtis*, 9 Nev. 325, 329; *State v. Blossom*, 10 Pac. 430, 432, 19 Nev. 812; *State v. Dierberger*, 2 S. W. 286, 287, 90 Mo. 369; *Perkins v. Fielding*, 119 Mo. 149, 159, 24 S. W. 444, 27 S. W. 1100; *Simpson v. McGonegal*, 52 Mo. App. 540, 545; *State v. Oates*, 57 N. W. 294, 297, 86 Wis. 255, 39 Am. St. Rep. 912; *Franklin v. Vandervort*, 50 W. Va. 412, 416, 40 S. E. 374; *Van Amringe v. Taylor*, 108 N. C. 196, 201, 12 S. E. 1005, 12 L. R. A. 202, 23 Am. St. Rep. 51; *State v. Carroll*, 38 Conn. 449, 456, 9 Am. Rep. 409; *Williams v. Boynton*, 25 N. Y. Supp. 60, 64, 71 Hun, 309; *Missouri Pac. Ry. Co. v. Preston*, 66 Pac. 1050, 1051, 63 Kan. 819; *Vanderberg v. Connolly*, 54 Pac. 1097, 1100, 18 Utah, 112; *Brown v. State*, 66 S. W. 547, 548, 43 Tex. Cr. R. 411; *People v. Hecht*, 38 Pac. 941, 944, 105 Cal. 621, 27 L. R. A. 203, 45 Am. St. Rep. 96.

A de facto officer is one who enters into office under color of title thereto, but whose election or qualification is in fact irregular. *Clegg v. State*, 42 Tex. 605, 608; *Commis-*



sioners of Trenton v. McDaniel, 52 N. C. 107, 113; People v. Cook, 8 N. Y. (4 Seld.) 67, 89, 59 Am. Dec. 451; Herkimer v. Keeler, 81 N. W. 178, 179, 109 Iowa, 680; Stickney v. Stickney, 42 N. W. 518, 519, 77 Iowa, 699; People v. Staton, 73 N. C. 546, 550, 21 Am. Rep. 479.

An officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law. Barlow v. Stanford, 82 Ill. 298, 302; Mechanics' Nat. Bank v. H. C. Burnett Mfg. Co., 32 N. J. Eq. (5 Stew.) 236, 238; Kuser v. Wright (N. J.) 31 Atl. 397, 398; Brown v. Lunt, 37 Me. 423, 429; State v. Jacobs, 17 Ohio, 143, 152; Mapes v. People, 69 Ill. 523, 529; Rex v. Corporation of Bedford Level, 6 East, 356, 369; McGargell v. Hazelton Coal Co. (Pa.) 4 Watts & S. 424, 425; Gregg Tp. v. Jamison, 55 Pa. (5 P. F. Smith) 468, 473; Humer v. Cumberland County, 8 Pa. Dist. R. 528; Fleming v. Mulhall, 9 Mo. App. 71, 73 (citing Parker v. Kett, 1 Ld. Raym. 658); Clark v. Town of Easton, 14 N. E. 795, 797, 146 Mass. 43; Tucker v. Aiken, 7 N. H. 113, 140; Dows v. Village of Irvington (N. Y.) 66 How. Prac. 93, 95; Franco-Texan Land Co. v. Laigle, 59 Tex. 339, 344; State v. Ourtis, 9 Nev. 325, 329; Attorney General v. Crocker, 138 Mass. 214, 218; State ex rel. Cosgrove v. Perkins, 40 S. W. 650, 652, 139 Mo. 106; Flournoy v. Clements, 7 Ala. 535, 538.

A de facto officer is one who exercises an office either by virtue of some appointment or election, or of such acquiescence of the public as will authorize the presumption, at least, of a colorable appointment or election. Pierce v. Edington, 38 Ark. 150, 153; Town of Plymouth v. Painter, 17 Conn. 585, 588, 44 Am. Dec. 574; Rice v. Commonwealth, 66 Ky. (3 Bush) 14, 17; Aulanier v. Governor, 1 Tex. 653, 665; People v. Albertson (N. Y.) 8 How. Prac. 363, 365; Wilcox v. Smith (N. Y.) 5 Wend. 231, 234, 21 Am. Dec. 218; People v. Church, 3 N. Y. Cr. R. 57, 59; People v. White (N. Y.) 24 Wend. 520, 581; Cary v. State, 76 Ala. 78, 85; Williamson v. Woolf, 37 Ala. 298, 304; Thorington v. Gould, 59 Ala. 461, 468; Dabney v. Hudson, 68 Miss. 292, 3 South. 545, 24 Am. St. Rep. 276.

In order to constitute an officer de facto, there must be some color of right—some pretense or claim of title by some appointment or election. He who assumes to execute the duties of an office without any color of title is a mere usurper, and the acts of the mere usurper are void in all respects. An officer de facto may act under those who have a legal right to appoint, but by an irregular or informal appointment, or he may have a regular and sufficient appointment, but may not have been duly qualified to perform his duties under it, or he may have become disqualified to act. But so long as he is claiming to be qualified and performing the duties of the office, this must be construed to

give him some color of title. Prescott v. Hayes, 42 N. H. 56, 58.

The doctrine of de facto officers was introduced into the law as matter of policy and necessity, to protect the interests of the public and individuals whose interests were involved in the official acts of persons exercising the duties of an office without being lawful officers. It would seem that the public could not reasonably be compelled to inquire into the title of an officer, nor be compelled to show a title. But to protect those who dealt with such officers when apparent incumbents of offices, under such apparent circumstances of reputation or color as would lead men to suppose they were legal officers, the law validated their acts as to the public and third persons on the ground that, as to them, although not officers de jure, they were officers in fact, whose acts public policy required should be considered valid. Jewell v. Gilbert, 64 N. H. 13, 5 Atl. 80, 81, 10 Am. St. Rep. 357.

An officer de facto is one who comes in by the power of an election or appointment, but, in consequence of some informality or omission, or want of qualification, or by reason of the expiration of his term of service, cannot maintain his position when called on by the government to show by what title he claims to hold his office. He is one who exercises the duties of an office under claim and color of title, being distinguished on the one hand from a mere usurper, and on the other from an officer de jure. The judges of the Court of Appeals who were in office under military appointment when the state was restored to the Union, holding over and continuing to exercise their office, were officers de facto, and their judgments and decrees are valid and binding. Griffin's Ex'r v. Cunningham (Va.) 20 Grat. 31, 43.

A de facto officer is one who comes into a legal and constitutional office by power of legal appointment or election; and, even though the law under which such officer holds be unconstitutional or repugnant to the laws of Congress, he would still be a de facto officer, so that his title to the office could only be inquired into by a direct proceeding instituted for that purpose, and not by a collateral proceeding, as in habeas corpus. Ex parte Parks, 3 Mont. 426, 431.

An officer de facto is one who comes in by the terms of law, and acts under a commission or election apparently valid, but, in consequence of some illegality, incapacity, or want of qualification, is incapable of lawfully holding the office. The distinction between a usurper and an officer de facto is that the former has no color of title to the office, while the latter has, by virtue of some appointment or election. Fitchburg R. Co. v. Grand Junction R. & D. Co., 83 Mass. (1 Allen) 552, 557.

A person declared elected and inducted into office is a de facto officer, though not lawfully elected. *Attorney General v. Meigs*, 68 N. H. 373, 379.

An officer de facto is one who actually performs the duties of an office, with apparent right, and under claim or color of appointment or election. An officer de facto is distinguished from a usurper, and a person, in order to become an officer de facto, must in some way have been put into office and secured such a holding as to be considered in peaceable possession, and actually exercising the functions of an officer. So a trustee of a corporation, elected to fill a vacancy on the board by all the available members, but less than a majority thereof, who secured peaceable possession, is an officer de facto. *Baggot v. Turner*, 58 Pac. 212, 213, 21 Wash. 339.

A de facto officer is one who derives his appointment from one having colorable authority to appoint, if the office is an appointive office, and whose appointment is valid on its face. It is not necessary that an officer should derive his appointment from one absolutely competent to invest him with a good title to the office. *Ex parte Strang*, 21 Ohio St. 610, 617.

An officer is said to be de facto when he has the color of an appointment or election, although it may be, in law, invalid. It must not be utterly void. To enable those who make an appointment that will make the appointee an officer de facto, they must have the legal capacity to make it, but, by reason of some defect in the time or manner of the appointment, have failed to make a valid one. *Hamlin v. Dingman* (N. Y.) 5 Lans. 61, 64, 65.

"An officer de facto is one who executes the duties of an office under some color of right—some pretense of title—either by election or appointment." *Hooper v. Goodwin*, 48 Me. 79. The foundation stone of this whole doctrine of a de facto officer, as gathered from all the authorities, seems to be that of preventing the public or third persons from being deceived to their harm by relying in good faith upon the genuineness and validity of acts done by a pseudo-officer. However much color of authority may clothe the person who assumes to perform the function of an office and discharge its duties, yet if the public or third persons are not deceived thereby—if they know the true state of the case—the reason which gives origin or existence to the rule which validates the act of an officer de facto ceases, and with it ceases, also, all of its ordinary validating incidents and consequences. *State ex rel. Osgrove v. Perkins*, 40 S. W. 650, 652, 139 Mo. 106.

An officer de facto is one who comes into a legal and constitutional office by color

of the legal appointment or election to that office, and, as the duties of the office may be discharged by some one for the benefit of the public, the law does not require third persons, at their peril, to ascertain whether such officer has been properly elected or appointed before they submit themselves to his authority, or call upon him to perform official acts which it is necessary should be performed. *People v. White* (N. Y.) 24 Wend. 520, 539 (quoted in *People v. McDowell*, 23 N. Y. Supp. 950, 70 Hun. 1).

The general rule with respect to de facto officers is that the office is so far void as to prevent the officer from asserting it to his own advantage at the expense or injury of another, but is valid so far as to protect third parties from injury—in other words, void as to himself and valid as to strangers. *Adams v. Tator* (N. Y.) 42 Hun. 384, 386, (quoted in *People v. McDowell*, 23 N. Y. Supp. 950, 952, 70 Hun. 1).

An officer de facto is one who by some color of right is in possession of an office, and for the time being performs its duties with public acquiescence, though having no right in fact, as where the appointing body is acting under an unconstitutional law. An unconstitutional act attaching territory to a certain county, accepted and acquiesced in, will suffice to render the acts of the register of deeds of such county as to such territory, done before the law was declared unconstitutional, the acts of a de facto officer. *State Bank v. Frey* (Neb.) 91 N. W. 239, 242.

An officer de facto is one who actually performs the duties of the office that appertain thereto under color of appointment or election. There must be a fair color of right, or an acquiescence by the public in his official acts so long that he may be presumed to act as an officer by right of election or appointment. Thus a deputy sheriff who had been acting as such was a de facto officer, though he had not taken the oath of office or filed his appointment for record as required by law. *State v. Quint*, 69 Pac. 171, 172, 65 Kan. 144.

An officer de facto is not a mere usurper, nor yet within the sanction of the law, but one who, colore officii, claims and assumes to exercise official authority, is reputed to have it, and the community acquiesces accordingly. *Ex parte Haly*, 25 Pac. 514, 515, 1 Okl. 12 (citing *Hussey v. Smith*, 99 U. S. 20, 25 L. Ed. 314; *State v. Murphy*, 13 South. 705, 713, 32 Fla. 138).

"What shall constitute an officer de facto may admit of some doubt in different cases. The mere assumption of the office by performing one or even several acts appropriate to it, without any recognition of the person as officer by the appointing power, may not be sufficient to constitute him an officer de facto. There must be at least some color-

able election and induction into the office ab origine, and some action thereunder, or so long an exercise of the office, and acquiescence therein of the public authorities, as to afford an individual citizen a strong presumption that the party was duly appointed." *Blencourt v. Parker*, 27 Tex. 558, 563.

An office may be held de facto by a person whose legal incapacity to hold it is imposed upon him by a prohibitory provision of the Constitution. His disability may arise from a fact that is not apparent. But the principle that forbids a collateral inquiry into the validity of an appointment or election has a broader foundation than a latent defect, discoverable only in extraneous evidence. A colorable appointment may be made by a body or person whose total lack of appointing power is matter of law. An unconstitutional statute, void on its face, can give color of official title. A person called in on a single occasion to exercise a power, which the void statute purports to confer upon him may be an officer de facto whose title cannot be assailed collaterally. So it is held that a person duly appointed by the selectmen a police officer, to hold during the pleasure of the selectmen, is an officer de facto, and his right to act as a police officer cannot be attacked on a trial for an assault on him while so acting for the first time. *State v. Barnard*, 29 Atl. 410, 411, 67 N. H. 222, 68 Am. St. Rep. 648.

A person inducted into an office according to the forms of law is an officer de facto, although incompetent by the provisions of the Constitution to hold the office, and his competency cannot be inquired into by the parties affected by his act. *City of Nashville v. Thompson*, 80 Tenn. (12 Lea) 844, 347.

A mere usurper cannot be said to be an officer de facto, yet one who was at first a mere usurper may by acquiescence become an officer de facto. Although an officer de facto may not be required to be in by color of election or appointment, yet he must, to distinguish him from a mere usurper or intruder, be in by some color of right; and the color of right which constitutes one an officer de facto may consist in an election or appointment, or the holding over after the expiration of one's term, or acquiescence by the public in the acts of such officer for such a length of time as to raise the presumption of colorable right by election or appointment. *Auditor General v. Menominee County Sup'rs*, 51 N. W. 483, 490, 89 Mich. 552.

The mere assumption of an office by performing one or even several acts appropriate to it, without any recognition of the person as officer by the appointing power, may not be sufficient to constitute him an officer de facto. There must at least be some colorable election and induction into office

ab origine, or so long an exercise of the office and acquiescence therein of the public authorities as to afford to the individual citizen a presumption strong of due appointment. *Burke v. Elliott*, 26 N. C. 355, 362, 42 Am. Dec. 142.

In order to prove a person to be an officer de facto, it is necessary to show that he has acted as such on other occasions than those which are the subject of the controversy. *Goulding v. Clark*, 84 N. H. 148, 154.

A party exercising the right of arrest under a statute providing that all persons have the right to prevent the consequences of theft by seizing any personal property which has been stolen, and bringing it, with the offender, if he can be taken, before a magistrate, is to all intents and purposes an officer de facto for the time being, and his acts, whilst such relation to the arrested person continues, will subject him, in effect, to the same rights and penalties as attach to officers de jure. *Smith v. State*, 13 Tex. App. 507, 518.

Under Pub. St. c. 27, § 74, providing that any town that accepted the provisions of that and the three following sections may elect three road supervisors, where a town without accepting such provisions, for several years elected several persons as road supervisors, who qualified and served as such, they were officers de facto. *Clark v. Town of Easton*, 14 N. E. 795, 797, 146 Mass. 43.

An officer legally elected and qualified, who enters upon the duties of his office, and afterwards is appointed to and accepts another office, but in good faith continues to publicly discharge the duties of the first office—his term not having expired, and no successor having been appointed or elected in his stead, nor any adjudication against his title—is an officer de facto. *Oliver v. Jersey City*, 44 Atl. 709, 711, 63 N. J. Law. 684, 48 L. R. A. 412, 76 Am. St. Rep. 228.

One who is performing the duties of the office of marshal of a town under color of title to such office is a de facto peace officer, and, as such, exempt from the penalty prescribed for one who shall carry a pistol into a church, school, or ballroom, etc. *Rainey v. State*, 8 Tex. App. 62, 64, 34 Am. Rep. 736.

Where a person who acted as commissioner had been appointed, and, under color of the appointment, he assumed to, and did, exercise the functions of the office, he was a de facto officer. *People v. Lytle*, 7 App. Div. 553, 573, 40 N. Y. Supp. 153, 162.

If an office is filled and the duties appertaining thereto are performed by an officer de jure, another person, although claiming the office under color of title, cannot

become an officer de facto. *State v. Blossom*, 10 Pac. 430, 432, 19 Nev. 312.

A de facto officer must be in fact the officer. He must be in the actual possession of the office, and have the same under his actual control. If the officer de jure is in the possession of the office—if the officer is also the officer de facto, then no other person can be an officer de facto for that purpose. Two persons cannot be officers de facto for the same office at the same time. *McCahon v. Leavenworth County Com'rs*, 8 Kan. 437, 442.

Where an office exists under the law, and a person is elected to fill such office, and duly qualifies and enters upon the discharge of his official duties, he is a de facto officer, and his acts are valid, notwithstanding the fact that he may not possess all the requisites and qualifications prescribed by the statute to fill such office. In *Hussey v. Smith*, 99 U. S. 20, 25 L. Ed. 314, the Supreme Court of the United States, in discussing this subject, said: "An officer de facto is not a mere usurper, nor yet within the sanction of law, but one who, *colore officii*, claims and assumes to exercise official authority, is reputed to have it, and the community acquiesces accordingly. Judicial as well as ministerial officers may be in this position." *Morford v. Territory*, 63 Pac. 958, 960, 10 Okl. 741, 54 L. R. A. 513.

The mere fact that one is found in the exercise of the duties of an officer without question of his authority as such is not sufficient to constitute him a de facto officer, unless he is in such office by some color of right or title, even though he may be apparently invested with all the insignia of office. A judge signing a decree December 6th in an action tried before him in November preceding was a de facto officer while signing the decree, though it transpired that his term of office expired on December 2d. *Cromer v. Boinest*, 27 S. C. 436, 452, 3 S. E. 849.

When an official person or body has apparent authority to appoint to public office, and apparently exercises such authority, and the person so appointed enters upon such office and performs his duties, his official acts will be valid. *Erwin v. City of Jersey City*, 37 Atl. 732, 733, 60 N. J. Law, 141, 64 Am. St. Rep. 584.

#### De jure office required.

There can be no de facto officer without a de jure office. *State v. Stevens* (S. D.) 92 N. W. 420, 421 (citing *Thurber v. Miller*, 11 S. D. 131, 75 N. W. 901).

To constitute an officer de facto, there must be an office, with a place for its exercise, and an incumbent under claim of right. *State v. Lake*, 8 Nev. 276, 285.

Where there is an office legally existing, and a person is appointed or elected to fill such office, his acts will be held valid, as those of a de facto officer, although a statute has prescribed an unconstitutional method for the appointment or election of such officers. Where, however, the office itself is created by an unconstitutional statute, there can be no incumbent of such office, either de jure or de facto. *Flaucher v. City of Camden*, 28 Atl. 82, 83, 56 N. J. Law (27 Vroom) 244.

Many of the definitions of a de facto officer in the text-books of decided cases assume that there can be no de facto officer except in a de jure office; and Dill. Mun. Corp. § 276, says that, in order that there may be a de facto officer, there must be a de jure office, and that the notion that there can be a de facto office has been characterized as a political solecism. *Burt v. Winona & St. P. R. Co.*, 18 N. W. 285, 286, 81 Minn. 472.

Under a written Constitution creating and defining the various offices of the state, there can be no such thing as a de facto office, and consequently no de facto officer, unless the office which he purports to hold is de jure. *Hildreth's Heirs v. McIntire's Devisee*, 24 Ky. (1 J. J. Marsh.) 206, 207, 19 Am. Dec. 61.

"Offices must be de jure, but officers may be such de facto. To say that an officer is one de facto, when the office itself is not created or authorized by the Legislature, is a political solecism, having no foundation in reason, nor support in law." *Welch v. St. Genevieve* (U. S.) 29 Fed. Cas. 608, 610.

A de facto officer is one who comes into a legal and constitutional office by color of a legal appointment or election to the office, and, as the duty of the office must be discharged by some one for the benefit of the public, the law does not require third persons, at their peril, to ascertain whether such officer has been properly elected or appointed, but they submit themselves to this authority to call upon him to perform official acts which it is necessary he should perform. *Mallett v. Uncle Sam Gold & Silver Min. Co.*, 1 Nev. 188, 197, 90 Am. Dec. 484.

A de facto officer is one who is surrounded with the insignia of office and seems to act with authority, but where there is no office there cannot be a de facto officer. *Jay v. Board of Education of City of Emporia*, 26 Pac. 1025, 1026, 46 Kan. 525.

Where an act creating a county court was void because unconstitutional, the officers constituting it were not de facto officers. *Norton v. Shelby County*, 6 Sup. Ct. 1121, 1127, 118 U. S. 425, 30 L. Ed. 178.

An unconstitutional act is sufficient to give color for the appointment to office

thereunder, so made to render the person an officer de facto. *In re Ah Lee* (U. S.) 5 Fed. 899, 907.

Where the office of freeholder is created by the Constitution, it is a de jure office; and when persons were elected by a plurality of the qualified electors, and received their certificates of election, and qualified, and participated in the action of the board, they were there under colore officii, and presumptively entitled to the office. They were de facto officers in the discharge of the duties of a de jure office, and, as such, their acts while they remained such were as valid and binding as those of de jure officers. There must be a de jure office to be filled before there can be a de facto officer. If the former exists, and the latter holds it under and pursuant to a regular commission purporting to empower him to act, his acts in such office, until his right thereto is finally determined, the law holds, on principles of policy and justice, to be valid, so far as they involve the public and third parties, notwithstanding the personal liability of the incumbent for intruding into such office. *People v. Hecht*, 38 Pac. 941, 944, 105 Cal. 621, 27 L. R. A. 203, 45 Am. St. Rep. 96.

#### Hold over.

The term de facto officer includes one who assumes an office legally, but in good faith continues to hold such office after his title has ended. *State v. Farrier*, 1 Atl. 751, 753, 47 N. J. Law (18 Vroom) 383.

Where the terms of a board of county commissioners had expired, and others had been appointed in their places, the former board were not officers de facto, where no general acquiescence was shown as to their acts as such. *State v. Murphy*, 13 South. 705, 716, 32 Fla. 138.

Officers coming rightfully into office, though improperly continuing in office, are generally regarded as officers de facto. *Thorington v. Gould*, 59 Ala. 461, 468.

One who retained possession of his office after the expiration of his regular term was an officer de facto, though at the same time another had been regularly elected and had qualified as his successor. As long as the de jure officer was not in possession of the office, the acts of his predecessor were those of a de facto officer. *Carli v. Rhener*, 7 N. W. 189, 27 Minn. 292.

A person who was the incumbent of an office during a previous term is not a de facto officer as to such office by holding over after the expiration of such time. *State v. Oates*, 57 N. W. 296, 297, 86 Wis. 634, 39 Am. St. Rep. 912.

#### As an officer.

See "Officer."

#### Officer de jure distinguished.

An officer de facto is one who exercises the duties of an office under color of an appointment or election to that office, and he differs, on the one hand, from a mere usurper of an office, who undertakes to act as an officer without any color of right, and, on the other, from an officer de jure, who is in all respects legally appointed and qualified to exercise the office. *Steinback v. State*, 33 Ind. 483, 490; *Town of Plymouth v. Painter*, 17 Conn. 585, 588, 44 Am. Dec. 574. Under this definition, a judge who has tendered a conditional resignation is at the very least an officer de facto until it has been accepted by the government. *Northrop v. Gregory* (U. S.) 18 Fed. Cas. 873. And so, where the Legislature authorized the common council of Hartford to appoint a judge of the police court, and they so appointed the judge, he was an officer de facto, though the act of the Legislature was entirely unconstitutional, and the General Assembly itself was the only body by whom the appointment could be made, since the attempted delegation of power to the council gave it a color of right to appoint the judge. *Park, J., dissenting. Brown v. O'Connell*, 36 Conn. 432, 453, 4 Am. Rep. 89.

The distinction between an officer de jure and de facto is well known and well established, and the consequences naturally arising from the distinction are equally well settled. An officer de jure is clothed with all the power and authority appertaining to the office, and neither his doings nor his acts within the limits of his authority can be questioned anywhere. The acts of an officer de facto are, as it respects third persons, valid; as to himself, invalid. An officer de facto is one who comes in by the forms of an election, but, in consequence of some informality or want of qualification, is incapable of holding office. *McGregor v. Balch*, 14 Vt. 423, 436, 39 Am. Dec. 231.

An officer de facto is one who actually performs the duties of an office with apparent right, and under claim and color of an appointment or election. On the one hand, such an officer is distinguished from a mere usurper of an office, and, on the other, from an officer de jure. In order to make a person an officer de facto, he should in some way have been put into the office, and have secured such a holding thereof as to be considered in peaceable possession, and actually exercising the functions of an officer. An intrusion by force is not sufficient. *State v. Curtis*, 9 Nev. 325, 329.

To constitute a de jure officer there must be either a valid election or appointment, and a qualification thereunder. Where there was no record in the county superintendent's office of the qualification of one who was acting as trustee under an appointment to fill a vacancy, he was not a de jure officer, but

only a de facto officer. *Meadors v. Patrick*, 56 S. W. 652, 653, 24 Ky. Law Rep. 95.

An officer de facto is one who exercises the duty of an office under a color of right by virtue of election to that office, as distinguished, on the one hand, from a mere usurper of an office, and, on the other, from an officer de jure. The acts of an officer de facto are valid so far as the rights of the public or third person are concerned, and cannot be indirectly called in question in a proceeding to which he is not a party. Therefore though a majority of a common council of a city, owing to the calling of an election at a date not authorized by statute, were elected in an unlawful manner, its acts were not void. *Mitchell v. Tolan*, 88 N. J. Law (4 Vroom) 195, 201.

A de facto officer is distinguished, on the one hand, from a mere usurper of an office, and, on the other, from an officer de jure. He is one who is in actual possession of an office under claim and color of election or appointment, and is in the exercise of its functions and in discharge of its duties. It is said that the best definition of an officer de facto is as follows: "An officer de facto is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law." *Waterman v. Chicago & I. R. Co.*, 139 Ill. 658, 29 N. E. 689, 691, 15 L. R. A. 418, 32 Am. St. Rep. 228.

#### Person failing to qualify.

An officer de facto is one acting under color of authority, and, so far as the public or third persons are interested, acts as if he were an officer de jure. A highway surveyor acting under color of authority pursuant to an appointment signed by a majority of the municipal officers is an officer de facto, and authorized to bind the town, within the scope of his authority, as far as the public or third persons are concerned; and the fact that the appointee had not been sworn did not prevent him from being a de facto officer. *Pease v. Inhabitants of Parsonsfield*, 42 Atl. 502, 92 Me. 845.

Where the deputy sheriff, on being appointed, refused to take the oath, and cut the same off his appointment, and there was no showing that he exercised the duties of the office, or had the reputation in the county of being deputy sheriff, he was an officer de facto. *Brown v. State*, 68 S. W. 547, 548, 43 Tex. Cr. R. 411.

If one duly elected sheriff qualifies by filing his official oath and bond, and thereupon enters on the duties of the office and exercises its functions, he is sheriff de facto, so that his right to the office cannot be successfully attacked in a collateral proceeding; and he cannot protect himself from official responsibility upon the ground that he failed to qualify in due time after his election, or

that he qualified under an invalid appointment by the Governor, or that his bond is defective. *Sprague v. Brown*, 40 Wis. 612.

Under a statute providing that the court might appoint six surveyors of the highways to lay out a road, and directing such persons within six days to subscribe the oath of office, and providing that, if this oath should not be taken or subscribed within the time prescribed, the neglect should be deemed a refusal to serve in such office, the person refusing is not an officer, and cannot be considered an officer de facto, so as to render his acts valid. *In re Public Road*, 4 N. J. Law (1 Southard) 396, 398.

Where a person was appointed by a constable as deputy, but failed to take an oath, he was an officer de facto. *State v. Dierberger*, 2 S. W. 286, 287, 90 Mo. 369.

One who, having been elected to an office, assumes to exercise its duties without having qualified or attempting to do so, is without color of title, and hence not a de facto officer. *Creighton v. Commonwealth*, 83 Ky. 142, 147, 4 Am. St. Rep. 143.

#### Rightful government required.

To constitute a de facto officer, there must be a rightful government. A de facto officer of an illegal or unlawful government is an anomaly that can only exist in absurdity. *Penn v. Tollison*, 26 Ark. 545, 580.

When a government is entirely revolutionized, and all its departments usurped by force, there may be a de facto executive, a de facto judiciary, or a de facto legislature; but, where the Constitution or form of government remains supreme, there can be no de facto department or a de facto office. *Frame v. Trebble*, 24 Ky. (1 J. J. Marsh.) 205, 206.

#### DE FACTO ROAD.

A "de facto road" means a road actually used by the public. *Locke v. First Division of St. Paul & P. R. Co.*, 15 Minn. 850, 865 (Gil. 283, 298).

#### DE FACTO SENATOR.

The act of the Senate in acquiescing when a person acts as senator is sufficient to give him color of title to the office, and makes him at least a senator de facto. *Auditor General v. Menominee County Sup'rs*, 51 N. W. 483, 490, 89 Mich. 552.

#### DE JURE.

"De jure" means of right; legitimate; lawful; by right and just title. In this sense, it is the contrary of "de facto." It may also be contrasted with "de gratia," in which case it means "as a matter of right," as de gratia

means "by grace or favor." Again, it may be contrasted with "de sequitate," here meaning "by law," as the latter means "by equity." Black, Dict.

### DE JURE CORPORATION.

Corporations de jure have been defined to be those whose legal right to exist cannot be questioned even by the state itself. If a corporation has a charter issued to it in the manner prescribed by law, and has in its organization complied fully with every requirement of the charter, then, even as against the state, the corporation has a right to exist, and is technically a de jure corporation. *Brown v. Atlanta Ry. & Power Co.*, 39 S. E. 71, 73, 113 Ga. 462.

A de jure corporation is one whose right to exercise a corporate function would prove invulnerable if assailed by the state by quo warranto proceedings. *Capps v. Hastings Prospecting Co.*, 58 N. W. 956, 957, 40 Neb. 470, 24 L. R. A. 259, 42 Am. St. Rep. 677.

### DE JURE DIRECTOR.

A director duly elected or appointed is a director de jure. *Hullings v. Hullings Lumber Co.*, 18 S. E. 620, 624, 38 W. Va. 351.

### DE JURE OFFICER.

De facto officer distinguished, see "De Facto Officer."

A de jure office is one having legal existence, or, rather, one having an existence recognized by law. *Buck v. City of Eureka*, 42 Pac. 243, 245, 109 Cal. 504, 30 L. R. A. 409.

"A de jure officer is one who is regularly and lawfully elected or appointed and inducted into office, and exercises the duties as his right." *People v. Staton*, 73 N. C. 546, 550, 21 Am. Rep. 479.

An officer de jure is one who is clothed with the full legal right and title of the office—in other words, one who has been legally elected or appointed to the office, and who has qualified himself to exercise the duties thereof according to the mode prescribed by law. *McMillin v. Richards*, 64 N. W. 242, 243, 45 Neb. 786; *Stott v. City of Chicago*, 68 N. E. 736, 738, 205 Ill. 281.

An officer de jure is one who has the lawful right to the office, but who has either been ousted from, or never actually taken possession of, the office. *Hamlin v. Kassafier*, 15 Pac. 778, 780, 15 Or. 456, 3 Am. St. Rep. 176.

An officer de jure has the legal title to, and is clothed with all the power and authority of, the office. He has a title against the world to exercise the functions of the office, and receive the fees and emoluments apper-

taining to it. He is responsible to the government and injured parties when he abuses or transcends his authority, and his acts within the scope of that authority cannot be questioned by the citizens or any department of the government. *Auditor General v. Menominee County Sup'rs*, 89 Mich. 552, 625, 51 N. W. 483.

### DE LUNATICO INQUIRENDO.

See "Commission de Lunatico Inquirendo."

### DE NOVO.

See "Trial de Novo"; "Venire Facias de Novo."

### DE QUARANTINA HABENDA.

At common law a widow entitled to quarantine could, in case the heir or other persons ejected her, sue out a writ known as the "writ de quarantina habenda." *Jacob's Law Dict. tit. "Quarantine," § 19*. This seems to have been a summary process, and required the sheriff, if no just cause were shown against it, speedily to put her into possession. In Oregon the right by statute secured to a widow, of remaining in the husband's house one year, cannot be enforced by the action of forcible entry and detainer *Aiken v. Aiken*, 12 Or. 203, 206, 6 Pac. 682, 683.

### DEAD.

Deprived of life; opposed to alive, living; destitute of life; inanimate. *Webst. Dict.*

### DEAD ANIMALS.

"Dead animals," as used in a city ordinance directing the city inspector to forthwith remove all putrid and unsound beef, pork, etc., all dead animals, and every unwholesome substance found in the city, is to be construed to mean such dead animals as in some way endanger the public health, and does not apply to all dead animals. *Underwood v. Green*, 42 N. Y. 140, 142.

### DEAD BLOCKS.

See "Deadwoods."

Dead blocks are bumpers or metallic projections placed on railroad cars to receive the concussion and the shock when moving cars come in contact with stationary ones: the drawheads being so constructed as to yield to pressure, so as to leave the shock of the collision to the dead blocks. *Norfolk & W. R. Co. v. Cottrell*, 3 S. E. 123, 127, 83 Va. 512.

**DEAD BODY.**

As property, see "Property."

Bones bleached by time, constituting parts of a human skeleton, casually found upon the bank of a creek—it being obviously impossible to ascertain who the deceased was, how long since death had ensued, or in what manner it was caused—did not constitute a dead body, within Act Dec. 14, 1893, relating to coroners' inquests. *Meads v. Dougherty County*, 25 S. E. 915, 98 Ga. 697.

A dead body after burial becomes a part of the ground to which it has been committed, and an action of trespass may be maintained by the owner of the lot in possession against one who disturbs the grave and removes the body, so long, at least, as the cemetery continues to be used as a place of burial. *Pulsifer v. Douglass*, 48 Atl. 118, 119, 94 Me. 556, 58 L. R. A. 238 (citing *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759; *Weld v. Walker*, 180 Mass. 422, 39 Am. Rep. 465; *Bessemer Land & Improvement Co. v. Jenkins*, 111 Ala. 185, 18 South. 565, 56 Am. St. Rep. 26).

**DEAD CULLS.**

Dead culls are the unavoidable product from the saw in sawing logs, distinguishable from the higher grades produced, which higher grades include shipping culls and better, and mill culls being everything above the grade of dead culls. *Brigham v. Martin*, 61 N. W. 276, 277, 103 Mich. 150.

**DEAD FREIGHT.**

Dead freight is the amount of damages, unascertained, which the parties are entitled to recover for a noncompletion of a cargo. *Phillips v. Rodle*, 15 East, 547, 555.

**DEAD SLOW.**

"Dead slow," as applied to the speed of a vessel, means a speed of about four knots an hour—just enough to give such a vessel steerageway. *The Oceanic* (U. S.) 61 Fed. 338, 343.

**DEAD TIMBER.**

Dead timber is timber which is practically lifeless or mortally hurt, and in such a state of decay that a prudent landowner would ordinarily direct it to be forthwith cut, to prevent further deterioration in value. *United States v. Pine River Logging & Improvement Co.* (U. S.) 89 Fed. 907, 915, 32 C. C. A. 406.

**DEAD WALLS.**

As used in 48 Geo. III, c. 139, relating to a rate for street repairs, and providing

that the commissioners should rate and assess all the churchyards, cemeteries, or other burying places, dead walls, and void spaces of ground within such parochial or other district which are not charged to such rate or assessment, in respect to any messuage, the term "dead walls" would include those erected by a railway company under an act requiring it to build a bridge over its railway, with a brick wall at each side thereof, at a spot where its railway intersected a public street or road which was paved and repaired under the local acts. *Arnell v. London & N. W. Ry. Co.*, 12 C. B. 697, 710.

**DEAD WEIGHT.**

The dead weight to which a bank is entitled under Act Feb. 5, 1842, providing that, with a view of enabling banks effectually to secure their debts, it shall be lawful for their respective boards of directors to consider the whole of the debts due them on the passage of this act as forming part of their dead weight, includes only the debts due banks at the time of the passage of the act, and not debts subsequently contracted, though between the date of the passage of the act and its promulgation or acceptance by the banks. *City Bank of New Orleans v. Barbarin* (La.) 6 Rob. 289, 291.

**DEADHEAD.**

"The term 'deadhead' is applied to persons other than the president, directors, officers, or employes of a railroad company who are permitted by the company to travel on the road without paying any fare therefor." *Gardner v. Hall*, 61 N. C. 21, 22.

**DEADLY.**

A charge relative to self-defense based on apparent danger, to the effect that the defendant must have had reasonable ground to believe that there was danger to his life, or of deadly violence to his person, is not error, where it clearly appears from the charge that the word "deadly" was used in the sense of great. *Acers v. United States*, 17 Sup. Ct. 91, 92, 164 U. S. 388, 41 L. Ed. 481.

While "deadly" and "dangerous" are not equivalents, deadly is more than the equivalent, and includes the full signification, of "dangerous." A dangerous weapon may possibly not be deadly, but a deadly weapon—one which is capable of causing death—must be dangerous. *State v. Lynch*, 83 Atl. 978, 979, 88 Me. 195.

**DEADLY WEAPON.**

Other deadly weapon, see "Other."

A deadly weapon is one likely to produce death or great bodily injury. *State v. Jarrott*, 23 N. C. 76, 87; *Briggs v. State*, 6 Tex.



App. 144, 146; *Pittman v. State*, 6 South. 437, 438, 25 Fla. 648; *Garner v. State*, 9 South. 835, 846, 28 Fla. 113, 29 Am. St. Rep. 232; *People v. Franklin*, 11 Pac. 797, 70 Cal. 641; *People v. Leyba*, 16 Pac. 200, 201, 74 Cal. 407; *People v. Lopez*, 66 Pac. 965, 966, 135 Cal. 23; *People v. Fuqua*, 58 Cal. 245, 247; *People v. Valliere*, 56 Pac. 433, 434, 123 Cal. 576; *McNary v. People*, 32 Ill. App. 58, 62; *Clary v. State*, 85 N. W. 897, 898, 61 Neb. 688; *Wilson v. State*, 15 Tex. App. 150, 155; *Skidmore v. State*, 43 Tex. 93, 97.

A deadly weapon is one which, in the manner used, is capable of producing death, or of inflicting great bodily injury, or seriously wounding. *McReynolds v. State*, 4 Tex. App. 327, 328; *People v. Cole*, 11 Pac. 481, 483, 70 Cal. 59. In a case of doubt, the manner in which the weapon is used may be taken into account, in determining whether or not it was deadly. *Mazzotte v. Territory (Ariz.)* 71 Pac. 911, 912; *Commonwealth v. Duncan*, 91 Ky. 592, 595, 16 S. W. 530.

A deadly weapon is one dangerous to life. *Cosby v. Commonwealth*, 72 S. W. 1089, 1090, 24 Ky. Law Rep. 2050.

A deadly weapon is any weapon or instrument by which death would likely be produced when used in a manner in which it may appear it was used in the affray. *State v. Bowles*, 47 S. W. 892, 893, 146 Mo. 6, 69 Am. St. Rep. 598.

A weapon may be a deadly weapon, although not specially designated for offensive or defensive purposes, or for the destruction of life or the infliction of injury. *Blige v. State*, 20 Fla. 742, 754, 51 Am. Rep. 628.

"Deadly weapon," as used in Rev. St. c. 28, art. 6, is not restricted to such weapons or instruments as are made and designed for offensive or defensive purposes, or for the destruction of life or the infliction of injury, but embraces any instrument with which a person may be wounded by cutting or stabbing. *Commonwealth v. Branham*, 71 Ky. (8 Bush) 387, 388.

A deadly weapon is an instrument used, or that may be used, for the purpose of offense or defense, capable of producing death. Some weapons are per se deadly. Others, owing to the manner in which they are used, become deadly. A gun, a pistol, or a dirk knife is of itself deadly. A small pocket-knife, a walking cane, a switch of the size of a woman's finger, if strong and tough, may be made a deadly weapon, if the aggressor shall use such instrument with great or furious violence, and especially if the party assailed should have comparatively less power than the assailant, or be helpless and feeble. *State v. Huntley*, 91 N. C. 617, 620.

Where an instrument appears prima facie capable of taking life or grievously

hurting, it is proper for the court to say, as a matter of law, that the weapon is a deadly one. *State v. Craton*, 28 N. C. 164, 181.

The question whether the weapon is deadly, within the meaning of the law of homicide, is by some writers said to be one of fact for the jury. Mr. Bishop, on the other hand, says: "It is one likely to produce death or great bodily injury. In case of doubt, the manner in which it was used may be taken into consideration in determining whether or not it was deadly; and, when all the facts are established, the question whether a particular weapon was deadly, or not, is one of law, for the court. Yet practically, as in most instances, the establishment of the fact awaits the verdict, and the jury must pass upon the question under instruction of the court." Bishop's *Statutory Crimes*, 320. Where a weapon and the manner of its use in the commission of assault are such as to admit of but one conclusion in that respect, the question whether or not it is deadly is one of law, and the court should take the responsibility of so declaring. *Krchnavy v. State*, 61 N. W. 623, 624, 43 Neb. 337.

In *Pittman v. State*, 25 Fla. 648, 6 South. 437, the court said "that any weapon is a deadly weapon which is likely to produce death, but a weapon capable of producing death is not necessarily a weapon likely to produce death." *Stone v. Heggie*, 84 South. 146, 147, 82 Miss. 410.

#### AX.

An ax will be presumed to be a deadly weapon. *Dollarhide v. United States (Iowa)* *Morris*, 233, 39 Am. Dec. 460.

An ax is a deadly weapon, ex vi termini, without further description. *State v. Shields*, 14 S. E. 779, 780, 110 N. C. 497.

Under a statute punishing an assault with a knife, sword, or other deadly weapon, with intent to kill, it is held that the phrase "other deadly weapon" cannot be restricted to such weapons only as are carried with the person, concealed or otherwise. The phrase should not be construed according to the rule of ejusdem generis, and is sufficiently broad to include an ax. *Wilson v. Commonwealth*, 66 Ky. (3 Bush) 105, 106.

An ax is not necessarily a deadly weapon. *Melton v. State*, 17 S. W. 257, 258, 30 Tex. App. 273.

#### Brass knuckles.

Though brass knuckles are named, with other weapons, in 2 Pasch. Dig. art. 6512, "as deadly weapons," yet it is necessary to charge in an indictment for an aggravated assault with a deadly weapon that the brass knuckles were a deadly weapon. *Wilks v. State*, 3 Tex. App. 34, 35.

**Chair.**

A chair is not necessarily a deadly weapon. Whether it is such must depend on its size or weight, in connection with the manner of its use, and the part of the person that is stricken with it. There may be chairs so small that they would not, when so used, be likely to produce death or serious bodily injury. *Kouns v. State*, 3 Tex. App. 13, 15.

**Chisel.**

A chisel may be a deadly weapon. *Commonwealth v. Branham*, 71 Ky. (8 Bush) 887, 388.

**Club or stick.**

A club is a deadly weapon, within the definition that a deadly weapon is a weapon likely to produce death or do great bodily harm. *State v. Phillips*, 10 S. E. 463, 464, 104 N. C. 786.

A club may be a deadly weapon. *McNary v. People*, 32 Ill. App. 58, 62.

A rock or club is not necessarily a deadly weapon, but may be made so in the hands of a malicious or infuriated person of ordinary strength, if used in an attack upon another with intent to take his life. The physical strength of the person using the instrument or weapon is to be considered by the jury in determining whether it is a deadly weapon. *Cosby v. Commonwealth*, 72 S. W. 1089, 1090, 24 Ky. Law Rep. 2050.

It is held in North Carolina that a stick with which in fact no serious injury was inflicted is not a deadly weapon. *State v. Ray*, 89 N. C. 587.

An oaken staff nearly three feet long, of a diameter of one inch and a half or two inches, with which three blows were struck on a man drunk, shattering the bones of the head and rupturing the interior vessels of the brain, was a deadly weapon. *State v. West*, 51 N. C. 505, 509.

A piece of pine weather boarding, 14 to 18 inches long, three-fourths of an inch thick, and 6 inches wide at one end, departing to a point at the other end, was not a deadly weapon in the hands of a sickly boy, 15 years old, weighing about 80 pounds, who held it by the small end, and struck with its large end the legs and back of an adult. *State v. Sinclair*, 27 S. E. 77, 78, 120 N. C. 603.

A good-sized or fair-sized walking stick, made of bois d'arc and loaded, is not a deadly weapon. *Stevens v. State*, 27 Tex. App. 461, 11 S. W. 459.

**Fence pole.**

A black-jack fence pole, though used for a rail, is not necessarily a deadly weapon.

It might have been so large, heavy, and unwieldy as to be harmless in the hands of a man, or it might have been so small or rotten as to be not at all dangerous. As to whether or not the weapon is in fact a deadly one is a matter of proof, and depends in some cases upon the manner of its use or attempted use. *Wilson v. State*, 15 Tex. App. 150, 155.

**Hoe.**

A hoe may be a deadly weapon. *Hamilton v. People*, 113 Ill. 84, 88, 55 Am. Rep. 396.

**Iron weight.**

A deadly weapon is a weapon with which death can be produced when used in the manner in which defendant on trial used it on the occasion mentioned in the indictment; it being admitted that defendant used an iron weight, and there being no conflict in the evidence as to its use, but only as to its size. *Long v. Commonwealth*, 35 S. W. 919, 18 Ky. Law Rep. 176.

**Knife.**

A drawn knife is a deadly weapon. *Coker v. State*, 2 S. W. 615, 616, 22 Tex. App. 20.

A knife with which defendant stabbed deceased, causing his death, is a deadly weapon. *State v. Bowles*, 47 S. W. 892, 893, 146 Mo. 6, 69 Am. St. Rep. 598.

A knife may be a deadly weapon. *McNary v. People*, 32 Ill. App. 58, 62.

**Pin.**

The pushing of a pin down an infant's throat, producing its death thereby, is killing it with a deadly weapon. The question whether an instrument with which a personal injury has been inflicted is a deadly weapon depends not infrequently more upon the manner of its use than upon the intrinsic character of the instrument itself. We may expect death to ensue from pushing a pin down the throat of an infant, just as we may look for death or serious bodily harm as a consequence of firing a pistol into a crowd of human beings or at a particular person. *State v. Norwood*, 20 S. E. 712, 115 N. C. 789, 44 Am. St. Rep. 498.

**Piece of pipe.**

In a contention that a piece of pipe was not a deadly weapon, it was stated that, if the weapon was shown to be one calculated to produce death, then, in law, it would become a deadly weapon. *Danforth v. State*, 69 S. W. 159-163, 44 Tex. Cr. R. 105.

**Pistol.**

A pistol used to strike with is not necessarily a deadly weapon, but may be such, or not, according to the size and manner of

using it. *McLendon v. State* (Tex.) 86 S. W. 553, 554 (citing *Shadle v. State*, 34 Tex. 572; *Stephenson v. State*, 33 Tex. Cr. R. 162, 25 S. W. 784). See, also, *Pierce v. State*, 1 S. W. 463, 464, 21 Tex. App. 540; *Ballard v. State* (Tex.) 13 S. W. 674. Where it appears that an assault with a pistol was committed by using the pistol as a club, the size and weight thereof must be shown, in order to show the pistol a deadly weapon. *Branch v. State*, 33 S. W. 356, 357, 35 Tex. Cr. R. 304. It is a matter within the common knowledge of men that almost any kind of a pistol, if loaded and fired at a person within about 40 feet, is capable of inflicting a serious wound. *Mazzotte v. Territory* (Ariz.) 71 Pac. 911, 912.

A pistol is a deadly weapon, from the use of which malice may be implied. *Kennedy v. State*, 5 South. 300-302, 85 Ala. 326.

The term deadly weapons, within the meaning of a statute prohibiting the carrying of such weapons, includes a pistol, although it is not loaded. *State v. Bollis*, 19 South. 99, 100, 73 Miss. 57.

In a prosecution for aggravated assault and battery, the jury, after retirement, came into court and asked the following question: "Is a pistol necessarily a deadly weapon—the size not known, and not known whether empty or loaded?" Defendant was charged with having struck the prosecuting witness with a pistol, and there was no evidence as to its size or weight. The court answered, without restriction, that a pistol was a deadly weapon. On appeal it was said that "a deadly weapon is defined as one likely to produce death or great bodily injury. A pistol used to strike with is nothing more than a piece of iron of the same size, weight, and shape. There may be pistols so small that they would not, when so used, produce death or serious bodily injury. The indictment alleged this pistol to be a deadly weapon, but the evidence did not show its size or weight. The instruction that those facts were immaterial was error." *Skidmore v. State*, 43 Tex. 93, 97.

An indictment for aggravated assault, charging that the weapon used was a pistol used as a bludgeon, does not preclude the idea that the assault was with a deadly weapon. *State v. Franklin*, 36 Tex. 155, 156.

A pistol is not necessarily a "deadly weapon." In an indictment for an aggravated assault with a deadly weapon, the character of the weapon used must be alleged, and on the trial proved. *Key v. State*, 12 Tex. App. 506.

#### Sledge hammer.

The term "deadly weapon," as used in Gen. St. c. 29, art. 4, § 2, imposing a punishment on any person who shall willfully and

maliciously cut, strike, or stab another with a knife, sword, or other "deadly weapon," etc., includes a sledge hammer. *Philpot v. Commonwealth*, 6 S. W. 455, 456, 86 Ky. 585.

#### Stone.

A deadly weapon is a weapon with which death may be easily and readily produced; anything, no matter what it is, whether it is made for the purpose of destroying animal life, or whether it was not made by man at all, or whether it was made by him for some other purpose, if it is a weapon, or if it is a thing with which death can be easily and readily produced, the law recognizes it as a deadly weapon. Thus a stone may be a deadly weapon. *Acers v. United States*, 17 Sup. Ct. 91, 92, 164 U. S. 388, 41 L. Ed. 481.

#### Whip.

The words "deadly or dangerous weapon," in Comp. Laws, § 6678, providing that every person is guilty of participating in a riot if such person carried at the time any species of firearms or "other deadly or dangerous weapon," require that the instrument carried must be what is known as a deadly or dangerous weapon per se, for offense or defense of persons. A driving whip is not, therefore, a deadly or dangerous weapon. *State v. Page*, 91 N. W. 313, 314, 15 S. D. 613.

#### DEADWOODS.

See "Dead Blocks;" "Double Deadwoods."

The deadwoods of a car are the fixtures or parts of the cars which come in contact with the goose neck of the tender when being coupled to it. *Grannis v. Chicago, St. P. & K. C. R. Co.*, 46 N. W. 1067, 81 Iowa. 444.

"Deadwood" of a freight car is a wooden block fastened to the end of the car. *Fay v. Minneapolis & St. L. Ry. Co.*, 30 Minn. 231, 232, 15 N. W. 241.

"Deadwoods" is the term used to designate horizontal timbers on the ends of freight cars, beyond which extends the drawheads of the cars. In coupling, the drawhead yields to the impact of the two cars, and the deadwoods or buffers of the cars coming together arrest the force of the blow. *Louisville & N. R. Co. v. Boland*, 11 South. 667, 96 Ala. 628, 18 L. R. A. 280.

#### DEAFNESS.

Inability to hear ordinary conversation is deafness, within the meaning of the chapter relating to the deaf, dumb, and blind asylum. *Pol. Code Cal. 1903, § 2241.*

**DEAL—DEALING.****See "Mutual Dealings."**

Where a bank is authorized by its charter to deal in bills of exchange and discount notes, the word "deal" meant to act between two persons, to have and to do with, and this power extends to all transactions with bills of exchange which are lawful, and considered by the bank as expedient to enable it to transact its business or increase its profits. *Branch Bank of Alabama v. Knox*, 1 Ala. 148, 151.

The taking of goods by the true owner out of the possession, order, or disposition of a bankrupt, after a secret act of bankruptcy, but before the date of the fiat, or the filing of the petition, is "a dealing or transaction with a bankrupt," within 12 & 13 Vict. c. 106, providing that all contracts, dealings, and transactions by and with any bankrupt, bona fide entered into before the bankruptcy, shall be deemed valid, notwithstanding any prior act of bankruptcy. *Graham v. Barugh*, 14 C. B. 134, 138.

Within the meaning of the statute of limitations as relating to the settlement of partnership accounts, "dealing" embraces any act done after the dissolution in winding it up, such as the collection or payment of outstanding debts due to or by the firm, and even good debts due to the firm, outstanding when the suit is brought. *Foster's Curator v. Rison* (Va.) 17 Grat. 321, 334; *Sandy v. Randall*, 20 W. Va. 244, 247.

"Dealing, trading, and trafficking, within the meaning of a statute providing that no person shall trade, deal, and traffic in this state as a peddler, hawker, or petty chapman in any foreign goods, wares, and merchandise, characterizes the act of carrying about and offering such goods for sale." *Merriam v. Langdon*, 10 Conn. 460, 471.

**Business relations implied.**

The word "dealing," as used in the rule requiring actual notice of the dissolution of a partnership to persons dealing with a partnership, is merely used as a general term to convey the idea that the person who is entitled to actual notice of dissolution must be one who has had business relations with a firm, by which a credit is raised upon faith of the partnership. *Vernon v. Manhattan Co.* (N. Y.) 22 Wend. 183, 190 (quoted and approved in *Clapp v. Rogers*, 12 N. Y. 283, 286; *Austin v. Holland*, 60 N. Y. 571, 25 Am. Rep. 246; *Bouker Contracting Co. v. Scribner*, 65 N. Y. Supp. 444, 446, 52 App. Div. 505). "Dealing," as used in reference to dealing with a partnership so as to require notice of its dissolution, is a general term, intended to convey the idea that the person who is entitled to actual notice of the dissolution must be one who has

had business relations with the firm by which a credit is raised on the faith of the copartnership. *Tobin v. McKinney*, 84 N. W. 228, 230, 14 S. D. 52, 91 Am. St. Rep. 688. See, also, *Rose v. Coffield*, 53 Md. 18, 26, 36 Am. Rep. 389.

Within the rule as to notice on dissolution of partnership, dealing need not be confined to any particular sort of transaction, but may include any transaction within the ordinary scope of the business of the firm, in the course of which one who deals with the firm is induced to act on a faith and belief well founded that certain individuals compose the firm, and are bound by the contracts made in the firm name, within the scope of its ordinary business. One who so deals has the right to expect the firm will not be dissolved by the retirement of a solvent member without notice to him. *Jansen v. Grimshaw*, 26 Ill. App. 287, 292.

**As buy or sell as a business.**

The term "dealing in goods" implies not only selling, but buying to sell, as an avocation or business. *Saunders v. Russell*, 78 Tenn. (10 Lea) 293, 297.

In the charter of a bank, declaring that the bank shall not deal in articles, or goods, wares, and merchandise, in any manner whatever, unless it be to secure a debt due to said bank incurred by the regular transactions of the same, the word "deal" means to buy and sell for the purpose of gain, or the taking or receiving of goods, wares, and merchandise to be sold for the owner for a profit or commission. *Bates v. Bank of Alabama*, 2 Ala. 451, 466.

Where a corporation by its charter was prohibited from dealing in commercial paper, such prohibition must be construed to mean the buying and selling of such paper; and hence the fact that the corporation received and sold notes given for the sale of its lands, for which sale it was incorporated, did not constitute a dealing in commercial paper, within such prohibition, so as to render the corporation guilty of a violation of its franchises. *Buckley v. Briggs*, 30 Mo. 452, 454.

Act Cong. April 10, 1816, c. 44, incorporating the Bank of the United States, and providing that it shall not directly or indirectly deal or trade in anything except bills of exchange, gold or silver bullion, or in the sale of goods really and truly pledged for money loaned, and not redeemed in due time, did not intend to prohibit purchases generally, but prohibited buying and selling for the purposes of gain. It meant to interdict the bank from doing the ordinary business of a trader or merchant in buying and selling goods for profit, and the words "deal" and "trade" were used in contradistinction to purchases made for the accommodation or use of the bank, or resulting from its ordinary

banking operations. *Fleckner v. United States Bank*, 21 U. S. (8 Wheat.) 338, 351, 5 L. Ed. 631. The charter of a bank of the United States, declaring that it should not directly or indirectly "deal or trade" in anything except bills of exchange, gold or silver bullion, or in the sale of goods really and truly pledged for money loaned, and not redeemed in due time, does not prohibit the corporation from purchasing promissory notes, but only denotes what may or may not be bought and sold by the bank. *Bank of United States v. Norton*, 10 Ky. (3 A. K. Marsh.) 422, 425.

#### **Sale through agent or intermediary.**

"Deal," as applied to intercourse between parties, includes any transaction of any kind between them, so that a liquor dealer who sells liquor to an adult who treats a minor deals with such minor, within the meaning of Rev. St. 1898, § 1557, providing that any keeper of any saloon who shall in any way deal or drink any intoxicating liquors with a minor shall be punished, etc. *Nelson v. State*, 87 N. W. 235, 237, 111 Wis. 394, 87 Am. St. Rep. 881.

Gen. Laws 1885, c. 296, § 4, making it criminal to "vend, sell, deal, or traffic" in intoxicating liquors, etc., without a license therefor, includes the sale of a keg of beer as an original package by the agent of a brewer; the plain meaning of the words including such sale. *Peitz v. State*, 32 N. W. 763, 68 Wis. 538.

#### **Single sale.**

In a statute providing that any person who shall deal in the selling of distilled spirituous liquors, and in the quantities of 1 pint or more, and less than 20 gallons, shall be deemed a retailer, the word "deal" does not refer to a regular and continued business and employment on the part of the respondent, but a single act of selling constitutes one a retailer, within the statute. *State v. Paddock*, 24 Vt. 312, 315. Rev. St. c. 83, § 14, provides that any person who shall deal in the selling of foreign or domestic distilled spirituous liquors in a less quantity than 20 gallons at one time shall be deemed to be a retailer, within the meaning of the chapter. Held, that the term "deal" or "dealing," as used in such section, was synonymous with "sell," and that the penalty imposed for unlawfully dealing might be incurred by illegally making a single sale. *State v. Chandler*, 15 Vt. 425, 430.

St. 1846, prohibiting the dealing in spirituous liquors without a license, should be construed to mean a single act of selling. *State v. Bugbee*, 22 Vt. 32, 34.

To deal in the selling of a thing is to traffic or trade in the selling of it; to make a business of it. A single act of selling will not constitute a person a merchant. He must

deal in the business to be one. *State v. Martin*, 5 Mo. 361, 363.

A dealer in articles of merchandise, within a statute defining peddlers, is a person making a business of selling such merchandise, and does not include a person engaged in taking orders for merchandise by sample, who made a single sale of the article, and delivered the sample carried by him. In re *Houston* (U. S.) 47 Fed. 539, 541, 14 L. R. A. 719.

#### **As traffic.**

In a complaint charging that a person did sell, deal, or traffic in, for the purpose of evading a certain law, spirituous, ardent, or intoxicating liquors, "deal" is synonymous with and means the same thing as "traffic in." *Clifford v. State*, 29 Wis. 827, 829.

#### **Dealing in futures.**

As a wagering contract, see "Wager." See, also, "Options."

Dealing in futures is the making of wagering contracts in regard to the future market value of stocks, where the customer, if the deal is with a broker, pays and risks something for the purpose of securing a profit from an expected rise in the market value of stocks. Often no actual purchase is contemplated, but settlements are made according to the market rates. *Maurer v. King*, 59 Pac. 290, 292, 127 Cal. 114.

The phrase "dealing in futures" has acquired the signification of mere speculations on chances, where the grain, cotton, or stock dealt in exist only in imagination, and where no delivery is contemplated, but the parties expect to settle on the difference in the market price. *Fortenbury v. State*, 1 S. W. 58, 59, 47 Ark. 188.

#### **Dealing in grain.**

"Dealing in grain" is not a technical term. Its meaning varies with the place in which it is used. It may mean dealing in grain on hand for present delivery for cash or on credit, or it may mean, also, dealing in futures by means of contracts of sale or purchase for purpose of speculating upon the course of the market. *Irwin v. Williar*, 4 Sup. Ct. 160, 164, 110 U. S. 499, 28 L. Ed. 225.

#### **Dealing in intoxicating liquors.**

The term "dealing in intoxicating liquors" cannot be used to characterize the act of assigning a duebill payable in whisky or wine. *Schweyer v. Oberkoetter*, 25 Ill. App. 183.

#### **Dealing in stocks.**

In the honest exercise of the power to compromise a doubtful debt owing to a bank, its acceptance of stocks with a view to their

subsequent sale or conversion into money, so as to make good or reduce an anticipated loss, is not a transaction amounting to a dealing in stocks. *First Nat. Bank v. National Exchange Bank*, 92 U. S. 122, 128, 23 L. Ed. 679.

#### Dealing together.

"Dealing together," as used in the statute of 1804 authorizing a set-off if two or more persons dealing together be indebted upon bill, bond, etc., is synonymous with "mutually indebted," as used in the statute of 1818 providing that if two or more persons be mutually indebted to each by judgments, etc., one debt may be set off against the other. *Pate v. Gray* (U. S.) 18 Fed. Cas. 1291, 1292.

#### DEALER.

See "Foreign Dealer"; "Free Dealer"; "Ice Dealer"; "Itinerant Dealer or Trader"; "Lumber Dealer"; "Produce Dealer"; "Regular Dealer"; "Retail Dealer"; "Security Dealer"; "Shop Dealer"; "Wholesale Dealer."

A dealer is not one who buys to keep or makes to sell, but one who buys to sell again. He stands intermediate between the purchaser and the consumer, and depends for his profits not on the labor he bestows on his commodities, but on the skill and foresight with which he watches the market. *Commonwealth v. Brinton*, 3 Pa. Dist. R. 783, 784; *Norris v. Commonwealth*, 27 Pa. (3 Casey) 494, 496; *City of New Orleans v. Le Blanc*, 84 La. Ann. 596, 597; *Commonwealth v. Hiller*, 7 Pa. Dist. R. 471, 472.

A dealer is one who buys to sell to others at a profit. In *re Delaware & H. Canal Co.'s Case*, 8 Pa. Co. Ct. R. 496, 497.

A dealer is one who makes successive sales as a business. *Overall v. Bezeau*, 37 Mich. 506, 507.

Acts 1881, c. 149, § 4, requiring a privilege tax from dealers in live stock, means persons who both buy and sell such stock, and does not include a person who buys such stock, but does not sell the same. *Saunders v. Russell*, 78 Tenn. (10 Lea) 293, 297.

A dealer is one who habitually engages in a course of dealing, so that a merchant who sometimes takes lumber or shingles in payment of a debt, or in exchange for goods kept by him for sale, is not a lumber dealer, within the revenue law. *State v. Barnes*, 35 S. E. 605, 606, 126 N. C. 1063.

The statute of 1846 relating to the punishment of a dealer in spirituous liquors without a license does not mean that one should actually do the business in person, or even that it should be done in his presence or by his express command. A merchant who

keeps liquors in his store for sale, and clerks to deal it out, in common with other commodities kept for sale, is equally as liable for sales made by such clerks as if made by him in person. It is a dealing by him. *State v. Dow*, 21 Vt. 484, 487.

A firm drawing an accommodation note made payable to the principal generally, and therefore negotiable, and indorsed to a bank or person as he pleases, makes the firm a dealer with the holder of the note, within the rule requiring actual notice of a dissolution of the firm to be given to dealers with it. "To deal is to traffic; to transact business; to trade." *Vernon v. Manhattan Co.* (N. Y.) 17 Wend. 524, 526 (quoting Johnson's Quarto Dict.).

The term "dealer" in the statute requiring all dealers in goods, wares, etc., who keep a store, etc., to take out a license, includes a person engaged in the purchase of hay, either baled or unbaled, which he sells baled to consumers, and which he stores and bales in barns. Dealers are the middlemen between the manufacturer or the producer and the consumer. *Commonwealth v. Robb*, 14 Pa. Super. Ct. 597, 602.

Where a company that owns and operates mines regularly sells a particular brand of powder exclusively to its own employes for use in its mines, usually at a profit, but sometimes for less than cost, the company is a dealer, and liable to assessment by the mercantile appraiser, under Act April 22, 1846. In *re Delaware & H. Canal Co.'s Case*, 8 Pa. Co. Ct. R. 496, 497.

#### Association or club.

A benevolent association which sells, as such, to its members, tickets entitling them, at a picnic, to a glass of beer, is a dealer in malt liquors, within the statute requiring a license for that purpose. *United States v. Giller* (U. S.) 54 Fed. 656, 658.

#### Barkeeper synonymous.

The words "dealer" and "keeper" of a barroom are synonymous, and mean the same thing, as used in an indictment charging defendant with being a dealer or keeper of a barroom. *Hofheints v. State* (Tex.) 74 S. W. 310, 311.

#### Butcher.

"Dealer," as used in the revenue act of 1879, Schedule B, requiring every dealer who shall buy and sell goods, wares, and merchandise to pay a license tax, does not include a butcher. *State v. Yearby*, 82 N. C. 561, 33 Am. Rep. 694.

A dealer is one who buys and sells; and, under Laws 1890, c. 11, § 51, imposing an annual license tax on the business of buying and selling fresh meat from offices, stores, etc., in cities and towns, and exempting farm-

ers who kill their own product and sell it, a person who was not a farmer, but who bought the cattle, butchered them, and sold the meat at his store in a town, was liable for the tax. The statute did not necessarily require that the party must buy and sell the meat when in the same state or condition. It intended to tax the business of buying fresh meat and the business of selling fresh meat—either or both—if prosecuted for gain, as a vocation. *State v. Carter*, 40 S. E. 11, 12, 129 N. C. 560.

#### Farmer.

"Dealer" is a term of trade, having a distinct and well-known signification, as that of merchant, mariner, or broker. It means one whose business it is to buy and sell; the middleman who stands between the producer and consumer; one who derives his profit from his skill in knowing when to buy and how to sell the products of others. It was so used in Act May 4, 1841 (Purd. Dig. p. 1455), as supplemented by Act April 22, 1846 (Purd. Dig. p. 1456), which imposes a certain tax on dealers in merchandise, or manufacturers who kept a store apart from their manufactory. Hence it would not include a farmer who sells the product of his farms in the public markets of the different towns, and occasionally sells the produce of other farms in his neighborhood. *Barton v. Morris* (Pa.) 1 Wkly. Notes Cas. 543, 544, 10 Phila. 360.

#### Manufacturer.

"Dealer," as used in Act 1881, p. 199, § 4, providing the rate of taxation on wholesale liquor dealers, cannot be construed to mean a manufacturer who sells articles manufactured by him; the article being the product of the growth of the state. A manufacturer of whisky or other spirituous liquors, who sells from his place of manufacture in unbroken packages, or as a manufacturer, is not a wholesale dealer in whisky. A dealer is a middleman between the manufacturer or the producer and the consumer. A dealer, in the popular acceptance or sense of the word, is not one who buys to keep or makes to sell, but one who buys to sell again. He stands immediately between the producer and consumer, and depends for his profits not on the labor he bestows on his commodities, but on the skill and foresight with which he watches the markets. *Taylor v. Vincent*, 80 Tenn. (12 Lea) 232, 285, 47 Am. Rep. 338.

As used in Act April 22, 1846, § 11, subjecting all dealers in goods, wares and merchandise to an annual tax or license fee, dealers are the middlemen between the manufacturer or the producer and the consumer. A dealer, in the popular, and therefore in the statutory, sense of the word, is not one who buys to keep, or makes to sell, but one who buys to sell again. He stands immediately between the producer and the consumer, and depends for his profits, not on the labor he

bestows on his commodities, but on the skill and foresight with which he watches the markets. One who buys hides, and manufactures them into leather by the usual process of tanning, and afterwards sells the leather, is not a dealer. *Commonwealth v. Campbell*, 33 Pa. (9 Casey) 380, 386.

A dealer, in the common acceptance, and therefore in the legal meaning, of the word, is not one who buys to keep, or makes to sell, but one who buys to sell again. One manufacturing ice and selling his product is not a dealer, within *Sayles' Ann. Civ. St. art. 5049*, subd. 52, imposing a tax on wholesale dealers in ice in cities of a certain population. *Egan v. State* (Tex.) 68 S. W. 273.

#### Merchant.

It does not follow, because a merchant is a dealer, that a dealer is also a merchant. A merchant must have a store, stand, or other place where he sells goods. A dealer need not have such store, stand, or place to keep and sell his goods. He may buy and sell without such aids to his business. A merchant is not required to be a purchaser, but a dealer, at common law, is both a buyer and a seller. *Kansas City v. Ferd Helm Brewing Co.*, 73 S. W. 302, 303, 98 Mo. App. 590.

#### Miller.

Act April 22, 1846, § 11, authorizing the taxation of dealers in goods, wares, and merchandise, applies to a miller who purchases and raises grain on his farm, and retails the flour at other places than his mill. *Berks County v. Bertolet*, 13 Pa. (1 Harris) 522, 524.

#### Money lender.

By a "dealer in real property," we understand a person who buys and sells for the purpose of profit. The term does not include one whose business it is to loan money upon notes or bonds and mortgages of real estate. *Blunt v. Walker*, 11 Wis. 334, 347, 78 Am. Dec. 709.

#### Pawnbroker.

Code 1892, § 3399, providing that dealers in pistols shall pay a privilege tax of \$100, means those who are engaged in the business of buying and selling pistols, and does not include a pawnbroker who takes a pistol as a pledge for the repayment of a loan. *Graham v. State*, 13 South. 883, 884, 71 Miss. 208.

A pawnbroker who in a solitary instance takes a pistol in pledge for a loan, and sells it for the payment of a debt, is not a dealer in pistols, within the law requiring such a person to take out a privilege tax. *Graham v. State*, 13 South. 883, 884, 71 Miss. 208.

#### Physician.

In Code, § 1077, which forbids dealers in intoxicating drinks and liquors to sell or give

the same to unmarried minors, knowing them to be such, "dealer" would include a physician who kept on hand intoxicating drinks or liquors for the purpose of sale or profit. *State v. McBrayer*, 2 S. E. 755, 756, 98 N. C. 619.

#### **Plumber.**

A plumber, who, in putting in steam and water heating apparatus, buys the necessary articles and materials from dealers in plumbing materials; works himself, employing other plumbers to help; gets paid by charging for the labor and adding a percentage to the cost of the material; has no place of business but his workshop, and does not do business as a buyer and seller—is not a dealer in goods, wares, and merchandise, within the meaning of the laws imposing mercantile license taxes. He does not buy to sell the articles he uses. He does not sell them in the literal sense, and he only buys them when he has a job of work to do for which he requires them. As between the dealer and himself, he is the consumer. He needs the articles in his business. He puts them in the buildings, putting his own work upon them; but, when they are placed there, they are not in the same shape as when he received them, but as a compact whole, composing all the materials required for the purpose, no matter from what source he obtained them. *Commonwealth v. Gormly*, 34 Atl. 282, 173 Pa. 586.

#### **One making a single sale.**

"Dealer," as used in the United States revenue laws, requiring a dealer in certain commodities to have a license, means one making a plurality of sales. A single sale of all the merchandise which a person has on hand, who is going out of a business formerly carried on by him, does not constitute him a dealer. A single sale, if accompanied by evidence of a preparation and readiness by the vendor to make other sales, constitutes him a dealer. *Goodwin v. Clark*, 65 Me. 280, 284.

A dealer is one who makes successive sales as a business. One owning certain property, and selling it in one lot, is not a dealer. *Overall v. Bezeau*, 37 Mich. 506, 507.

#### **Dealer in drugs.**

Rev. Code 1855, p. 1077, prohibiting merchants from selling intoxicating liquors in less quantities than one gallon, but allowing a dealer in drugs and medicines to sell liquors in any quantity, when it is used only for medicinal purposes, means a merchant engaged principally in selling drugs and medicines, though he may incidentally admit into his store, and may sell, articles not strictly falling under the denomination of drugs and medicines. The term does not include a merchant whose principal dealing was in dry goods, groceries, provisions, etc., although, it being a country store, a small assortment of

drugs was kept for the convenience of his customers. *State v. Wells*, 28 Mo. 565, 568.

#### **Dealer in futures.**

"Dealer in futures," as used in Act 1883, c. 106, § 4, fixing a certain tax for dealers in futures, means persons buying and selling cotton, corn, general produce, stocks, bonds, etc., for future delivery for their customers. *Memphis Brokerage Ass'n v. Cullen*, 79 Tenn. (11 Lea) 75, 77.

#### **Dealer in intoxicating liquor or spirits.**

One who engages in the business of procuring from the manufacturers beer by the case, and disposing of it by the bottle, is dealing in liquors; and it can make no difference if it is true that the customers left their orders for specific quantities before the defendant undertook the procurement thereof. The word "dealer" is not confined to one who sells his own property only. If one open a place of business for the purpose of furnishing, to all who may patronize him, liquors in quantities of less than five gallons, he is engaged in the business of a retail liquor dealer, irrespective of the question of the manner or mode in which he procures the liquors from the manufacturers. *United States v. Allen* (U. S.) 38 Fed. 736, 737.

"Dealer," as used in Pen. Code, art. 186, providing for the punishment of dealers in spirituous liquors for selling such liquors on Sunday, cannot be construed to include one who has made but a single sale. *Archer v. State*, 10 Tex. App. 482, 483.

"Liquor dealers," as used in the Constitution, giving the General Assembly power to tax liquor dealers, the term is employed in a generic sense, and includes all kinds and classes. There may be different classes and varieties included under the general description of "liquor dealers," and it is competent for the General Assembly to classify the different kinds of liquor dealers included within the description as used in the Constitution. *Timm v. Harrison*, 109 Ill. 593, 601; *Dennehy v. City of Chicago*, 11 N. E. 227, 229, 120 Ill. 627.

Since the passage of the act of December 24, 1890 (1 Acts 1890-91, p. 128), rendering it unlawful to sell spirituous liquors in any quantity whatever without first obtaining a license, the phrase "dealers in spirituous liquors," when used in a statute, comprehends all persons who sell such liquors in any quantity. Consequently the fifteenth clause of the second section of the general tax act of 1892 is to be construed as imposing the tax therein specified upon dealers who sell by wholesale, in the original packages, corn whisky of their own manufacture, in this state, the same as upon other dealers of such liquors. *Fincannon v. State*, 21 S. E. 53, 93 Ga. 418.



A distiller or rectifier is not a dealer in spirits, within 6 Geo. IV, c. 80, § 124, prohibiting any dealer in spirits from sending out or selling spirits of a certain grade. *Wetherell v. Jones*, 8 Barn. & Adol. 221.

Making a single sale of a stock of liquors in gross does not constitute the seller a dealer, or enable the buyer to resist payment of his note for the price on the ground that the seller has not paid a tax to the state as a dealer. *Overall v. Bezeau*, 87 Mich. 506, 507.

#### **Dealer in secondhand goods.**

The term "dealer in secondhand goods," in a statute requiring dealers in secondhand goods to pay a license tax, includes a bicycle dealer who sells secondhand bicycles procured in trade, or which have been used in a bicycle livery and school maintained by him, even though he also sells new bicycles. *Lasley v. District of Columbia*, 14 App. D. C. 407.

The keeper of every shop where old metals are bought and sold is a dealer in such metals, within Rev. St. c. 102, § 29, providing that suitable persons may be licensed to be dealers in secondhand articles; and where they purchase old gold and silver articles at their shops, and send them away to be refined, every such purchase is a deal, and the purchasers are traffickers or dealers in old gold or silver. *Commonwealth v. Hood*, 66 N. E. 722, 723, 183 Mass. 196.

#### **Dealer in tobacco.**

As the word is used in the revenue law, a dealer in tobacco is a person whose usual business, occupation, employment, or vocation is to deal in tobacco—in other words, who is a tobacconist. It is not, however, every one who sells tobacco that is required to take out a license, but only dealers in tobacco, as the term is thus defined. *Carter v. State*, 44 Ala. 29.

#### **DEALERS' TALK.**

The term "dealers' talk" means the puffing of goods by their owners to induce the sale thereof. "The law recognizes the fact that men will naturally overstate the value and quality of the articles which they have to sell. All men know this, and a buyer has no right to rely upon such statements." *Kimball v. Bangs*, 11 N. E. 113, 114, 144 Mass. 321.

"Dealing talk" is a term used to designate the puffing of goods, etc., in transactions for the sale thereof. It "is not regarded, in law, as fraudulent, unless accompanied by some artifice to deceive the purchaser and throw him off his guard, or some concealment of intrinsic defects, not easily discoverable by reasonable care and diligence." *Reynolds v. Palmer* (U. S.), 21 Fed. 433, 435.

#### **DEALT.**

The words "played" and "dealt," as used in the chapter punishing gaming, have the meaning attached to them in common language. The word "exhibited" is intended to signify the act of displaying the bank or game for the purpose of obtaining bettors. *Pen. Code Tex.* 1895, art. 387.

#### **DEAR WIFE.**

A devise by a husband to his dear wife, but which does not mention her name, means the individual who answers the description at the date of the will, and not a subsequent wife. "The words 'my dear wife' point to a person then existing, the qualifying adjective necessarily implying affection for an individual; such an affection being inconceivable of a person not then occupying the designated relation." *Johnson v. Johnson*, 1 Tenn. Ch. 621, 623.

#### **DEATH.**

See "Civil Death"; "Instant Death"; "Penalty of Death."

Death by accident, see "Accident—Accidental."

Death by his own act, see "Die by His Own Act."

Death by his own hand, see "Die by His Own Hand."

Death by the hand of justice, see "Die by the Hand of Justice."

Death by poison, see "Poison."

Death by opium, see "Opium."

Death by suicide, see "Suicide."

Death from intemperance, see "Intemperance."

Death in consequence of violation of law, see "Die in Consequence of Violation of Law."

Death leaving issue, see "Die Leaving Issue."

Death without children, see "Die Without Children."

Death without heirs, see "Die Without Heirs."

Death without issue, see "Die Without Issue."

Death without leaving children, see "Die Without Leaving Children."

Death without leaving issue, see "Die Without Leaving Issue."

"The destruction of all the senses is death." *In re McDanel's Will*, 25 Ky. (2 J. Marsh.) 331, 338.

Death is the opposite of life. It is the termination of life. There must be a living child before its death can be produced. It is not the destruction of the fetus, the interruption of that process by which the human race is propagated and continued, that

is punished by the statute as manslaughter, but it is causing the death of a living child. *Evans v. People* (N. Y.) 1 Cow. Cr. R. 494, 497; *Evans v. People*, 49 N. Y. 86, 90.

The father of a minor who was employed as a switchman of a railroad company entered into a contract with the company by which he stipulated that he released and forever acquitted the company from all or any claim or liability to him for damages for any injuries sustained by the son. The son was thereafter killed while in the employ of the railway company, and the father brought an action to recover for his death. It was held that, while the words "injury" and "death" were by no means synonymous, yet it was certainly true that, relatively to the father seeking to recover for the lost services of his minor child, it was immaterial whether the tort from which his loss originated was one which occasioned the child physical injury, or one which, by causing his death, brought about the same result; and hence such contract was a bar to the action. *New v. Southern R. Co.*, 42 S. E. 891, 892, 116 Ga. 147, 59 L. R. A. 115.

The word "death," as used in a devise to one person, and, in case of his death, to another, refers to a death in the lifetime of the decedent. *Wright v. Charley*, 129 Ind. 257, 259, 28 N. E. 706.

#### As absence or removal.

See "Removal."

Absence from the state or otherwise, see "Otherwise."

#### As personal injury.

See "Personal Injury."

## DEBAUCH.

Where, in an action by a husband for the alienation of his wife's affections, the petition alleged that defendant debauched the plaintiff's wife, the word "debauched" should be construed, not as importing corruption of affections and conscience, but as meaning adultery. *Wood v. Mathews*, 47 Iowa, 409, 410.

The words "seduce and debauch," in their common, as well as legal, acceptation, mean illicit intercourse accomplished by arts, promises, or deception. *State v. Curran*, 49 N. W. 1006, 1007, 51 Iowa, 112.

#### As carnally know.

Debauch means to carnally know. *State v. Wheeler*, 18 S. W. 924, 925, 108 Mo. 658.

The debauching of a woman, within the meaning of the statute making it criminal to seduce and debauch any unmarried female, etc., is the carnal knowledge of her. A female may indeed be debauched without being

seduced, or seduced without being debauched. *Putman v. State*, 16 S. W. 97, 29 Tex. App. 454, 25 Am. St. Rep. 738 (citing *State v. Reeves*, 97 Mo. 668, 10 S. W. 841, 10 Am. St. Rep. 849).

The words "seduce and debauch," in the statement in an indictment that defendant unlawfully and feloniously did seduce and debauch a woman named, necessarily charged the offense of seduction. They import the idea of illicit intercourse, accomplished by arts, promises, or deception, and have no other meaning. The use of the phrase "carnally know" is not essential to charge the offense, for the reason that the words "seduce and debauch" include the same meaning. *State v. Whalen*, 68 N. W. 554, 555, 98 Iowa, 662 (citing *State v. Curran*, 51 Iowa, 112, 49 N. W. 1006).

#### Seduce distinguished.

Under Rev. St. § 1259, providing that "if any person shall, under promise of marriage, seduce and debauch any unmarried female of good repute," etc., there are two steps necessary to be taken to consummate the crime: First, the female must be "seduced"; that is, corrupted, deceived, drawn aside from the path of virtue which she was pursuing. Her affections must be gained, and her mind and thoughts polluted. Second, in order to complete the offense, she must be "debauched"—that is, she must be carnally known—before the guilty agent becomes amenable to human laws. Thus it will be seen that a female may be "seduced" without being "debauched," or "debauched" without being "seduced." *State v. Reeves*, 10 S. W. 841, 845, 97 Mo. 668, 10 Am. St. Rep. 849.

A demurrer to a complaint was sustained on the assumption that the words "made an indecent assault, and then and there debauched and carnally knew," imported nothing more than the seduction of the plaintiff, for which she could maintain no action. "I have already pointed out the mistake that the party demurring has fallen into, as I suppose, from finding these words exclusively used heretofore in actions for seducing a daughter or a wife, and inferring thereby that they amounted to nothing more than an averment of seduction. And I also apprehend that he has not entirely comprehended the full extent of the meaning of the word 'debauched,' which the plaintiff has used as descriptive of the act or injury done to her, and which, in our ordinary dictionaries, is defined, 'enticed, led astray, vitiated, or corrupted,' but which, especially when used as a legal word, has a more extended signification. The verb 'to debauch' is a word of French origin, compounded of the preposition 'de,' from, and 'bauche,' an old word in use in Brittany, meaning shop, and signifying in its compound sense to entice or draw one away from his work, employment, or duty. *Lunier, Dictionnaire des Sciences*

et des Arts, Paris, 1805. It is in this sense of enticing and corrupting that it came into use in our language, as will be found by reference to one of the earliest authorities for the meaning of English words, Phillip's New World of Words, 1696, where it is defined 'to corrupt one's manners, to make lewd, to mar or spoil,' a sense in which it had been previously used by Ben Jonson and by Shakespeare. Bailey, in his Dictionary, some 20 years after, adds further: 'To seduce and vitiate a woman.' As applied to a woman, the word as thus defined meant merely seduction. But in the folio edition of Bailey (by Scott, 1755) the meaning of the word was extended: 'To seduce and violate a woman.' It is in this two-fold sense that it is used in the law forms, and which it has now fully acquired as a general word. McKenzie in his English Synonyms (London, 1854), defines it to 'ravish, deflower, violate'; and it is used in Worcester, Dict. (Boston, 1847), as an appropriate definition for the word 'constuprate,' from the Latin 'constupro,' meaning to violate. There is authority, therefore, in the legal forms and in the lexicographers, for the use of the word in the sense in which plaintiff has employed it." *Koenig v. Nott* (N. Y.) 2 Hilt. 323, 329.

## DEBENTURE.

A debenture is defined as a writing acknowledging a debt; specifically, an instrument, generally under seal, for the payment of money lent; usually, if not exclusively, used of obligations of corporations or large moneyed copartnerships, issued in a form convenient to be bought and sold as investments. Sometimes a specific fund or property is pledged by the debentures, in which case they are usually termed "mortgage debentures." *Barton Nat. Bank v. Atkins*, 47 Atl. 176, 180, 72 Vt. 83.

## DÉBRIS.

Débris is used in the mining law to designate that superficial deposit on the earth's surface which is movable, as contrasted with the immovable mass that lies below. *Stevens v. Williams* (U. S.) 23 Fed. Cas. 44.

## DEBT.

See "Antecedent Debt"; "Bad Debt"; "Bonded Debt"; "Book Debt"; "Community Debt"; "Confusion of Debts"; "Contingent Debts or Liabilities"; "Continuing Debt"; "Evidence of Debt"; "Existing Debt"; "Fiduciary Debt"; "Floating Debt"; "Funded Debt"; "Imprisonment for Debt"; "Individual Debts"; "Just Debts"; "Legal Debt"; "Mutual Debt"; "Pre-existing Debt"; "Preferential Debts";

"Provable Debt"; "Public Debt"; "State Debt"; "Steamboat Debts"; "Unliquidated Debt"; "War Debt"; "Writ of Debt."

See, also, "Indebted—Indebtedness."

All debts, see "All."

Any debt, see "Any."

Debts of municipal corporations, see "Indebtedness."

Situs of debt, see "Situs."

A debt, according to Webster is that which is due from one person to another, whether money, goods, or services; that which one person is bound to pay to another or to perform for his benefit; that of which payment is liable to be exacted; due; obligation; liability. *Cook v. Bartholomew*, 22 Atl. 444, 445, 60 Conn. 24, 13 L. R. A. 451 (citing Webst. Dict.); *Warner v. Warner* (N. Y.) 18 Abb. N. C. 151, 155; *Rodman v. Munson* (N. Y.) 13 Barb. 188, 189 (citing Webster in Sen. Doc. 1851); *Equitable Life Ins. Co. of Iowa v. Board of Equalization*, 37 N. W. 141, 142, 74 Iowa, 178; *Harris v. Larsen*, 66 Pac. 782, 24 Utah, 139; *City Council of Dawson v. Dawson Waterworks Co.*, 32 S. E. 907, 912, 106 Ga. 696; *Lewis v. New York Cent. R. Co.* (N. Y.) 49 Barb. 330, 336; *Newell v. People*, 7 N. Y. (3 Seld.) 9, 124.

In common parlance the word "debt" is sometimes used to denote any kind of just demand, and has been differently defined, owing to the subject-matter of the statute in which it has been used, and while ordinarily it imports a sum of money arising upon a contract, express or implied, in its more general sense it means that which one person is bound to pay to or perform for another. *Barber v. City of East Dallas*, 18 S. W. 438, 439, 83 Tex. 147.

The word "debt" includes any sort of obligation to pay money. *Chalmers v. Sheehy*, 64 Pac. 709, 712, 132 Cal. 459, 84 Am. St. Rep. 62; *In re Lambie's Estate*, 54 N. W. 173, 174 84 Mich. 489; *Latimer v. Veadar*, 46 N. Y. Supp. 823, 829, 20 App. Div. 418.

A debt is that which one is bound to pay to another, and that the debtor has means with which to pay makes him none the less a debtor until he has paid. *Lovejoy v. Inhabitants of Foxcroft*, 40 Atl. 141, 147, 91 Me. 367.

A debt is a certain sum that is owing from one person to another. *Little v. Dryer*, 27 N. E. 905, 906, 138 Ill. 272, 32 Am. St. Rep. 140.

"A debt is a sum of money due from one person or party to another." *Anthony v. Savage*, 3 Pac. 546, 548, 3 Utah, 277; *Appeal Tax Court of Baltimore City v. Rice*, 50 Md. 302, 316.

"A debt is a legal liability to pay a specific sum of money." *Allen v. Dickson* (Ala.) 1 Minor, 119, 120.

A debt is defined as any claim for money that one is bound to pay. In *re Lambie's Estate*, 94 Mich. 489, 491, 54 N. W. 173, 174.

A "debt" is created when one person binds himself to pay money to another. *Scott v. City of Davenport*, 34 Iowa, 208, 213.

"A debt is an obligation to pay a certain sum of money due from a debtor to his creditor." *Johnson v. Hines*, 61 Md. 122, 136.

A debt, as defined by the Century Dictionary, is that which is due from one person to another, whether money, goods, or services. *State v. Georgia Co.*, 17 S. E. 10, 11, 112 N. C. 34, 19 L. R. A. 485.

A debt is defined to be in its general sense a specific sum of money, which is due or owing from one person to another, and denotes, not only the obligation of the debtor to pay, but the right of the creditor to receive and enforce payment. *Campbell v. City of Indianapolis*, 57 N. E. 920, 929, 155 Ind. 186.

The word "debt," as defined by Burrill, is of large import, including not only debts of record or judgments and debts by specialty, but also obligations arising by simple contract to a very wide extent, and in its popular sense includes all that is due to a man under any form of obligation or promise. *New Jersey Ins. Co. v. Meeker*, 37 N. J. Law (8 Vroom) 282, 300; *Daniels v. Palmer*, 42 N. W. 855, 857, 41 Minn. 116; In *re Brouillard*, 40 Atl. 762, 20 R. I. 617.

"Debt," as used in Civ. Code 1895, § 5893, limiting the amount of debt of municipal corporations, is to be taken in its ordinary, natural, common-sense, popular meaning. Constitutions are the result of popular will, and their words are to be understood ordinarily as used in the sense that such words convey to the popular mind. The debt of an individual or corporation or the public, in its usual and popular sense, means the amount for which the individual or corporation or the public would be personally liable, if called upon to discharge the obligation. *Epping v. City of Columbus*, 43 S. E. 803, 805, 117 Ga. 263.

Rev. St. c. 44, § 10, requires the receiver of a corporation to pay all "debts" due from the corporation, if the funds in his hands shall be sufficient therefor, and that, if not, he shall distribute the same ratably among all the creditors who shall prove their debts. Held, that the term "debts" is not employed in any strict, technical sense, but is to be understood in its popular meaning, as extending to all legal demands actually due and which may be ascertained without the intervention of a jury. *Atlas Bank v. Nahant Bank*, 44 Mass. (3 Metc.) 581, 582.

"The word 'debt,' even in its broadest signification, implies that the consideration

of the obligation of a debtor has been executed on the part of the creditor, and the payment of the debt discharges the obligation." *Pettibone v. Toledo, O. & St. L. R. Co.*, 19 N. E. 337, 340, 148 Mass. 411, 1 L. R. A. 787.

The word "debt" includes any obligation that one is under to another to pay money or other thing of value, which arises the very moment that the obligation is undertaken, and continues until discharged by payment. *Park v. Candler*, 40 S. E. 523, 528, 114 Ga. 466.

"A debt signifies whatever one owes. There is always some obligation that it shall be paid; but the manner in which or the condition upon which it is to be paid, or the means of coercing payment, do not enter into the definition." *Rodman v. Munson* (N. Y.) 13 Barb. 188, 197; *Dunsmoor v. Furstenfeldt*, 26 Pac. 518, 519, 88 Cal. 522, 12 L. R. A. 508, 22 Am. St. Rep. 331.

The word "debts," as used in the charter of a corporation which provided that, in order to insure the safety of debts due from the association, it should be its duty to maintain a special fund in the care of a trustee, etc., was construed as synonymous with the phrase "payments and expenses of every character" in section 18, making it the duty of the corporation to make and enforce assessments "in order to meet all payments and expenses of every character due from the association." In *re Penobscot Lumbering Ass'n*, 45 Atl. 290, 292, 93 Me. 391.

Code 1871, § 1302, giving to justices of the peace jurisdiction in suits for the recovery of debts, damages, or personal property, embraces every subject of recovery, other than realty. *Western Union Tel. Co. v. Sullivan*, 12 South. 460, 70 Miss. 447.

Within the meaning of a statute providing that any person who shall sell or dispose of any personal property on which a lien exists, and shall fail to pay the debt secured by the same within 10 days, or shall fail in such time to deposit the amount of such debt with the clerk of court of the county in which the lien debtor resides, shall be deemed guilty of a misdemeanor, the word "debt" will include a person who, in selling property, had agreed to deliver cotton in payment of the rent for the use of land. *State v. Bardin*, 41 S. E. 959, 960, 64 S. C. 206.

The term "debt," as used in the revenue act, "means those unsecured liabilities owing by the person, firm, corporation, or association, assessed to bona fide residents of this state, or firms, associations, or corporations doing business therein; but credits, claims, debts, and demands due, owing, or accruing for or on account of money deposited with savings or loan corporations shall, for the purpose of taxation, be deemed and treated

as an interest in the property of such corporations, and shall not be assessed to the creditor or owner thereof. Pol. Code Cal. 1903, § 3617, subd. 6.

The term "debts," as used in the title relating to the revenue, means those liabilities owing by the person, firm, corporation, or association assessed to the bona fide resident of the state, or firms, associations, or corporations doing business therein. Pol. Code Idaho 1901, § 1313, subd. 6.

The word "debts" includes every claim and demand upon which a judgment for a sum of money, or directing the payment of money, could be recovered in an action. Code Civ. Proc. N. Y. 1899, § 2514, subd. 3; Cook v. Woodward (N. Y.) 5 Dem. Sur. 97, 100.

The term "debts," as used in the title on taxation, means those secured or unsecured liabilities owing by a person. Rev. St. Utah 1898, § 2505; Pol. Code Mont. 1895, § 3680, subd. 6.

#### Administration expenses.

Under a statute making a decedent's land liable for his debts, and providing for the sale thereof to pay so much of the debts as his personal property will not pay, it is held that the expenses of settling his estate, including executors' commissions and counsel fees, are "debts," within the meaning of the statute. Personette v. Johnson, 40 N. J. Eq. (18 Stew.) 173, 178, 179.

In the statute providing for the payment of debts, funeral expenses, and the expenses of administration of the estate of a decedent out of the personal estate, and that the real estate shall also stand chargeable for the debts over and above what the personal estate may be sufficient to pay, the debts referred to are those due by the intestate at his decease, and do not include expenses of administration. So, where the debts of the decedent allowed against the estate have all been paid, such statute does not authorize the sale of real estate for the purpose of paying the expenses of administration. Hollman v. Bennett, 44 Miss. 322, 328, 331.

The term "debts" when used without any words of limitation or qualification in a will in which testator charges certain devises with his debts, is to be construed as not including liabilities arising after the decease, or charges imposed by law as funeral expenses, and charges and costs of administration. Nash v. Ober, 2 App. D. C. 304, 308.

"Debts," as used in a statute requiring an administrator to file an itemized account of the debts of an estate, does not include his expense in carrying on an unauthorized business with the estate property. In re Rose's Estate, 22 Pac. 86, 87, 80 Cal. 166.

#### Alimony.

As debt founded on contract, see "Debt Founded On Contract."

Alimony is not awarded as a debt, but for the enforcement of a duty growing out of the marital relation, which is not severed by the husband's misconduct. Alimony is not strictly a debt due to the wife, and it is not a debt or liability which the wife can assign, or which can be appropriated for a debt existing prior to the divorce. It is not a debt provable in bankruptcy. Turner v. Turner (U. S.) 108 Fed. 785, 786, 787. See, also, In re Lachemeyer (U. S.) 14 Fed. Cas. 914, 915; In re Nowell (U. S.) 99 Fed. 931, 933; Chase v. Ingalls, 97 Mass. 524, 530; Lynde v. Lynde, 52 Atl. 694, 699, 702, 64 N. J. Eq. 736, 58 L. R. A. 471; People v. Grell, 65 N. Y. Supp. 522; Noyes v. Hubbard, 23 Atl. 727, 64 Vt. 302, 15 L. R. A. 334, 33 Am. St. Rep. 928; Linton v. Linton, 15 Q. B. Div. 239, 54 Law J. Q. B. 529, 33 Wkly. Rep. 714, 2 Morrell, Bankr. Cas. 179, 49 J. P. 597; In re Hawkins, 1 Q. B. 25, 10 Rep. 29, 69 Law T. 769, 42 Wkly. Rep. 202, 1 Manson, Bankr. Cas. 6; Kerr v. Kerr, 2 Q. B. 439, 66 Law J. Q. B. 833, 77 Law T. 29, 46 Wkly. Rep. 46, 4 Manson, Bankr. Cas. 207 (cited in Lynde v. Lynde, 52 Atl. 694, 699, 702, 64 N. J. Eq. 736, 58 L. R. A. 471). See, however, In re Van Orden (U. S.) 96 Fed. 86, 88, wherein it is held that a claim of a bankrupt's divorced wife for unpaid monthly installments of the alimony awarded her is a provable debt.

The claim of the wife for alimony is not in the nature of a debt, and she is not a creditor of the husband. Daniels v. Lindley, 44 Iowa, 567, 569.

In Romaine v. Chauncey, 129 N. Y. 566, 29 N. E. 826, 14 L. R. A. 712, 26 Am. St. Rep. 544, it is said that alimony is not strictly a debt due to the wife, but rather a general duty of support, made specific and measured by the court, and hence cannot be seized for payment of wife's debts. Locke v. Locke, 24 N. Y. Supp. 1129, 1130, 71 Hun, 363, 366.

It is the well-settled law of this country that a decree or order for alimony in a divorce proceeding is not a "debt," within the meaning of that term as used in Const. art. 1, § 17, prohibiting imprisonment for debt. In re Cave, 66 Pac. 425, 426, 26 Wash. 213, 90 Am. St. Rep. 736. See, also, Kaderabek v. Kaderabek, 2 O. C. D. 236, 237, 3 Ohio Cir. Ct. R. 419.

"Debt," as used in Gen. St. c. 124, § 5, prescribing the proper mode of serving an execution issued for "debt or damages" in a civil action, except in actions for tort cannot be construed to include the allowance of alimony, or the award to the wife of her own or a part of the husband's estate on

granting a divorce. *Chase v. Ingalls*, 97 Mass. 524, 530.

#### **Allowance to widow.**

The allowance to a widow and minor children is a debt of the estate, and under the statute has preference over all others, except funeral expenses, etc. *Watts v. Watts*, 38 Ohio St. 480, 491.

Section 82 of the administrative act (Swan & C. St. pp. 580, 581) classifies the allowance of a sum of money to the widow and child of the decedent among the debts of the deceased. A certain deed of a decedent was decreed by the court to be void as to creditors, and subjected to the payment of the debts of the estate and the costs of administration. Held, that the allowance to the support of the widow and child was a debt of the estate, for the payment of which resort might be had to such land or its proceeds. *Allen v. Allen's Adm'r*, 18 Ohio St. 234, 236.

Under a will declaring that, "out of the proceeds of my property directed to be sold, my funeral and all other debts I desire to be first paid, including the expenses for the support and maintenance of my family from the time of my death until the division of my estate," the claim of the widow for the support and maintenance of herself and family until the division of the estate is not one of the debts which can be paid under the statute relating to insolvent estates, but is a legacy, the payment of which is postponed to the payment of the debts. *Prince v. Prince*, 47 Ala. 283, 288, 289.

#### **Antenuptial obligation.**

"Debt," as used in a clause in a will directing the payment of testator's debts, includes a debt due from the husband to his surviving wife by virtue of an antenuptial contract. *Warner v. Warner* (N. Y.) 18 Abb. N. C. 151, 155.

#### **Balance in bank.**

The term "debt," however technically correct, is not colloquially or familiarly applied to a balance at a banking house. *Parker v. Marchant*, 1 Younge & C. Ch. 290, 300.

#### **Bond.**

"Debts," as used in Acts 1862-63, declaring that United States notes issued under the loan and currency act shall be lawful money and a legal tender for the payment of debts, means obligations for the payment of money, which does not include a bond obligating the defendant to repay the principal sum borrowed in gold and silver coin; such obligation not being a debt, but an obligation to deliver a particular chattel described. *Bronson v. Rodes*, 74 U. S. (7 Wall.) 229, 250, 19 L. Ed. 141.

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"Debts," as used in Legal Tender Act U. S. Feb. 25, 1862, providing that ordinary debts may be satisfied by the tender of United States notes, means obligations for the payment of money in which the medium of payment is not specified, and does not authorize a tender of United States notes in payment of a contract payable in American gold dollars; such a contract being a contract for the delivery of specific chattels, and not a negotiable instrument payable in money of the realm. *McGoon v. Shirk*, 54 Ill. 408, 5 Am. Rep. 122.

"Debt," as used in a will fixing the commission of the executor for collecting testator's debts, includes the interest-bearing obligations of the United States which were owned by testator. In re *Tilden* (N. Y.) 44 Hun, 441, 444. See In re *Tilden* (N. Y.) 5 Dem. Sur. 230, 233.

"Debts due," as used in Pub. St. c. 11, § 4, authorizing the taxation of debts due the persons to be taxed, includes railroad bonds. *Hale v. Hampshire County Com'r*. 187 Mass. 111, 115.

#### **As chattel or property.**

See "Chattel"; "Personal Property"; "Property."

#### **Claim synonymous.**

Bankr. Act, § 19, provides that all debts due and all debts existing, but not yet payable, are provable against the estate, makes provision for contingent debts and liabilities of various sorts, and declares that all demands against the bankrupt for or on account of any goods or chattels wrongfully taken or withheld by him may be proved and allowed as debts. Section 83 declares that debts arising from fraud, embezzlement, or a breach of trust may be proved, and are entitled to a dividend. Held, that the word "debt" is synonymous with the word "claim" in both sections, and will embrace claims arising from debts created by fraud, so that a debt for fraud, which was presented for allowance and defendant's dividend made thereon, was saved from discharge as to the balance by section 83. *Stokes v. Mason*, 10 R. I. 261, 263.

"Debt," as used in Comp. Laws, § 4995, which authorizes an attachment when it appears "that the debt was incurred for property obtained under false pretenses," should be construed to be synonymous with the term "claim," as used in the first subdivision, requiring the affidavit in attachment to contain a statement of the claim, specifying the amount and grounds thereof. *Coats v. Arthur*, 58 N. W. 675, 676, 5 S. D. 274.

"Debt," as used in Civ. Code, § 2461, providing that a partner authorized to act in liquidation might collect, compromise, or release any debts due the partnership, and

pay or compromise any claims against it, is synonymous with "claim." While the word "debt" in its legal sense does not, like the word "claim," include a demand for damages arising from a tort, it is apparent that the word was used in this connection to avoid repetition, and that the term "debt" was intended to have an application as broad as the term "claim." *Berson v. Ewing*, 23 Pac. 1112, 1114, 84 Cal. 89.

Gen. Laws, c. 274, § 28, provides that any claims growing out of trover or replevin, or any tort, may be proved against an insolvent; and section 50 enacts that a discharge in insolvency shall release an insolvent from "all his provable debts." Held, that provable debts include all claims against the insolvent which may be proved under section 28; the word "debts" evidently being used in its generic, and not in its strict legal, sense. In other words, "debts" means claims. In *re Brouillard*, 40 Atl. 762, 20 R. I. 617.

In a judgment entered against an estate, requiring its payment to be made in preference to all other debts, the word "debts" is not used synonymously with "claims," and claims for funeral expenses and expenses of administration both have priority over debts, of whatsoever character they may be. *Williams v. Robinson*, 56 Tex. 347, 351.

#### **Claim distinguished.**

A claim upon the United States is something in the nature of a demand for damages arising out of some alleged act or omission of the government, not yet provided for or acknowledged by law. The term imports something asked or demanded on the one hand, and not admitted or allowed on the other. When the demand is admitted, authorized, or provided for by law, it is not a mere claim, but a debt. *Dowell v. Cardwell* (U. S.) 7 Fed. Cas. 990, 994.

#### **Compensation for appropriation of private property.**

While the appropriation of private property for public use is accomplished, not by contract, but by force, yet the just compensation which the Constitution prescribes shall be allowed, when fixed by the proper authorities, becomes a debt, and, being so, the Constitution of the United States restrains the state from enforcing its payment in anything but gold and silver. *State v. Beackmo* (Ind.) 8 Blackf. 246, 250.

An order of the city council, upon laying out a street, that a certain sum be paid as damages to a party over whose land the street is laid out, does not constitute a debt due from the city, and hence does not make the city liable as trustee of such party under the statute regulating trustee process. *Fel-*

*lows v. Duncan*, 54 Mass. (13 Metc.) 332, 333, 334.

Damages to which a landowner is entitled for the taking of his land for the alteration of a highway are not a debt for which he is taxable before such damages have become fixed and receivable. *Lowell v. Boston Street Com'rs*, 106 Mass. 540, 541.

The word "debt," as used in Act April 13, 1899, annexing the territory of East Dallas to the city of Dallas, and providing that the latter shall pay all the lawful debts of the former, "is used in a general sense, and its evident meaning is to include all obligations to pay money, whether arising from contract or implied by law as a compensation for damages for property taken, damaged, or destroyed for or applied to public use." *Barber v. City of East Dallas*, 18 S. W. 438, 439, 83 Tex. 147.

#### **Conditional, uncertain, contingent, or future obligation.**

A debt is understood to be an unconditional promise to pay a fixed sum at some specified time, and is quite different from a contract to be performed in the future, dependent upon a condition precedent, which may never be performed, and which cannot ripen into a debt until performed. *Saleno v. City of Neosho*, 80 S. W. 190, 192, 127 Mo. 627, 27 L. R. A. 769, 48 Am. St. Rep. 653.

To constitute a debt within the attachment laws, the sum must be certainly and at all events payable; but, whenever it is uncertain whether anything will ever be demandable by virtue of the contract, it cannot be called a debt. Per *Sedgwick J. Wentworth v. Whittemore*, 1 Mass. 471, 473.

A claim for uncertain and unliquidated damages is not a debt. This is the settled doctrine of the courts of law, and the same rule prevails in equity. *Jackson v. Bell*, 31 N. J. Eq. (4 Stew.) 554, 558 (citing *Duncan v. Lyon* [N. Y.] 8 Johns. Ch. 351, 8 Am. Dec. 513).

"Debts," as used in the revenue law (St. 1861, p. 419, § 5), providing for the assessment of debts, should be construed to include not only debts due and payable on or before the 1st day of December of the year for which an assessment is made, but debts to become due and payable at any time thereafter. "Standing alone, the word 'debt' is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is a debt due. In other words, debts are of two kinds: *solvendum in presenti*, and *solvendum in futuro*. Whether a claim or demand is a debt or not is in no respect determined by reference to

the time of payment. A sum of money which is in all events payable is a debt, without regard to the fact whether it be payable now or at a future time. A sum payable upon a contingency, however, is not a debt, or does not become a debt until the contingency has happened." *People v. Arguello*, 37 Cal. 524, 525.

Where a statute detaching certain territory from a county provided that it should be liable for its pro rata share of the debts of the county from which it was taken, it did not mean contingent liabilities arising from a breach of duty. *Askew v. Hale County*, 54 Ala. 639, 644, 25 Am. Rep. 730.

"Debts," as used in the bankruptcy act, declaring that all persons, being merchants, etc., owing debts to the amount of not less than a certain sum, shall be liable to become bankrupts, and may, on the petition of one or more of their creditors, to whom they owe debts amounting in the whole to not less than a certain sum, should be construed to include debts not yet due, as well as those due; for a debt is not less owing because it is not yet due. *Ex parte Tower*, 1 N. Y. Leg. Obs. 8, 9.

Uncertain and contingent demands are included within the word "debt" in Bankr. Act 1841, c. 9, § 1, providing that all persons owing debts may take the benefit of the act by declaring, among other things, that they are unable to meet their debts and engagements, and, in section 4, that, having conformed to the requirements of the statute, the bankrupt shall be entitled to a full discharge from all his debts. *Fowles v. Treadwell*, 24 Me. (11 Shep.) 377, 381.

"Debts," within the meaning of the rule of evidence that a voluntary gift by one owing debts and insolvent will be presumed to be fraudulent as to his creditors, can only be construed to mean present debts, and does not include the liability of an accommodation indorser before the indorsed note matures. *Severs v. Dodson*, 34 Atl. 7, 8, 53 N. J. Eq. (8 Dick.) 633, 51 Am. St. Rep. 641.

The liability of a bankrupt indorser of commercial paper, which did not become absolute until after the filing of the petition, is a "debt" within Bankr. Act July 1, 1898, c. 541, § 63, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447], which enumerates debts on contracts, expressed or implied, among those provable in bankruptcy. *Moch v. Market St. Nat. Bank* (U. S.) 107 Fed. 897, 898, 47 C. C. A. 49; *In re Gerson*, Id.

Within the meaning of Pub. St. c. 201, § 42, providing that a petition of the creditors in insolvency proceedings must show that the debtor is owing \$300 or more, and that his property within the state not exempt from attachment is in their belief insufficient to pay his debts, the word "debts"

embraces all debts, as well those that are not, as those that are, presently payable. *Hinds v. Heath*, 38 Atl. 382, 68 N. H. 551.

The term "debt" means "a fixed and certain obligation to pay money or some other valuable thing or things, either in the present or in the future." *Appeal of City of Erie*, 91 Pa. 398, 402.

"Debt," as used in Act June 16, 1836, § 35, authorizing the attachment of a debt due a judgment debtor, "is of very broad application, and embraces many obligations which, in strict speech, are not debts. A contract to pay money at a future day is not strictly a debt until the day of payment arrives, although it is called 'debitum in presenti, solvendum in futuro,' and is undoubtedly attachable. When the condition is performed, which in this case is by mere lapse of time, it will be a strict debt." *In re Glen Iron Works* (U. S.) 20 Fed. 674, 680.

"Debts," as used in a statute making officers of a corporation personally liable for debts contracted during the time in which the corporation is in default in making certain reports, does not include the liability on a contract for the purchase of lumber, which is not to be delivered according to the terms of the contract until after the corporation has made such report. *Garrison v. Howe*, 17 N. Y. 458, 465.

Act Feb. 17, 1848, providing that every company organized thereunder should make a certain annual report, and that, if any company shall fail to do so, the trustees should be jointly and severally liable for all debts of the company then existing and all that should be contracted before such report should be made. A manufacturing corporation by resolution appointed one its general agent and attorney, agreeing to pay him a salary of \$1,000 a year, to commence on the 6th day of that month, besides expenses; but no time was fixed when the salary was to become due and payable. Held, that the company did not create a debt, within the statute, when they adopted the resolution, nor did they contract a debt for the agent's services as they were rendered; the word "debt," in the statute, meaning debts existing or contracted, and not liabilities which might ultimately ripen into debts. *Oviatt v. Hughes* (N. Y.) 41 Barb. 541, 545.

The term "debt" in Pub. St. c. 155, §§ 11, 12, providing that, upon the failure of a manufacturing corporation to file a statement of its condition on or before the 15th day of February in each year, the stockholders shall be liable for any debt then existing, does not include a sum to be due on a contract for the purchase of goods to be delivered in November; the payment not to be made until the goods are delivered. *Wing v. Slater*, 35 Atl. 302, 304, 19 R. I. 597, 33 L. R. A. 566.



"Debts," as used in Comp. Laws 1857, § 1821, declaring that on the neglect or refusal of the directors of a manufacturing company to comply with certain provisions of law regarding the filing of their articles of association, or filing an annual report, the directors shall be jointly and severally liable for all debts of the corporation contracted during the period of such neglect or refusal. Held, that the word "debts," as used in the statute, meant "present debts," and liabilities which may give causes of action against the company and result in judgment against it are not embraced in the provision. *Lockhart v. Van Alstyne*, 31 Mich. 76, 78, 18 Am. Rep. 156.

The words "debts or demands," in a statute requiring all debts or demands of whatsoever nature against the estate of testator or intestate to be exhibited in two years, includes debts not due. *Fillyau v. Lavery*, 3 Fla. 72, 107.

Act. Feb. 24, 1834, § 24, declares that no debts of a decedent not secured by mortgage or judgment shall remain a lien on his lands after his death longer than five years, unless an action for their recovery be commenced within that period, or a statement of the debt, if it is not payable within that period, be filed in the office of the prothonotary. Held, that a "debt," within the meaning of the word as used in the act, means a debt existing at the time of decedent's death, and does not include a claim for services thereafter rendered and expenses incurred in the settlement of the estate. In re *Emerick's Estate*, 33 Atl. 550, 551, 172 Pa. 191.

Code Civ. Proc. § 1778, provides that in an action against a foreign or domestic corporation to recover damages for the nonpayment of a note or other evidence of debt for the absolute payment of money on demand or at a particular time, an order of a judge shall be served with the summons, directing trial of the issues raised. Held, that the term "evidence of debt for the absolute payment of money" meant a debt which was absolutely payable without any contingency, and hence a policy of life insurance was not such a debt, notwithstanding the fact that the policy had become due by the death of the insured, since by the terms of the policy it is itself payable, not absolutely, but conditionally, and it is none the less a conditional contract because ultimately there may grow out of it an absolute liability. *New York Life Ins. Co. v. Universal Life Ins. Co.*, 88 N. Y. 424, 428.

Laws 1848, c. 40, § 12, provides that the trustees of a corporation shall be individually liable for all the debts of the company existing or contracted during the time that they are in default in the filing of a certain report required by them to be made. Held

that, if there is no obligation giving a person a present right of action against the company, there is no debt or duty which can be demanded under the statute as a penalty against the trustees. There is no debt, within the meaning of the statute, if the time of payment has not arrived. Consequently, where an indebtedness of a company fell due during the time its trustees were in default for not making a report, for which notes were given, which were renewed, and an action was commenced against the trustees to enforce the statutory liability prior to the maturity of a portion of the renewed notes, the plaintiff was only entitled to recovery on the notes due at the time of the commencement of the action. *Folger, J. dissenting. Jones v. Barlow*, 62 N. Y. 202, 205.

The word "debt," as used in Rev. St. art. 3203, requiring actions for debt not evidenced by written contract to be brought within two years, is not restricted to its technical or common-law meaning, but includes any open, unliquidated claim for money. Hence the sum shown to be due by a street improvement certificate issued by a city against an abutting lot owner is a debt. *O'Connor v. Koch*, 29 S. W. 400, 401, 9 Tex. Civ. App. 586.

A claim for damages against insolvent manufacturers for loss of prospective profits on goods which might thereafter have been manufactured and supplied under a contract or on goods manufactured and on hand, but not delivered, at the time of the assignment, is not a debt provable against the assigned estate, but merely a claim for unascertained damages. In re *Adams* (N. Y.) 12 Daly, 454, 457.

A debt is not created by a city when the people by an election consent that the council may issue the bonds, nor when the council by ordinance provides for the issue of the bonds, nor even when the bonds have been prepared, signed, and sealed, but not sold or delivered. All this might have been done, and yet, if the bonds had not been sold or delivered to a purchaser, the city would have owed nothing. *City of Austin v. Valle* (Tex.) 71 S. W. 414, 416.

The claim which an insane asylum has against a patient who has been supported in it is not strictly speaking a debt. It is true it is a charge provided by law against the estate of the lunatic, not against him, to be enforced in rem in the contingency and only when prescribed by the statute. *Central Kentucky Asylum v. Penick*, 102 Ky. 533, 44 S. W. 92. So that Ky. St. § 1707, allowing the homestead of a decedent to be sold to pay his debts, does not apply to such a claim. *Holburn v. Pfanmiller's Adm'r*, 71 S. W. 940, 941, 24 Ky. Law Rep. 1613.

**Corporate stock.**

In considering the question whether, in the distribution of the moneys remaining in the treasury in the Centennial Board of Finance at the close of the affairs of that corporation, the appropriation to that corporation of \$1,500,000 made by Congress in Act Feb. 18, 1876, should be paid into the treasury of the United States before any division of assets was made among stockholders, the act providing that the United States is to be paid out of the moneys that remain in the treasury of the company after the payment of the debts, the court said: "The liability of a corporation to its stockholders on account of their stock is not a debt. The shares of a stockholder represent his proportion of the property of a corporation, and upon the winding up of its affairs the assets remaining after all liabilities are discharged are for division among the stockholders, according to their respective interests. The payment to stockholders upon such a division is for a dividend of the property divided, and not for a debt owing by the corporation." *Eyster v. Centennial Board of Finance*, 94 U. S. 500, 502, 24 L. Ed. 188.

The value of stock in a national bank, owed by a taxpayer, must be considered a part of the debts due or to become due him from which he is entitled to deduct the amount of his bona fide and unconditional indebtedness, in listing his property for taxation, under subdivision 10, § 1038, Rev. St. *Ruggles v. City of Fond du Lac*, 10 N. W. 565, 568, 58 Wis. 486.

**Costs.**

A judgment against the plaintiff for costs in an action for a tort is a debt, within the meaning of exemption laws. *Lane v. Baker* (Pa.) 2 Grant, Cas. 424.

A judgment for costs, recovered by a sheriff in an action against him for not returning an execution, is a debt provable under the bankruptcy act, and therefore reached by a discharge. *Graham v. Pierson* (N. Y.) 6 Hill, 247.

The term "debt," as used in the constitutional provision forbidding imprisonment for debt, is used in a broad sense, and will embrace such obligations to pay money as arise upon the law, as well as those which arise upon contract, and will include the liability of a guardian to pay the costs adjudged in an action against an infant plaintiff. *Granholm v. Sweigle*, 57 N. W. 509, 510, 8 N. D. 476.

A debt is that which is due from one person to another, and under Code Civ. Proc. § 2749, providing that real estate of a decedent may be sold for the payment of his debts, and sections 2756, 2757, providing that a judgment against a personal representative for a debt due from decedent is deemed a

debt of decedent, but that the same shall be allowed, as against his real property, at no greater sum than the amount recovered, exclusive of costs, a judgment for costs in an action against decedent, continued against his personal representative, is not a debt of the decedent. *In re Foley*, 57 N. Y. Supp. 131, 132, 39 App. Div. 248.

Where the persons among whom an estate was divided gave a bond to the administrator that they would pay all debts, dues, demands, and claims now "due or to grow due," such language included legal costs and charges against the estate afterwards incurred in the settlement of said estate. *Springsteen v. Samson*, 32 N. Y. 703, 707.

"Debt," as used in Laws 1848, p. 54, § 12, making the trustees of a corporation personally liable for the debts of the corporation in case of default on their part in filing an annual report as required by law, meant not only a sum of money due by certain and express agreement, but whatever the law orders any one to pay; and hence a judgment for costs was within the statute. *Andrews v. Murray* (N. Y.) 9 Abb. Prac. 8, 14.

"Debts," as used in Pamph. Acts, c. 64, § 1, approved April 23, 1873, relating to property exempted from sale for the payment of "debts," should be construed to include the costs adjudged in a civil suit. *Clingman v. Kemp*, 57 Ala. 195, 196.

The word "debt," as used in a constitutional prohibition against imprisonment for debt, does not include the costs in a criminal case. *Caldwell v. State*, 55 Ala. 133, 135; *Morgan v. State*, 47 Ala. 34, 36; *In re Boyd*, 9 Pac. 240, 243, 34 Kan. 570; *Bailey v. State*, 6 South. 398, 399, 87 Ala. 44. Contra, see *Thompson v. State*, 16 Ind. 516, 517.

**Credit distinguished.**

See "Credits."

**As debt owing by intestate.**

The word "debts," as used in Rev. St. 1880, § 184, making it the duty of an administrator to pay all debts, including taxes due, means debts due by the intestate at his death, and applies only to debts which the intestate owed. *Langston v. Canterbury*, 78 S. W. 151, 154, 173 Mo. 122.

**Demand distinguished.**

See "Demand."

**As dues.**

The word "debt," as used in a statute making stockholders liable for the debts unpaid of a corporation, is not a broader expression than "dues," as used in the Constitution, which secures dues from a corporation by additional stockholders' liability.

Ward v. Joslin (U. S.) 105 Fed. 224, 227, 44 C. C. A. 456.

#### As duty.

"Debt," in its broad sense, means duty, as used in Rev. Laws, § 1967, providing that each mortgagor and mortgagee of chattels shall make affidavit that the mortgage is made for no other purpose than securing the debt specified in the conditions thereof, etc., and includes the duty which the maker of a promissory note owes to the indorser of such notes to save him from a payment thereof. Gilbert v. Vail, 14 Atl. 542, 544, 60 Vt. 261.

#### Equitable or moral obligation.

"The word 'debt' is not always used in the same sense; that is, it does not always import a legal obligation on the part of one to pay another something due him. It often implies a mere moral or equitable obligation, as well as a strictly legal one." Scott v. Neeves, 45 N. W. 421, 423, 77 Wis. 305.

"Debts," as used in Rev. St. § 5067, allowing proof in bankruptcy proceedings of all debts due and payable from the bankrupt, etc., includes debts which are only provable in equity, as well as debts provable at law. It includes a claim for an account of profits against an infringer of a patent right. In re Boston & Fairhaven Iron Works (U. S.) 29 Fed. 783, 784.

The term "debt," as used in a statute relating to estates of deceased persons, is not limited to such as are strictly legal debts, but manifestly includes every demand by a creditor, whether recoverable at law or in equity; and such will be held to be its meaning in a bond of a legatee conditioned for the faithful discharge of all the just debts and obligations of the deceased, and will not be limited to a fixed and determinate sum due from one person to another. Snyder v. State, 40 Pac. 441, 5 Wyo. 318, 63 Am. St. Rep. 60.

"Debts," as used in 2 Rev. St. p. 116, § 18, and Id. p. 95, § 78, authorizing the surrogate to decree the payment of debts, legacies, and distributive shares out of decedent's estate, on the application of a creditor, legatee, or next of kin, and making it the imperative duty of the surrogate to determine on a final accounting all the questions concerning any debt, claim, legacy, bequest, or distributive share, should not be limited to such as are strictly legal debts, but manifestly comprehends every claim and demand by a creditor, whether recoverable at law or in equity; in other words, it includes equitable as well as legal debts, and hence the claim of a surviving partner for a balance due him from his deceased copartner is a debt. Babcock v. Lillis (N. Y.) 4 Bradf. Sur. 218, 219; Sellis' Case (N. Y.) 4 Abb. Prac. 272, 273.

#### Fare of passenger.

"Debts," as used in Act Cong. Feb. 25, 1863, declaring that United States notes shall be lawful money, and a legal tender for all debts, public and private, will be construed to include the fare of a passenger on a railroad train. Lewis v. New York Cent. R. Co. (N. Y.) 49 Barb. 330.

#### Fine.

A fine is not a debt, for the nonpayment of which a person may be imprisoned. In re McDonald, 33 Pac. 18, 20, 4 Wyo. 150; State v. Mace, 5 Md. 337, 351; McCool v. State, 23 Ind. 127, 132; Ex parte Robertson, 11 S. W. 669, 670, 27 Tex. App. 628, 11 Am. St. Rep. 207.

Bankr. Act 1867, § 19, provided that all debts due and payable from the bankrupt might be proved against the estate, and that all demands against him for or on account of any goods wrongfully taken or withheld might be proved or allowed as debts. Held, that the word "debt" was used in the legal or limited sense, and not in a popular sense, but as meaning a sum of money due by certain and express agreement; and hence a judgment for a fine was not a debt provable in bankruptcy. In re Sutherland (U. S.) 23 Fed. Cas. 456, 457.

Under a provision of the Constitution exempting a homestead from sale under execution or other process "issued on any demand for any debt contracted," a fine imposed by statute for the violation of the law cannot in any just sense be designated as a debt contracted. The ordinary meaning of the word "debt" is a sum of money due to another by contract, and a "debt contracted" necessarily means that the debtor has come under a voluntary obligation to pay it. The relation of debtor and creditor implies that the one has given credit to the other by contract. It would be a solecism to observe and say that the fine imposed as a punishment for a penal offense was a debt contracted. Contracted how? Contracted with whom? A debt contracted implies the voluntary action of debtor and creditor on a valuable consideration. This cannot be predicated upon a fine imposed by mere punishment. The very essence of a contract is taken away when the amount is assessed as a penalty for violating law and claimed as a punishment for crime. Whiteacre v. Rector (Va.) 29 Grat. 714, 715, 716, 26 Am. Rep. 420.

A fine or penalty incurred by a breach of an ordinance of the corporation of Washington is a debt, and recoverable at common law as such. Ex parte Reed (U. S.) 20 Fed. Cas. 404, 407.

The Court of Appeals of Virginia has decided that a fine imposed by a criminal court

of the state is a debt or demand due the state. In *re Shaner* (U. S.) 89 Fed. 869.

Judgments for pecuniary fines are debts due the state, within the meaning of the law authorizing the sale of lands without valuation; and lands surrendered to obtain the discharge of the body seized in execution are to be sold in the same manner as if levied upon by the sheriff in the first instance. *Walsh's Lessee v. Ringer*, 2 Ohio (2 Ham.) 327, 333, 15 Am. Dec. 555.

A fine imposed upon a party by the court of chancery for the willful violation of an injunction is not a debt, so as to be affected by discharge in bankruptcy. *Spalding v. People* (N. Y.) 7 Hill, 301; *Spalding v. New York*, 45 U. S. (4 How.) 21, 24, 11 L. Ed. 858.

#### **Funeral expenses.**

The term "debt," used in reference to the estate of a deceased person, cannot be construed to include funeral expenses; for they are not a debt, but properly a charge on the estate, and payable in preference to debts. *Gregory v. Hooker's Adm'r*, 8 N. C. 394, 397, 402, 9 Am. Dec. 646.

A will bequeathed all of the testator's property to his wife, and provided that, if at her death anything should be left after all her just debts were paid, it should be divided between his children. It was held that, while in a restricted sense the word "debts" would embrace only obligations resulting from the widow's contracts, the word is not used in such restricted sense in the will; it being evidently his intention that, should the income of his estate prove insufficient for his wife's support, she should have recourse to the principal. He may be presumed to have contemplated, and to have thus provided for, her decent interment after her decease, and therefore included the necessary expense of such interment in the phrase "all her just debts," so that the estate is chargeable with the funeral expenses of the widow. *Smith v. Gilliatt*, 49 N. Y. Supp. 614, 22 Misc. Rep. 246.

#### **Gift distinguished.**

There is a distinction between gifts and debts in the law of collation. Thus the obligation of a son to collate for the value of slaves given to him by his parents does not constitute a debt. *Succession of Meyer*, 11 South. 532, 535, 44 La. Ann. 871.

#### **Indivisibility.**

A debt is an entire thing, though payable by installments. *Bosler v. Kuhn* (Pa.) 8 Watts & S. 183, 186.

#### **Interest.**

Interest is to be regarded as incidental to the debt. Principal is always debt, and the debt. Interest is accessory to or in-

cident to the principal. The principal is a fixed sum. The accessory is a constantly accruing one. The former is the basis or substance from which the latter arises, and on which it rests. *Howe v. Bradley*, 19 Me. (1 App.) 31, 36. Interest on the principal debt is not, within the meaning of the Constitution, a part of the debt until it is due, and is not within the constitutional limitation. *Epping v. City of Columbus*, 43 S. E. 803, 808, 117 Ga. 263.

The word "debt," in a statute providing that receipt and acceptance by a mortgagee of one-half of the fine imposed upon the mortgagor of personalty as a punishment for fraudulently selling the mortgaged property operates to extinguish the debt to secure which the mortgage was executed, embraces the interest, as well as the principal. *Conley v. Maher*, 20 S. E. 647, 648, 93 Ga. 781.

Acts 1833, c. 163, § 6, relating to insolvents, directs the debtor, on the first meeting of creditors, to deliver to his assignees a schedule of his creditors and the sums due to them and the consideration for each debt. Held, that the word "debts," in the statute, is used in its broadest sense, and not only includes all accruing interest on contracts carrying interest on the face of them, but the interest which by law is allowed on all other claims and demands which are due and unpaid. *Brown v. Lamb*, 47 Mass. (6 Metc.) 208, 210.

"Debts, dues, and demands," as the terms are used in a discharge of all debts, dues, and demands, includes a special promise to pay the interest upon an assigned note. *Howel v. Seaman* (Conn.) 1 Root, 883.

#### **Judgment.**

Under a statute making debts due a bankrupt assignable by commissioners, it is held that the term "debts" includes any judgment recovered by the bankrupt and remaining unsatisfied. *Sullivan v. Bridge*, 1 Mass. 511, 514.

A judgment is a debt, and the extinguishment of a simple contract debt and its merger into the higher debt does not in terms nor by implication discharge the liability of the trustee. *McHarg v. Eastman*, 30 N. Y. Super. Ct. (7 Rob.) 137, 140, 141.

Rev. St. U. S. § 5067, declares that unliquidated damages arising out of any contract or agreement on account of any goods and chattels wrongfully taken, converted, or withheld, as well as debts due or to become due, are provable against the bankrupt's estate. Held, that the word "debts," as used in such section, is synonymous with "claims," and therefore includes a judgment of a court in a civil action between individuals existing against the bankrupt at the time his petition in bankruptcy was filed, whether the cause of action on which the

judgment was founded arose out of a tort or on contract. *Howland v. Carson*, 28 Ohio St. 625, 628.

The word "debt," in a statute making the trustees of a manufacturing company who neglect to file a certain annual report liable for debts of the company, means the debt contracted by the corporation, and not the judgment which a creditor may have recovered against the corporation; and hence a trustee who was not such at the time the debt was due is not liable, under the statute, because of the corporation's liability on a judgment subsequently recovered and unpaid during his incumbency. *McHarg v. Eastman* (N. Y.) 35 How. Prac. 205, 207.

The word "debts," as used in the statute making the trustees of a corporation jointly and severally liable for all the debts thereof because of the failure of the trustees to make and file within the specified time the annual report required by law, includes a judgment of record rendered against the corporation organized under the manufacturing laws. *Lewis v. Armstrong* (N. Y.) 8 Abb. N. C. 385, 389.

#### Judgment in bastardy proceedings.

There is no distinction, under the bankrupt law, between a judgment in an action arising *ex delicto* and a judgment in an action arising *ex contractu*. They are both debts, within the meaning of the law, and both provable against the estate of the bankrupt; and the decision of this question is not affected by the fact that in the action *ex delicto* it is adjudged by the court, and certified upon the execution, that the cause of action arose from the willful and malicious act or neglect of the party. In *re Comstock* (U. S.) 22 Vt. 642, 6 Fed. Cas. 237.

The word "debt," as found in a bankrupt act, was used in its legal and limited sense, and not in its popular and enlarged signification. Thus, some demands, although in the form of judgments, are held not to be "debts" within the meaning of that term as used in the acts; and others, though within the letter, are held not to be within the spirit, of those laws. Thus, under the act of 1867, a judgment for a fine was held not to be a debt provable in bankruptcy. Under such rule a judgment in a bastardy proceeding for the maintenance of a child is not a debt. In *re Baker* (U. S.) 96 Fed. 954, 956.

#### Judgment for taxes.

The term "debt" is not confined to obligations for the payment of money arising on contract, but means an obligation or legal liability to pay a certain sum, without regard to how that liability arises, whether it be imposed by law without contract, or imposed by the obligations of a contract. A judgment which is personal against the tax-

payer and in rem against real estate is a "debt," within the act of Congress which makes certain United States notes a legal tender for debts. Taxes are not debts within the act of Congress referred to; but, if the state goes into court and obtains a judgment for those taxes against the person of the taxpayer, the personal judgment becomes a debt. *Rhodes v. O'Farrell*, 2 Nev. 60, 61.

#### Judgment for tort.

The phrase "any debt," as used in Const. art. 10, exempting a homestead from sale under execution issued on a judgment for any debt, embraces a judgment in an action *ex delicto*. *Dellinger v. Tweed*, 66 N. C. 206, 210.

The statute, in providing that the homestead shall not be liable for forced sale for any debt, not only means debts arising on contract, but applies to a judgment rendered in an action of tort. *Smith v. Omana*, 17 Wis. 395, 397.

"Debt," as used in Const. art. 16, § 2, providing that every homestead shall be exempt from forced sale on execution or any other final process from a court for any debts contracted, etc., is one of large import and includes all kinds of claims, arising not only on contract but also in tort. Thus the word would include a debt of record or judgment founded in tort. *Mertz v. Berry*, 59 N. W. 445, 446, 101 Mich. 32, 24 L. R. A. 789, 45 Am. St. Rep. 379.

Under the homestead act, exempting the homestead from a sale on execution for the satisfaction of any debt, the homestead cannot be sold under an execution based on a judgment rendered in an action *ex delicto*. *Dellinger v. Tweed*, 66 N. C. 206, 210; *Gill v. Edwards*, 87 N. C. 76.

"Debt," as used in Bill of Rights, § 16, providing that there shall be no imprisonment for debt, except in cases of fraud, should be construed as meaning a cause of action *ex contractu*, and not *ex delicto*. A judgment for damages arising *ex delicto* is not transformed into a debt, so as to prevent the debtor's imprisonment. *Moore v. Green*, 73 N. C. 394, 396, 21 Am. Rep. 470; *Long v. McLean*, 88 N. C. 3, 4.

A judgment recovered for a tort is a debt, and will be the basis for attachment proceedings as much as if it was recovered upon a contract. *Johnson v. Butler*, 2 Iowa (2 Clarke) 535, 545.

As the bankrupt law makes no exceptions as to debts, except those of a fiduciary character, the discharge is from all other debts, and includes a judgment in a court of law obtained in an action of tort. In *re Book* (U. S.) 3 Fed. Cas. 867, 868.

The Illinois statute concerning discharge from imprisonment for debt (Rev. St. c. 72).

providing by section 30, as amended by Act June 14, 1887, that no person shall be discharged under the act who neglects or refuses to schedule his property as thereby required, applies to defendant's imprisonment under execution upon judgment for tort, as well as upon judgments for debt, since a judgment for tort becomes a debt in such sense as to be embraced in the statutory provision concerning imprisonment for a debt. *Stroheim v. Deimel* (U. S.) 77 Fed. 802, 806, 23 C. C. A. 467.

#### Legacy.

A will provided that, as soon as convenient after testator's decease, all his debts and funeral expenses be paid out of his means. Certain legacies were thereafter provided, and in the eighth item of the will it was provided: "After all debts and expenses are paid, give the balance left in equal sums to the Foreign and Home Boards of Missions of the Presbyterian Church." It was held that the debts and expenses mentioned in the eighth item referred to the legacies previously given, and therefore the will was consistent with itself. *Stebbins v. Stebbins*, 49 N. W. 294, 296, 86 Mich. 474.

A will provided for the payment of specific legacies in the form of annuities, payable every three months. In another provision it was declared that the rents of the estate should be paid every month, and kept three months and all debts paid out of them, and the balance kept to the end of the year and divided among the heirs. The will required the payment of all testator's debts before such fund came into existence. Held, that the specific legacies were not inconsistent with the provision requiring the rents to be divided among the heirs, as the testator intended by the use of the word "debt" to include the quarterly payments to the legatees. *Angus v. Noble*, 46 Atl. 278, 280, 73 Conn. 56.

The word "debt," as used in Ky. St. § 2219, providing that partial payments on interest-bearing debts shall be first applied to the reduction of accrued interest, was intended to include every interest-bearing obligation or demand, and includes a specific legacy. *Morton's Ex'r v. Trustees of Church Home for Females and Infirmary for Sick*, 70 S. W. 841, 24 Ky. Law Rep. 1122.

#### As legal obligation.

The word "debt," as used in the law of garnishment, includes only legal debts—causes of action upon which the defendant in the attachment, under the common-law practice, can maintain an action of debt or indebitatus assumpsit, and not mere equity claims. *Hassie v. God Is With Us Congregation*, 35 Cal. 385, 386; *Redondo Beach Co. v. Brewer*, 101 Cal. 322, 325, 35 Pac. 896, 897.

#### As liability.

See "Liability."

#### Liability for breach of contract.

Strictly speaking a debt is a precise sum due by express agreement. As used in a statute permitting attachment for debts, it would include any demand arising out of a contract, though such demand be for damages for breach thereof. *Stiff v. Fisher*, 21 S. W. 291, 292, 2 Tex. Civ. App. 346.

A debt, secured or unsecured, is a liquidated demand for a sum of money due by a certain and express agreement, or, in other words, a sum of money reduced to a certainty, as distinguished from a claim for uncertain damages. Thus, a refusal of a railroad company to honor its contracts of carriage renders it liable in damages, but until such unliquidated claims could be reduced to judgment they would in no legal sense constitute a debt outstanding against it. *Tompkins v. Augusta Southern R. Co* 30 S. E. 992, 995, 102 Ga. 436.

A debt is a demand for a certain sum, or sum actually ascertained. In order to constitute a debt, the liability must be fixed and certain, and an unliquidated demand or liability does not constitute a debt. The term "debt" is used in this sense in the law relating to assignments for the benefit of creditors, so that a bill for damages for breach of contract by the assignor will be a claimant's loss. Possible profit accruing after the assignment is not provable as a debt against the estate, when an insolvent assigned for the benefit of creditors. In *re Adams* (N. Y.) 15 Abb. N. C. 61, 65.

"Debts," as used in a statute requiring corporations to file statements of debts, does not include liabilities which will ultimately ripen into debts, and hence does not include unliquidated claims for breaches of contract. *Victory Webb Printing & Folding Mach. Mfg. Co. v. Beecher* (N. Y.) 26 Hun, 48, 52.

Gen. St. p. 920, § 72, provides that the assets of an insolvent corporation shall be collected and sold, and the proceeds divided among the creditors in proportion to the amount of their respective debts. Held, that the term "debt" is not used in any restricted sense, and includes a claim sounding in unliquidated damages. *Rosenbaum v. United States Credit System Co.*, 40 Atl. 591, 593, 61 N. J. Law, 543.

The term "debt" does not apply to a warranty of the soundness of a negro, which is rather a contract of which the consideration is the purchase price paid for the slave. *Lyons v. Stephens*, 45 Ga. 141, 143.

A liability upon breach of warranty is a "debt," within the meaning of the statute which provides for suits against stockhold-

ers, in the event of dissolution of a corporation. *Dryden v. Kellogg*, 2 Mo. App. 87, 94.

As used in Rev. St. art. 3203, § 4, providing that actions for debt, where the indebtedness is not evidenced by a contract in writing, are barred if not commenced within two years after accruing, the word "debt" would include damages by reason of the loss or waste of a grain crop, caused by the failure of a harvester to work as represented by the seller. *Wood Mowing & Reaping Mach. Co. v. Hancock*, 23 S. W. 384, 385, 4 Tex. Civ. App. 302.

#### **Liability for corporate debts.**

St. 1838, c. 163, providing that all debts due and payable from an insolvent debtor may be provable in the insolvency proceedings against him, cannot be construed to include the qualified liability of a member of a manufacturing corporation for the "debts" of such corporation. *Kelton v. Phillips*, 44 Mass. (3 Metc.) 61, 62.

The statutory liability of a director or a stockholder of a corporation is not a debt, within the meaning of the law relating to insolvency or bankruptcy; it being a statutory, and not a contractual, liability. *Old Colony Boot & Shoe Co. v. Parker-Sampson-Adams Co.*, 67 N. E. 870, 871, 183 Mass. 557.

#### **Liability for desertion.**

"Debt," as used in Act Cong. March 16, 1802, § 23, providing that no noncommissioned officer, musician, or private shall be arrested or taken in execution for any debt under a certain sum, contracted before enlistment, nor for any debt contracted after enlistment, should be construed in its common acceptance as meaning a debt created by contract between the soldier and any other individual, and does not extend to a soldier committed by an alderman for want of security to appear to answer a charge of having deserted his wife and family and left them a charge on the guardians of the poor. *Commonwealth v. Keeper of Jail of Philadelphia (Pa.)* 4 Serg. & R. 505, 506.

#### **Liability for infringement of patent.**

Liability for things done which are independent of contracts cannot be construed a debt or contract; and hence, the infringement of a patent being essentially wrong, independent of a contract, liability therefor is not a debt or contract for which the officers of a corporation are liable. *Child v. Boston & Fairhaven Iron Works*, 137 Mass. 516, 521, 50 Am. Rep. 328.

#### **Liability for official neglect.**

A claim arising out of the official neglect of the clerk of a county court in Virginia, against the officer, a nonresident of Virginia at the time the claim was asserted, is not a

claim for debt for which a foreign attachment in chancery would lie under a statute authorizing such proceedings against absent debtors. *Dunlop v. Keith (Va.)* 1 Leigh, 430, 19 Am. Dec. 755.

#### **Liability for tort.**

A verdict for the plaintiff in an action for tort will not convert the cause of action into a debt. Such a cause of action will not constitute a debt till judgment is rendered on it. Therefore a defendant against whom a verdict has been rendered for a tort is not subject to trustee process in an action against a plaintiff before judgment is rendered on such verdict. *Thayer v. Southwick*, 74 Mass. (8 Gray) 229.

A liability for tort which has not been converted into a judgment is not a debt, within the bankruptcy act. *Crouch v. Gridley (N. Y.)* 6 Hill, 250.

In *Esmond v. Bullard (N. Y.)* 16 Hun, 65, it was held that, under the bankruptcy act and other statutes which expressly relate to the proving or payment of debt, a tort was not, strictly speaking, a debt. The court, after citing this case, held that a person who was entitled to recover for a tort was a creditor, within the meaning of the statute making a transfer of the property of a corporation void as to creditors when made in contemplation of insolvency. *Munson v. Genesee Iron & Brass Works*, 56 N. Y. Supp. 139, 143, 37 App. Div. 203.

"Debt," as used in Laws 1848, c. 40, § 12, providing that the trustees of a manufacturing corporation shall in certain cases be liable for all the debts of the company then existing and for all that shall be contracted, does not include the liability for a tort; for it does not grow out of a contract. *Esmond v. Bullard (N. Y.)* 16 Hun, 65, 68.

"Debt," as used in a statute authorizing an attachment for debt, does not include a claim arising in tort. *Day v. Bennett*, 18 N. J. Law (3 Har.) 287, 288; *Holcomb v. Town of Winchester*, 52 Conn. 447, 448, 52 Am. Rep. 609; *Finlay v. Bryson*, 84 Mo. 664, 663; *Sunday Mirror Co. v. Galvin*, 55 Mo. App. 412, 418, 419; *El Paso Nat. Bank v. Fuchs*, 34 S. W. 206, 207, 89 Tex. 197.

"Debt," as used in a statute making void all fraudulent conveyances to avoid the debt or duty of others, does not comprehend claims founded on torts. In common speech, a debt or duty is never applied to a mere legal liability to an action for a tort in which the party may be subjected to pay damages. to be ascertained by the verdict of a jury. *Fox v. Hills*, 1 Conn. 295, 299.

"A debt is in law an obligation to pay money, and the obligation may arise ex contractu or ex delicto. The obligation may be express ex contractu, or implied quasi ex

contractu. It may arise ex delicto on actual tort, or quasi ex delicto on what the law chooses to treat as a tort, and thus it is plain that a debt or obligation may be contracted as well through a tort committed as a bargain entered into." In *re Radway* (U. S.) 20 Fed. Cas. 154, 162.

A claim for damages for a wrongful act, which demand was unliquidated, is not a debt, and cannot become so until it has been prosecuted to judgment. The claimant had only the disputed claim, not based upon or growing out of a contract, and cannot be considered a creditor. He has a claim for redress, but no debt. *Hill v. Bowman*, 35 Mich. 191, 192.

A claim for damages in an action for slander and malicious prosecution does not become a debt until included in a judgment; hence, where a claimant had recovered a verdict on such a claim at the time the defendant in the action was adjudged a bankrupt, but judgment had not then been entered, the amount of the judgment or claim was not a debt which could be proved against the bankrupt's estate. *Zimmer v. Schleeauf*, 115 Mass. 52, 53.

"Debt" is defined to be "a sum of money due by certain and express agreement." Consequently a right of action for a tort is not a debt, and does not come within the provision of Const. art. 11, § 2, providing that "nothing contained in this Constitution shall impair the validity of any debts," etc. *Parker v. Savage*, 74 Tenn. (6 Lea) 406, 408.

A statute giving foreign administrators a right to sue for the recovery of debts due to decedents (Gen. St. Ky. c. 39, art. 2, § 43) confers no capacity to sue for the wrongful death of such decedent; a claim for tort, not reduced to judgment, not being a debt. In *Gray v. Bennett*, 44 Mass. (3 Metc.) 522, 526, in defining the legal meaning of the term "debt," the court said: "The word 'debt' is of large import, and includes, not only debts of record or judgment and debts of specialty, but also obligations arising under simple contracts to a very wide extent, and in its popular sense includes all that is due to a man under any form of obligation or promise." In *Dunlop v. Keith* (Va.), 1 Leigh, 430, 19 Am. Dec. 755, a claim for the official neglect of a county clerk was held not to be a debt within the meaning of the statute authorizing an attachment for debt. A claim against a corporation for damages for the negligent loss of a steamboat was held not to be a debt, within the meaning of an act making stockholders liable for all the existing debts of a corporation. *Cable v. McCune*, 26 Mo. 371, 72 Am. Dec. 214. In *Detroit Post & Tribune Co. v. Reilley*, 46 Mich. 459, 9 N. W. 492, it was held that a claim for damages sounding in tort was not a debt before it had been prosecuted to judgment. So, also, *Maysville Street Railway & Transfer Co. v. Marvin* (U.

S.) 59 Fed. 91, 92, 8 C. C. A. 21 (citing *Zimmer v. Schleeauf*, 115 Mass. 52).

The primary definition of "debt" is a sum of money due by certain and express agreement. It has, however, a much broader popular significance, and includes that which is due from one person to another, whether money, goods, or services; that which one is bound to pay to another or to perform for his benefit. In *Dunsmoor v. Furstenfeldt*, 88 Cal. 529, 26 Pac. 520, 12 L. R. A. 508, 22 Am. St. Rep. 331, it is said any kind of obligation of one man to pay money to another is a debt. A debt signifies what one owes. There is always some obligation that it shall be paid, but the manner in which it is to be paid or the means of coercing payment do not enter into the definition. And, as used in Act April 15, 1880, giving the State Board of Agriculture control of the State Agricultural Society, and providing that in no event shall the state be liable for any debts created by said board, the term "debt" includes an unliquidated demand arising by implication of law from an injury to a visitor to the fair, due to an act of nonfeasance of the officers of the society. *Melvin v. State*, 53 Pac. 416, 419, 121 Cal. 16.

"Debts," as used in Gen. St. c. "Corporations," §§ 136, 139, requiring corporations to publish annually a true statement of the existing "debts" of the corporation, means only those obligations arising on express and implied contracts growing out of dealings between the corporations and others, where the financial condition of the corporation would or might be the foundation of credit, and would not include damages for tort. *Doolittle v. Marsh*, 9 N. W. 54, 11 Neb. 243.

Rev. Code 1845, p. 234, § 18, declares that the stockholders of a corporation shall be jointly and severally liable if the corporation fails to give notice annually of all the existing debts of the corporation. Held, that the words "existing debts" were not synonymous with the word "demands," and did not mean, therefore, a demand against a corporation for damages arising through the negligence of its servants, but were sums of money due by certain or express agreements, according to Blackstone's definition of the term "debt." *Cable v. McCune*, 26 Mo. 371, 383, 72 Am. Dec. 214; *Cable v. Gaty*, 34 Mo. 573, 574, 86 Am. Dec. 126.

Under Ky. St. § 2030, providing that a guardian may, with leave of court, compound a debt or demand owing to the ward, the debt or demand does not include an unliquidated claim for damages for a tort on behalf of the ward, so that a settlement of such a claim by the guardian, if made in good faith, is binding on the ward. *Manion v. Ohio Val. Ry. Co.*, 36 S. W. 530, 531, 99 Ky. 504.

Act Feb. 11, 1775, § 12, providing that if any person shall sue, except before a justice,



for any debt or demand, and shall obtain a verdict or judgment which, without costs, shall not exceed a certain amount, he shall recover no costs, includes every species of action, whether founded on contract or tort. *White v. Hunt*, 6 N. J. Law (1 Halst.) 415, 418.

The word "debt," when used in the statute without some plain or expressed declaration making it applicable thereto, does not include taxes or claims for unliquidated damages. The legal definition of the word is opposed to unliquidated damages, or a liability in the sense of an inchoate or contingent debt, or an obligation not enforceable by ordinary process, so that a statute abolishing imprisonment for debt is inapplicable to cases involving demands for unliquidated damages. *Bolden v. Jensen* (U. S.) 69 Fed. 745, 746.

The word "debt," as used in Revision 1860, § 2281, includes the liability of a person who has obtained money from another by means of false and fraudulent representations in the sale of a patent right. Whenever a party has derived a pecuniary advantage from a wrong done by him, and the person wronged can waive a tort and maintain an action on contract, the obligation of the wrongdoer to pay is a debt. *Warner v. Cammack*, 37 Iowa, 642, 644.

As applied to a municipal corporation, "debt," if given its broadest signification, would include, not only obligations for extraordinary expenditures, but every outstanding warrant upon the treasury, the accruing salaries of officers, and expenses daily arising for water supply, street lighting, street repairs, and other like legitimate purposes. *Bouvier* says that "in an enlarged sense the term denotes any kind of just demand," which latter definition is broad enough to include claims based upon tort, as well as contract. *Swanson v. City of Ottumwa*, 91 N. W. 1048, 1051, 1052, 118 Iowa, 161, 59 L. R. A. 620 (quoting *Bouv. Law Dict.*; *Jacob, Law Dict.*).

#### **Liability for trespass.**

A cause of action in trespass is not a "debt," within the contemplation of the bankruptcy act. The fact that a verdict has been rendered does not alter the case. Until judgment on such action, there is no debt which is reached by the discharge. *Kellogg v. Schuyler* (N. Y.) 2 Denio, 73, 74.

#### **Liability for trover.**

The term "debts," as used in Bankr. Act, § 13, giving the commissioners power to assign for the use of the creditors all the debts due to such bankrupt, means all claims founded in property, and is not used in its technical meaning, and hence would embrace a cause of action for trover, etc. *Sullivan v. Bridge*, 1 Mass. 511, 513.

#### **License fee or tax.**

Taxes, debts, dues, and demands due the state, as used in Act March 30, 1871, providing that coupons on state bonds should be receivable for all taxes, debts, dues, and demands due the state, include the "charges or assessments made by law as a condition precedent to obtaining license for pursuing a business or profession." *Royall v. Virginia*, 6 Sup. Ct. 510, 513, 118 U. S. 572, 29 L. Ed. 735.

#### **As a liquidated demand.**

"A debt," says Sir John Cross, in *Ex parte Thompson*, Mont. & B. 219, "is a demand for a sum certain." In re *Assignment of Adams* (N. Y.) 67 How. Prac. 284, 286.

A debt is defined as a demand for a certain sum; a sum actually ascertained. That there must be an ascertained debt, and not an unliquidated demand or liability, is sustained by all the cases, legal and equitable. In re *Adams* (N. Y.) 12 Daly, 454, 457.

In *Bac. Abr. tit. "Debt,"* the term "debt" is defined as an action founded on an express or implied contract, in which the certainty of the sum or duty appears, and therefore "the plaintiff is to recover the same in numero, and not to be repaired in damages by the jury, as in those actions sounding in damages." *Watson v. McNairy*, 4 Ky. (1 Bibb) 356.

A debt is a money demand, and of a liquidated nature, and one on which an action of debt or indebitatus assumpsit would lie. *Lindsay v. King*, 23 N. C. 401, 403; *Dowling v. Stewart*, 4 Ill. (3 Scam.) 193, 195.

"A debt is properly opposed to unliquidated damages and liability for use, in the sense of an inchoate or contingent debt." *Commercial Nat. Bank v. Taylor*, 19 N. Y. Supp. 533, 535, 64 Hun, 499.

A "debt," technically so called, may be evidenced by record, by contract under seal, or by simple contract only. Its distinguishing feature is that it is for a sum certain, or that it may readily be reduced to a certainty, and the action of debt lies for the recovery thereof, without regard to the manner in which the obligation is incurred or is evidenced. *Baum v. Tonkin*, 110 Pa. 569, 573, 1 Atl. 535.

Under Pub. St. c. 151, § 2, cl. 11, as amended by St. 1884, c. 285, § 2, authorizing a suit to subject a partner's interest in the firm to the payment of a debt, it is held that where defendant bought an undivided half interest in the partnership, composed of plaintiff and another, for a certain sum, provided plaintiff could buy out his partner, a sum falling due from defendant upon plaintiff's purchase of his partner's interest was a debt, within the statute. *Draper v. Hollings*, 39 N. E. 793, 794, 163 Mass. 127.

**Loan distinguished.**

A debt is something quite different from a loan. A loan contracted creates a debt, but there may be a debt created without contracting a loan. A debt may be contracted without resorting to a loan; hence it may be that a corporation may have the power to contract a debt for property which it is authorized to purchase, and not have the power to borrow money or contract a loan. *Ketchum v. City of Buffalo* (N. Y.) 21 Barb. 294, 305.

**Miscarriage distinguished.**

In passing upon the meaning of the words "debt, default, and miscarriage," it is said they apply to guaranties for an existing debt, guaranties for future debts, or to some past or future default in duty by a third person. *Wood on Frauds*, § 114. The word "miscarriage" has a broader meaning than either debt or default, and includes the failure by a third party to succeed in a proposed business, regardless of the fact whether his failure to do so would entitle the plaintiff to an action at law or not. The requirement than an actionable duty shall exist was made first by the court in cases of debt. The same requirement was later extended to default, meaning default in any duty and for the same reason. But the reason does not exist in the case of miscarriage—that is, the act of a third party—and this requirement should not be made. In other words, if any meaning is to be given to the word, it must mean something different or broader than debt or default, and this is the only distinction than can be made. *Gansey v. Orr*, 73 S. W. 477, 481, 173 Mo. 532.

**Mortgage.**

Ordinarily the term "debt" imports a sum of money arising on a contract, express or implied. In its more general sense it is defined to be that which is due from one person to another, whether money, goods, or services; that which one person is bound to pay or perform to another. The obligation of a party under a bond and mortgage is a debt, which is payable in legal tender. *Kimpton v. Bronson* (N. Y.) 45 Barb. 618, 620.

The word "debts," in a provision in a will directing the executors to pay all testator's just debts, includes mortgage debts. *Turner v. Laird*, 35 Atl. 1124, 1125, 68 Conn. 198.

A charge upon a specific parcel of a person's property for the payment of a sum of money constitutes a debt as fully as a demand which is or may be made a charge upon all his property, and it makes no difference in this respect whether the lien is acquired by express agreement or by operation of law. While it is frequently said that a debt secured by a mortgage is not a debt of a person to whom the land is sub-

sequently sold, yet it is his debt to the extent that his property is liable for its payment. Every lien which may be discharged by the payment of a sum of money is a security for the payment of a debt. In accordance with these views, the act of Congress which makes treasury notes lawful money, and legal tender in payment of debts, refers to the obligation of a judgment creditor or redemptioner to pay a certain amount of money in order to exercise the statutory right to redemption from the sale of land made by the sheriff. *People v. Mayhew*, 26 Cal. 655, 661.

As used in How. Ann. St. § 6105, as amended in Laws 1889, Act 67, providing that an administrator may borrow money to pay "debts against the estate," the phrase quoted includes a mortgage on testator's land, since the mortgage constituted a lien securing an indebtedness, and the property was charged with the payment of the debt. *In re Lambie's Estate*, 54 N. W. 173, 174, 94 Mich. 489.

**Note.**

The term "debt" includes a promissory note before maturity, as well as after. *Dodson v. Taylor*, 21 Atl. 293, 294, 53 N. J. Law (24 Vroom) 200.

A note given by a city in payment for waterworks material, and payable, with interest, two years after date, is a "debt," within a constitutional provision providing that no debt shall be created by any city, unless at the same time provision be made for its payment; it not being a current expense of the city, within the rule that current expenses are not debts, within the meaning of such provision. *City of Terrell v. Dessaint*, 9 S. W. 593, 594, 71 Tex. 770.

Rev. St. c. 90, § 83, providing that any person claiming title or interest in attached property may be allowed to dispute the validity and effect of the prior attachments, on the ground that the debt demanded in the first suit was not "justly due" when the action was commenced, cannot be construed to include a note made without the knowledge of the payee, who was liable as a surety for the maker for a debt due, but not paid, against which liability the maker had promised to secure the payee, until assented to by the payee. *Baird v. Williams*, 36 Mass. (19 Pick.) 381, 383.

A promissory note is not a debt, any more than any other promise is. *Hill v. Beebe*, 13 N. Y. (3 Kern.) 556, 563.

**Obligation synonymous.**

"Debt," as used in an affidavit for attachment, which, after stating that defendant was indebted to plaintiff on contract, stated that defendant fraudulently contracted the debt or incurred the obligation, was synonymous with the term "obligation," the obligation and the debt being necessarily the

same thing; and therefore the affidavit was not void for uncertainty because of the use of the disjunctive conjunction "or," separating the allegation that defendant fraudulently contracted the debt from the allegation that he fraudulently incurred the obligation. *Emerson v. Detroit Steel Spring Co.*, 58 N. W. 659, 660, 100 Mich. 127.

**As an obligation ex contractu.**

A debt is a sum of money due by certain and express agreement. It originates in and is founded on contract, express or implied. *City of Camden v. Allen*, 26 N. J. Law (5 Dutch.) 398, 399; *Borough of McKeesport v. Fidler*, 23 Atl. 799, 800, 147 Pa. 532; *Appeal of City of Erie*, 91 Pa. 398, 399; *Rodman v. Munson* (N. Y.) 13 Barb. 63, 77; *Commercial Nat. Bank v. Taylor*, 19 N. Y. Supp. 533, 535, 64 Hun. 499; *United States Rolling Stock Co. v. Clark*, 10 South. 917, 95 Ala. 322; *Dickey v. Leonard*, 77 Ga. 151, 153; *Hampton v. Truckee Canal Co.* (U. S.) 19 Fed. 1, 4; *Hagar v. Reclamation Dist. No. 108*, 4 Sup. Ct. 663, 666, 111 U. S. 701, 28 L. Ed. 569; *In re Southerland* (U. S.) 23 Fed. Cas. 456, 457; *Hyatt v. Vanneck*, 33 Atl. 972, 973, 82 Md. 465; *Appeal Tax Court of Baltimore City v. Rice*, 50 Md. 302, 316; *McElfresh v. Kirkendall*, 36 Iowa, 224, 226; *Spilman v. City of Parkersburg*, 14 S. E. 279, 282, 35 W. Va. 605; *City of Carondelet v. Picot*, 38 Mo. 125, 130 (citing *Pierce v. City of Boston*, 44 Mass. [3 Metc.] 520); *Boatman's Sav. Inst. v. Bank of Missouri*, 33 Mo. 497, 518, 84 Am. Dec. 61; *Heint v. City of Terre Haute* (Ind.) 66 N. E. 450, 452 (citing *Quill v. City of Indianapolis*, 124 Ind. 292, 23 N. E. 788, 7 L. R. A. 681). It does not depend upon any after calculation to ascertain it. *Fisher v. Consequa* (U. S.) 9 Fed. Cas. 120, 121. It is not essential to the creation of a debt that the borrower should be liable to be sued therefor. *Brown v. City of Corry*, 17 Pa. Co. Ct. R. 490, 496. It is a sum of money due by express agreement, either in writing or by parol, where the quantity is fixed and does not depend on future calculation. The nonpayment or nonperformance is an injury for which an action of debt may be brought. *Respublica v. Le Caze* (Pa.) 1 Yeates, 55, 69.

"Debt" means an obligation or legal liability to pay a sum certain, and it makes no difference how that liability arises, whether it be by contract or be imposed by law without contract. *Rhodes v. O'Farrell*, 2 Nev. 60, 61.

Bouvier defines a "debt" to be a sum of money due by certain and express agreement, and says that debts arise or are proved by matter of record (as judgment debts), by bonds, and by simple contracts, where the amount is fixed and specific, and does not depend on any future valuation to settle it. Burrill gave Mr. Stevens as authority for the proposition that a debt is not a

contract, but the result of a contract; and he says that the word "debt" is of large import, and includes debts of record, debts by specialty, and obligations arising under simple contract. Both authors show that in a popular sense the word "debt" may be more, but never less, comprehensive. A promise, then, to pay a certain sum in United States gold coin, is a debt. *Milliken v. Sloat*, 1 Nev. 585, 590.

"Debt" is defined by the Supreme Court of Massachusetts in *Gray v. Bennett*, 44 Mass. (3 Metc.) 526, as follows: "The word 'debt' is of large import, including not only debts of record, or judgments, and debts by specialty, but also obligations arising under simple contract. To a very wide extent and in its popular sense it includes all that is due to a man under any form of obligation or promise." *Arapahoe County Com'rs v. Fidelity Sav. Ass'n*, 71 Pac. 376, 377, 31 Colo. 47.

In *Heacock v. Sherman* (N. Y.) 14 Wend. 58, the word "debt" was regarded, when used in relation to the liability of a stockholder for the debts and demands of the corporation, as limited to claims arising out of contract. *Kelly v. Fourth of July Min. Co.*, 53 Pac. 959, 972, 21 Mont. 291, 42 L. R. A. 621, 69 Am. St. Rep. 668.

The Constitution, in forbidding municipal corporations creating debts beyond a certain extent, meant any debts created by contract, express or implied; any voluntary incurring of any liability to pay in any manner or for any purpose. *Spilman v. City of Parkersburg*, 14 S. E. 279, 282, 35 W. Va. 605.

Blackstone says that the legal acceptance of a debt is a sum of money due by certain and express agreement, as by a bond for a determinate sum, a bill or note, a special bargain, or a rent reserved on a lease, where the quantity is fixed and specific, and does not depend on any subsequent valuation to settle it. *Davenport v. Kleinschmidt*, 13 Pac. 249, 257, 6 Mont. 502; *Solis v. Blank*, 49 Atl. 302, 303, 199 Pa. 600.

"The legal acceptance of debt is a sum of money due by certain and express agreement, as by a bond for a determinate sum, a bill or note, a special bargain, or a rent reserved on a lease, where the quantity is fixed and specified. *Powell v. Oregonian Ry. Co.* (U. S.) 36 Fed. 726, 730 (quoting 3 Bl. Comm. 154).

The word "debt" is defined to be whatever one owes; a liquidated demand; a sum of money due by certain and expressed agreement. In its most general sense, that which is due from one person to another, whether money, goods, or services; that which one is bound to pay or perform for another; a fixed and certain obligation to

pay money, or some other valuable thing, in the present or in the future. *Coats v. Arthur*, 58 N. W. 675, 682, 5 S. D. 274 (citing *And. Law Dict.* p. 315); *Wilcoxon v. City of Bluffton*, 54 N. E. 110, 115, 153 Ind. 267; *Harris v. Larsen*, 66 Pac. 782, 24 Utah, 139.

"A debt is money due upon a contract, without reference to the question of the remedy for its collection." *City of Baltimore v. Gill*, 31 Md. 375, 390.

The word "debt," when used in regard to the substitution of one debtor for another debtor, who is also his creditor, imports a sum of money arising on contract, and not a mere claim for damages, so that, where a person merely promises to advance money to another, he did not thereby become his creditor. *Rietzloff v. Glover*, 64 N. W. 298, 91 Wis. 65.

A debt, in its more general sense, is a specified sum of money which is due or owing from one person to another, and denotes, not only the obligation of the debtor to pay, but also the right of the creditor to receive and enforce payment. *Rap. & L. Law Dict. tit. "Debt."* It is essential to the idea of a debt that an obligation must have arisen out of a contract, express or implied, in favor of some one occupying the relation of creditor, which entitles the latter to receive a sum of money, which obligation, by any possibility, might or ought to be enforced against another. *State v. Hawes*, 14 N. E. 87, 88, 112 Ind. 323.

A debt is a sum of money due by contract, and it most frequently is due by certain and express agreement, which also fixes the sum independent of any extrinsic circumstances. But it is not essential that the contract should be expressed, or that it should fix the precise amount of the sum to be paid. *United States v. Oolt* (U. S.) 25 Fed. Cas. 581, 582.

"Debts," as used in Act 1851, § 1, providing that debts due to nonresidents are subject to taxation in the same manner and to the same extent as personal estate of residents, is to be understood in its usual legal sense, and means nothing more nor less than sums of money due from inhabitants to the nonresidents mentioned by certain and express agreements or judicial sentence. *People v. Halsey* (N. Y.) 36 How. Prac. 487, 504.

"Debts," as used in Comp. St. c. 16, § 136, providing that every corporation shall publish the amount of its existing debts, and, if it fail to do so, all the stockholders shall be jointly and severally liable for all the debts of the corporation then existing, means only those obligations arising on express and implied contracts growing out of the dealings between the corporation and other corporations or individuals, where the financial conditions of such corporation were or might

be the foundation of credit. *Howell v. Roberts*, 45 N. W. 923, 924, 29 Neb. 483 (citing *Doolittle v. Marsh*, 9 N. W. 54, 11 Neb. 243).

Act Cong. Feb. 25, 1862, provided that United States notes issued thereunder should be legal tender in payment of all debts. Held, that by the word "debts" was meant such obligations for the payment of money as are founded on contract. *Perry v. Washburn*, 20 Cal. 318, 350.

"Debt," as used in a constitutional provision that no person shall be imprisoned for debt in any action founded on contract, means debt in the popular sense of a demand founded on contract, express or implied, and comprises all actions *ex contractu*. *Perry v. Orr*, 35 N. J. Law (6 Vroom) 295, 298.

"Debt," as the term is used in Const. art. 1, par. 17, declaring that no person shall be imprisoned for debt in any action or on any judgment founded on contract, unless in case of fraud, etc., means contract debt, and does not include a case where a man promised to marry a woman, and thereafter seduced her by influence of such promise, and then sought to avoid the performance by attempting to run away with intent to abandon her, and refusing to marry her, since his original promise under such circumstances was a fraud, for which he might legally be imprisoned and held to bail in a subsequent action for the injury so done. *Perry v. Orr*, 35 N. J. Law (6 Vroom) 295.

"Debt," as used in Bill of Rights, Const. § 16, providing that no person shall be imprisoned for debt, except in cases of fraud, means only a liability arising on contract. There are many forms of liabilities that do not constitute a debt, in the technical and legal sense of that term. *In re Wheeler*, 8 Pac. 276, 277, 34 Kan. 96.

"Debts," as used in 1 Rev. St. (2d Ed.) p. 800, § 19, providing that, if any controversy shall arise between trustees and any other person in settlement of any demands against a debtor or of debts due to his estate, the same may be referred to three indifferent persons by the mutual agreement of the parties, should be construed in its ordinary and legal acceptance, importing a sum of money arising on a contract, express or implied, and would not include a right or title to stock in an incorporated company. *In re Denny* (N. Y.) 2 Hill, 220, 222.

"Debt" does not mean damages, and an action to recover damages is not an action to recover debt. *Millington v. Texas & P. Ry. Co. (Tex.)* 2 Willson, Civ. Cas. Ct. App. § 171.

A claim for damages is not a debt. *Clark v. Nevada Land & Mining Co.*, 6 Nev. 203, 208.

A debt embraces a sum of money arising upon a contract, express or implied, and not a mere claim for damages. Thus, where, pending an action for libel, defendant therein died intestate, the claim of the plaintiff, even if meritorious, was not such a debt against the estate of the decedent as would prevent his widow, as sole heir at law, from taking possession of his estate without administration. *McElhanev v. Crawford*, 22 S. E. 895, 96 Ga. 174.

#### Partnership debt.

A discharge of an insolvent debtor from all debts founded on any contract made by him included debts due from the firm of which he had been a member. Such debts were, strictly speaking, his debts. He was liable in solido for them, and his individual property, after paying his separate debts, was applicable in insolvency to their payment. *Lothrop v. Tilden*, 62 Mass. (8 Cush.) 375, 376.

#### Penalties.

Under Code 1871, § 1802, giving to justices of the peace jurisdiction of suits for the recovery of debts, damages, or personal property, it is held that the term "debt" means anything for which one is liable or bound to another, or which may be exacted of one, and it embraces penalties recoverable in a civil action. *Western Union Tel. Co. v. Sullivan*, 12 South. 460, 70 Miss. 447.

A penalty in a bastardy proceeding is not a debt, within the constitutional prohibition against imprisonment for debt. *State v. Brewer*, 16 S. E. 1001, 1003, 38 S. C. 263, 19 L. R. A. 362, 87 Am. St. Rep. 752.

#### Principal.

Principal, whether due or to become due in the future, is a part of the debt of a municipality, within the provisions of the Constitution limiting such debt. *Epping v. City of Columbus*, 43 S. E. 803, 808, 117 Ga. 263.

#### As provable debt.

"Debt," as used in Bankr. Act 1800, § 42, directing that where it shall appear to the commissioners that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between them at any time before such person became bankrupt, the assignee or assignees of the debt shall state the account, and one debt may be set off against the other, "is fairly to be construed to mean any debt for which the act provides. A debt which may be proved before the commissioners, and to the owner of which a dividend must be paid, is a debt in the sense of the term as used in this section." *Oxley v. Tucker* (U. S.) 18 Fed. Cas. 931.

18 Stat. 180, § 12, providing that any person owing debts as aforesaid, who shall do so and so, shall be deemed to have committed an act of bankruptcy, does not mean "that the debts shall be of a provable character, or shall be at some time provable, but that they shall be debts provable at the time the petition is filed, and made provable at that time by the statute." In *re Morse* (U. S.) 17 Fed. Cas. 846, 848.

"Debt," as used in the bankruptcy act, shall include any debt, demand, or claim provable in bankruptcy. U. S. Comp. St. 1901, p. 3419.

#### Recognizance.

A recognizance given by accused in a criminal cause is simply a means of compelling the attendance of the party accused of crime to answer the complaint and abide the order of the court thereon. The liability of the defendant under the recognizance is not a debt in such a sense that he may be allowed to set off against that liability a debt owing to him from the town to which the recognizance was given. *Town of Wallingford v. Hall*, 45 Conn. 350, 353.

#### Rent.

Rent due a receiver and unpaid constitutes a debt, within Const. art. 1, § 15, prohibiting imprisonment for debt. *Knutte v. Superior Court of City and County of San Francisco*, 66 Pac. 875, 134 Cal. 660.

#### Salary of public officer.

The legal acceptance of debt is said by Blackstone to be a sum of money due by certain and express agreement. The liability of a city for the salary of a public officer fixed by law is not a debt or right arising out of a contract, express or implied, and therefore not subject to garnishment. *Troy Laundry & Machinery Co. v. City of Denver*, 53 Pac. 256, 257, 11 Colo. App. 368.

The constitutional provision that, on the passage in either house of the Legislature of any law which imposes or creates a debt or charge, the question shall be taken by yeas and nays, etc., refers to the contracting of a public debt for extraordinary expenditures, and has no reference to the salary of public officers. *McDonald v. State*, 50 N. W. 151, 183, 80 Wis. 407.

#### Securities distinguished.

There is a difference between the debt itself and the securities for it. The debt is one, but there may be a number of securities of different kinds—personal, real, pledge, mortgage, etc. A note given is only evidence of a debt, and one of the means of collecting; and, if there is a mortgage, that is only another security for the same debt. *Bailou v. Young*, 42 S. C. 170, 177, 20 S. E. 84, 86.

**Sum ordered paid over by court.**

The word "debt" is a technical term, and, when construed according to its strict and literal meaning, there is a very close question whether imprisonment, as a means of compelling the party over whom the court has jurisdiction to surrender the possession of money which he has no legal right to keep, is imprisonment for debt within the meaning of the constitutional provision. *Ripon Knitting Works v. Schreiber* (U. S.) 101 Fed. 810, 816.

A "debt," as the word is used in the statute prohibiting imprisonment for debt recoverable in a civil action, does not include an amount of money due from executors, which they have been ordered to pay over to distributees by the order of distribution. *Ex parte Smith*, 58 Cal. 204, 207.

An order of the probate court, made upon an executor to pay certain allowances out of the assets of the estate to the widow of the deceased for the support of herself and minor children pending the settlement of the estate, creates no debt against the executor. *Leach v. Peabody*, 2 Atl. 737, 746, 58 Vt. 485.

**Surplus of savings bank.**

When the surplus of a savings bank, under a charter and the laws of the state where it exists, belongs to its depositors, and, though it is not payable at the same time with their deposits and may be retained for a time to meet contingencies, depositors or their representatives are ultimately entitled to the pecuniary benefit of it, such surplus is a debt due the depositors, so as not to be subject to taxation under Laws 1857, c. 456. *People v. Barker*, 47 N. E. 1103, 1104, 154 N. Y. 122.

**Tax.**

The term "debt" in its ordinary sense does not include a tax. *Loeber v. Leininger*, 51 N. E. 703, 705, 175 Ill. 484; *Jack v. Welennett*, 3 N. E. 445, 446, 115 Ill. 105, 56 Am. Rep. 129; *Dunlap v. Gallatin County*, 15 Ill. (5 Peck) 7, 9; *Iowa Land Co. v. Douglass County*, 67 N. W. 52, 56, 8 S. D. 491; *Hanson County v. Gray*, 80 N. W. 175, 12 S. D. 124, 76 Am. St. Rep. 591; *Danforth v. McCook County*, 76 N. W. 940, 941, 11 S. D. 258, 47 Am. St. Rep. 808; *State v. Baltimore & O. R. Co.*, 23 S. E. 677, 41 W. Va. 81; *Gallup v. Schmidt*, 56 N. E. 443, 449, 154 Ind. 196; *Morris v. Lalaurie*, 1 South. 659, 663, 39 La. Ann. 47; *City of Shreveport v. Gregg*, 23 La. Ann. 836, 837; *Atlantic County Chosen Freeholders v. Inhabitants of Weymouth Tp.*, 54 Atl. 458, 68 N. J. Law, 652; *City of Camden v. Allen*, 26 N. J. Law (2 Dutch.) 398, 399; *Peirce v. City of Boston*, 44 Mass. (3 Metc.) 520, 521; *State v. O'Neill*, 25 Atl. 273, 55 N. J. Law (26

*Vroom*) 58; *City of Hannibal v. Bowman*, 71 S. W. 1122, 1123, 98 Mo. App. 193 (citing *City of Carondelet v. Picot*, 38 Mo. 125); *State v. Snyder*, 41 S. W. 216, 217, 139 Mo. 549; *Richards v. Clay County Com'rs*, 58 N. W. 594, 595, 40 Neb. 45, 42 Am. St. Rep. 650; *Reynolds v. Fisher*, 61 N. W. 695, 699, 43 Neb. 172; *State v. Yellow Jacket Silver Min. Co.*, 14 Nev. 220, 250; *Shaw v. Peckett*, 26 Vt. 482; *Meriwether v. Garrett*, 102 U. S. 472, 513, 26 L. Ed. 197; *Emsheimer v. City of New Orleans* (U. S.) 116 Fed. 893, 895; *In re Duryee* (U. S.) 2 Fed. 68, 69; *Florida Cent. & P. R. Co. v. Reynolds*, 22 Sup. Ct. 176, 178, 183 U. S. 471, 46 L. Ed. 288; *Crabtree v. Madden* (U. S.) 54 Fed. 426, 431, 4 C. C. A. 408; *Lane County v. Oregon*, 74 U. S. (7 Wall.) 71, 79, 19 L. Ed. 101; *Slaughter v. City of Louisville*, 8 S. W. 917, 921, 89 Ky. 112; *Louisville & N. Ry. Co. v. Commonwealth*, 12 S. W. 1064, 1065, 89 Ky. 531; *Grunewald v. City of Cedar Rapids*, 91 N. W. 1059, 1060, 118 Iowa, 222; *City of Dubuque v. Illinois Cent. R. Co.*, 39 Iowa, 56, 63; *City of Rochester v. Gleichauf*, 82 N. Y. Supp. 750, 752, 40 Misc. Rep. 446; *City of New York v. McLean*, 68 N. Y. Supp. 606, 608, 57 App. Div. 601; *Borough of McKeesport v. Fidler*, 23 Atl. 799, 800, 147 Pa. 532; *State v. Travelers' Ins. Co.*, 40 Atl. 465, 468, 70 Conn. 590, 66 Am. St. Rep. 138; *Gatling v. Carteret County Com'rs*, 92 N. C. 536, 539, 53 Am. Rep. 432; *City Council of Charleston v. Ashley Phosphate Co.*, 13 S. E. 845, 847, 34 S. C. 541 (citing *Cooley, Tax'n*, 13); *Bonaparte v. State*, 63 Md. 465, 470; *Hewitt v. Traders' Bank*, 51 Pac. 468, 469, 18 Wash. 326; *Perry v. Washburn*, 20 Cal. 318, 350; *Texarkana Water Co. v. State*, 35 S. W. 788, 790, 62 Ark. 188; *City of Augusta v. North*, 57 Me. 392, 393, 2 Am. Rep. 55; *Whiteaker v. Haley*, 2 Or. 128, 139; *United States v. Baltimore & O. R. Co.*, 84 U. S. (17 Wall.) 322, 326, 21 L. Ed. 597.

A tax, in its essential characteristics, is not a debt, nor in the nature of a debt. A tax is an impost levied by authority of government upon its citizens or subjects for the support of the state. It is not founded on contract or agreement. It operates in invitum. *Lane County v. Oregon*, 74 U. S. (7 Wall.) 71, 80, 19 L. Ed. 101 (citing *City of Camden v. Allen*, 26 N. J. Law [2 Dutch.] 398).

Taxes are not debts in the ordinary sense of the term, and their collection will in general depend on the remedies given by statute for their enforcement. Where no remedy is specially provided, a remedy by suit may be fairly implied; but where one is given it does not embrace an action at law. A tax cannot in general be recovered in a common-law action as a debt, and where a statute provides a mode for the collection of taxes, such as by distress and sale of the goods of the delinquent taxpayer, and by creating a

lien on his real and personal estate without the right of exemption in the collection of the same, the remedy therein described must be strictly pursued, and no action at common law can be maintained. *Appeal of Schied*, 7 Pa. Co. Ct. R. 282, 284.

"Debt" in an enlarged sense means a duty to pay on any ground, and in this sense includes a tax, though in strict technical language a tax is not a debt. *Gilliam Co. v. Wasco Co.*, 13 Pac. 324, 14 Or. 525.

"Debt," as used in statutes relating to set-off, means a demand for money due founded upon a contract, and does not include a tax, which is an impost levied by authority of government upon the citizens or subjects for the support of the state, and is not founded upon contract or agreement, but operates in invitum. *Gatling v. Carteret County Com'rs*, 92 N. C. 536, 539, 53 Am. Rep. 432.

"Debts," as used in Georgia laws relating to the settlement of estates by the executors, and declaring priority of the debts to be as follows: Funeral expenses, including the physicians' bills and expenses of last sickness; the necessary expenses of administration, and including a provision for the support of the family; unpaid taxes, or other debts due the state or United States, etc.—includes taxes levied for state purposes, but it does not include taxes levied for county purposes. *Hargrove v. Lilly*, 69 Ga. 326, 329.

"Debts," as used in Rev. St. § 3466 [U. S. Comp. St. 1901, p. 2314], providing that, whenever the estate of a deceased person in the hands of his administrator is insufficient to pay all the debts due the deceased, the debts due the United States shall be first satisfied, does not include taxes and funeral charges. *United States v. Eggleston* (U. S.) 25 Fed. Cas. 979, 981.

Pub. St. c. 106, § 60, providing that the officers of a corporation who knowingly make a false certificate on the condition of the corporation shall be jointly and severally liable for its debts and contracts, should be construed to include debts existing when the certificate was made, as well as future debts, and includes a tax duly assessed against a corporation and presently payable. *Felker v. Standard Yarn Co.*, 19 N. E. 220, 221, 148 Mass. 226.

In the most extensive sense of the term everything is a debt which is an absolute obligation, but in its more limited sense it imports only a particular kind of duty, and in this sense is substantially synonymous with "contract." In this sense it is more generally used in statutes relating to the execution of process, and therefore the several acts of Congress exempting soldiers from arrest for any debt or contract, does not bestow on a soldier an exemption from arrest for payment of taxes. *Webster v. Seymour*, 8 Vt. 135, 139.

While it has been held in North Carolina that, when a tax is imposed, the taxpayer becomes a debtor, and what he owes is a debt in one sense of the word, as embracing any kind of just demand, yet the right of a sheriff to collect such tax after he has settled for them with the proper authorities is not such debt as is subject to attachment. *Davis v. Blackburn*, 23 S. E. 321, 322, 117 N. C. 383.

The United States Supreme Court decided in *Dollar Sav. Bank v. United States*, 86 U. S. (19 Wall.) 227, 22 L. Ed. 80, that an internal revenue tax was a debt, in the sense that it might be collected by an action at law; but in *Lane County v. Oregon*, 74 U. S. (7 Wall.) 71, 19 L. Ed. 101, it decided that taxes, whether state or national, are not debts, so as to be subject to the legal tender laws then in existence. But in any view of the case the defendant, in an action brought by the United States to enforce the payment of taxes, cannot plead a set-off growing out of independent claims against the United States. *United States v. Pacific R. Co.* (U. S.) 27 Fed. Cas. 397.

A special tax or assessment is not an ordinary debt arising out of contract, express or implied, though partaking somewhat of the nature of a debt, and is not a debt within the rule that a debt may be assigned. *Hinchman v. Morris*, 2 S. E. 863, 871, 29 W. Va. 673.

A special tax levied by county commissioners on all the property of the taxing district is not an indebtedness of the township or townships composing such taxing district, but is an indebtedness of the taxpayers secured by lien on their property, and for which sum their property is liable, and is no more to be counted in ascertaining the indebtedness of a township than the individual indebtedness of the inhabitants of the town. *Monroe County Com'rs v. Harrell*, 46 N. E. 124, 127, 147 Ind. 500.

"Debt or demand," as used in Gen. St. c. 208, § 7, providing that, where "there are mutual debts or demands between the plaintiff and the defendant at the time of the commencement of the plaintiff's action, one debt or demand may be set off against the other," cannot be construed to include taxes assessed by a township, the trustee, in the suit against the principal defendant, so that they may be set off against the sum due from the trustee to the defendant. The words "debt" and "demand" are often used as synonymous. The former is the more specific, and the latter the more general, term. Either would include a claim for money alleged to be due, and either is broad enough to allow a judgment, recovered by the trustee against the principal defendant, to be set off against the sum found due the latter from the former in the process of foreign attachment. *Hibbard v. Clark*, 56 N. H. 155, 157, 22 Am. Rep. 442.

"Debt," as used in Act Cong. Feb. 25, 1862, authorizing the issue of legal tender treasury notes, and making such notes legal tender in the payment of all debts, public and private, is not used in the sense of meaning merely a sum of money due by express and certain agreement, but in the sense of any claim for money, or that which is due from one person to another, that which one person is bound to pay or perform to another, and hence includes a tax levied by a territorial Legislature. *Haas v. Misner*, 1 Idaho, 170, 177.

In a contract of dissolution, by which one partner agreed to pay all debts contracted by the firm, the word "debts" includes taxes due by the firm. *Young v. Clute*, 12 Nev. 31, 37.

A tax levied or authorized by the territorial Legislature of Idaho is a debt within the meaning of the act of Congress authorizing the issue of legal tender treasury notes, and therefore the territorial statute requiring the payment of taxes in gold coin or its equivalent is void, as being in conflict with the act of Congress authorizing the issue of legal tender treasury notes. *Haas v. Misner*, 1 Idaho, 170.

An act of Congress declaring that treasury notes are payable for all taxes, internal duties, excises, debts, and demands of every kind due to the United States, except for interest on bonds and notes, and shall also be lawful money and a legal tender in the payment of all debts, public and private, is not inconsistent with the statute of the state requiring that taxes be paid in gold and silver. The books define taxes as a contribution levied or imposed by government upon cities or individuals for the service of the state. With us they mean the poll and property assessment of the statute. They do not certainly come within the meaning of public or private debts. They have none of the characteristics of a debt. A debt is something arising from and due upon contract, and before an enforcement of that something due can happen there must come the process of the law and the solemn adjudication of the courts. A tax is a judgment in its inception, fixed without the consent of the taxpayer, perhaps without his knowledge as to assessment, levy, and collection. It needs not the issuance of an execution to enforce it. If not paid in due time penalties follow, and, willing or not, upon default, the delinquent's personal property passes by collector's sale to the purchaser, or he loses the title to his real estate. There is none of the mutuality which enters into a contract, and none of the legal incidents of a debt. *Whiteaker v. Haiey*, 2 Or. 128, 139.

The claim of the county against an estate for taxes does not stand on the same footing with other indebtedness. It is entitled to priority in payment. A tax is not an

ordinary debt. It is levied for support of the government, and takes precedence of all other demands against the owner. It is a charge upon the property, without reference to the matter of ownership. The property itself may be seized and sold, although there may be prior liens or encumbrances upon it. The estate of a deceased person is primarily liable for the taxes that may be due from it. The state is not bound to wait until the estate is administered, and then participate with the creditors in the distribution of the proceeds. It may enforce payment to the exclusion of all other creditors. *Dunlap v. Gallatin County*, 15 Ill. (5 Peck) 7, 9.

#### Trust distinguished.

A debt, in the technical sense, is money due or owing on account of a contract, expressed or implied, while a trust, strictly speaking, is an obligation arising out of a confidence reposed in a person to whom the legal title to property is conveyed upon the condition that he will faithfully apply it according to the direction and risks of the vendor. *Thornburg v. Buck*, 41 N. E. 85, 86, 18 Ind. App. 446.

#### Unpaid stock subscription.

"Debt," as used in the by-laws of a banking corporation, declaring that the bank reserves a lien upon all stock issued to and held by any stockholder for the security of any debt owing in any form to said bank by such stockholder, whether the same is due or not, is to be construed to include unpaid subscriptions on such stock, though no call has been made for the payment thereof. *Kahn v. Bank of St. Joseph*, 70 Mo. 262, 272.

#### Verdict.

Act March 4, 1859, § 61, providing that it shall be lawful for a judge, on the ex parte application of a judgment debtor, to order that all debts owing or accruing, etc., does not include a mere verdict in an action on contract for unliquidated damages, since prior to the final judgment there was no debt owing or accruing. *Dresser v. Johns*, 6 O. B. (N. S.) 429, 436.

A verdict does not convert a claim for unliquidated damages into a debt. *Thayer v. Southwick*, 74 Mass. (8 Gray) 229. It does not become a debt, for the purpose of a trustee process, until it passes into judgment. *Wilde v. Mahaney*, 67 N. E. 337, 339, 183 Mass. 455, 62 L. R. A. 813.

A verdict does not annihilate or extinguish a debt, or change the nature of it, or the rule of law. It only amounts to a conclusive evidence of the debt, so that the creditor has the same right to set it off after the verdict as he had before; and, where the creditor is sued by the debtor after a verdict for the debt has been obtained, the creditor may set up the debt as a set-off, as he could



have done had no suit been brought thereon. *Bell v. Cowgell* (Pa.) 1 Ashm. 7, 9.

#### Wages.

See "Wages."

#### Warrant.

The term "debts" includes certificates issued by a city, which state that the city owes the holder a specified sum of money, and containing its promise to or a direction to its treasurer to pay such money at a specified time. *Law v. People*, 87 Ill. 385, 393.

Warrants drawn upon designated funds in anticipation of uncollected revenue have always been regarded in this state as debts in only a restricted sense (In re State Warrants, 6 S. D. 518, 62 N. W. 101, 55 Am. St. Rep. 352; *Western Town Lot Co. v. Lane*, 7 S. D. 1, 62 N. W. 982; *Shannon v. City of Huron*, 9 S. D. 356, 69 N. W. 598; *Lawrence County v. Meade County*, 10 S. D. 175, 72 N. W. 405), and are not outstanding debts, so as to authorize the creation of sinking fund for their payment. *Chicago & N. W. Ry. Co. v. Faulk County*, 90 N. W. 149, 15 S. D. 501.

#### DEBT (Action of).

Assumpsit distinguished, see "Assumpsit."

"The action of debt at common law was for the recovery of debt eo nomine and in numero, and is most frequently brought on a deed." *State v. Harmon*, 15 W. Va. 115, 124.

Debt is a form of action provided at common law as the remedy for the recovery of a sum certain, due to the plaintiff. While we have no specific action for debt as at common law, yet the same general principles are applicable under our system, and, as used in Rev. St. art. 3203, providing for actions for debt, it means suits for the recovery of debts. At common law this action is a remedy upon statutes, first, when an action for debt is given by the statute, and, second, where the statute provides for the payment of a sum of money or gives a penalty or a forfeiture on the doing of a forbidden act. *Davidson v. Missouri Pac. Ry. Co. (Tex.)* 3 Willson Civ. Cas. Ct. App. § 173.

Act Gen. Assem. 1805, relative to a limitation of actions, and prescribing the time within which all actions of debt shall be brought, means those actions which were commonly brought on simple contracts. *Bishop v. Sanford*, 15 Ga. 1, 4.

The common-law action of debt lies whenever the demand is for a sum certain, or is capable of being readily reduced to a certainty, and is the appropriate action for the recovery of the statutory penalty, upon the ground of implied promise which the law

annexes to its liability. *Russell v. Louisville R. Co.*, 25 S. E. 99, 100, 93 Va. 322.

By the common law an action of debt is a general remedy for the recovery of all sums certain, whether the legal liability arise from contract or be created by statute. *United States v. Lyman* (U. S.) 26 Fed. Cas. 1024, 1030.

Debt is defined in Bacon's Abridgment to be an action founded on a distress or implied contract, in which the certainty of the sum or duty appears, and "therefore the plaintiff is to recover the sum in numero, and not to be repaid in damages by the jury." The three distinguishing points in the action of debt are that the contract must be, first, one for money; second, for a sum certain; and, third, specifically recoverable. Such an action will not lie on a writing obligatory for \$200 to be paid in lumber. *Casady v. Laughlin* (Ind.) 3 Blackf. 134, 135. And see *Watson v. McNairy*, 4 Ky. (1 Bibb) 356, 357.

"An action of debt will not lie to charge a person, where a particular mode of payment is agreed on, unless there has been a failure on the part of the defendant." *Harris v. Baker* (Conn.) 1 Root, 220.

Debt lies whenever a sum certain is due, without regard to the way in which the obligation was incurred, or by what it is evidenced. *Omaha Nat. Bank v. Mutual Ben. Life Ins. Co.* (U. S.) 81 Fed. 935, 939.

Debt lies when one is entitled to receive a certain unliquidated sum of money, or in case of a bond for the payment of money or the performance of some act under a penalty, or for goods sold and delivered, etc. *Mitchell v. McNabb*, 58 Me. 506, 507.

An action of debt does not lie on a collateral or conditional undertaking. *Reid v. Blaney*, 2 Me. (2 Greenl.) 128, 129.

An action of debt will not lie on a writing to pay "a horse at the value of £30," since it is one of the essentials of an action for debt that the contract be for money and specifically recoverable. *Watson v. McNairy*, 4 Ky. (1 Bibb) 356, 357.

An action of debt will not lie upon a sealed instrument wherein is contained no promise to pay any sum of money under any terms or conditions, but a bill of sale of certain tools used in and about boot and shoe business, together with the debtor's good will, and an agreement not to carry on such business in the city for a certain time. *Mitchell v. McNabb*, 58 Me. 506, 507.

By "action of debt," as used in Rev. St. §§ 3104, 3106, providing for the recovery of usurious interest in an action of debt, the Legislature did not, we think, mean to require that the action be technically that action known as such at the common law, for

the reason that we have no forms of action. Still it is true that the provision gives only the right to recover the penalty by some action for it, as for a debt, so that the debtor cannot do so by a purely defensive pleading when sued for the debt. *Rosetti v. Lozano*, 70 S. W. 204, 205, 98 Tex. 57.

An action of debt is the proper remedy for duties against the owner or importer under the rules of the common law. *United States v. Lyman* (U. S.) 26 Fed. Cas. 1024, 1028.

#### DEBT ACTUALLY DUE.

Where a bank charter provided that all debts actually due and payable to the corporation by a stockholder requesting a transfer must be satisfied before such transfer should be made, the words "debts actually due and payable to the corporation" implied more than mere indebtedness, but did not include paper not due at the time the transfer was demanded. *Reese v. Bank of Commerce*, 14 Md. 271, 283, 74 Am. Dec. 536.

#### DEBT AND COSTS PAID.

An entry by plaintiff on the docket, after suit brought, "Debt and costs paid," is equivalent to "satisfaction." *Phillips v. Israel* (Pa.) 10 Serg. & R. 391, 392.

#### DEBT BY SPECIALTY.

Debts by specialty are such whereby a sum of money becomes or is acknowledged to be due by debt or instrument under seal. *Tyler's Ex'rs v. Winslow*, 15 Ohio St. 364, 366; *Probate Court for Orleans Dist. v. Child*, 51 Vt. 82, 86; *Kimball v. Whitney*, 15 Ind. 280, 282. In the case of *Stockwell v. Coleman*, 10 Ohio St. 40, the court says that the term "specialty," in the strict and early use of the word, was regarded as applicable only to bonds, deeds, or other instruments under seal. In *Marriott v. Thompson*, Willes, 189, the court says: "Whenever a man by deed obliges himself to pay money to another, it is a debt by specialty." A mortgage is an instrument whereby a debt or duty is acknowledged to be due or owing to another, and very often an agreement or promise in writing is contained therein; and a mortgage sealed and delivered is a "specialty," within the definition of the term. *Kerr v. Lydecker*, 51 Ohio St. 240, 252, 37 N. E. 267, 23 L. R. A. 842.

#### DEBT CONTRACTED.

The term "debts contracted," as used in a statute providing that an exemption shall be valid against debts created both before and after the passage of the law, must "ex vi termini" mean all debts, and not some par-

ticular debt, to the exclusion of others." *Darling v. Berry* (U. S.) 13 Fed. 659, 664.

The term "debts contracted," as used in Gen. St. Mass. 1821, c. 23, providing that every person, who shall become a member of any manufacturing corporation which may be hereafter established in this commonwealth, shall be liable in his individual capacity for all debts contracted during the time of his continuing a member of such corporation, means not only debts in the strict sense of the term, but includes any liabilities incurred by the corporation. *Carver v. Braintree Mfg. Co.* (U. S.) 5 Fed. Cas. 235, 241.

A debt was clearly contracted in the erection of a building, within the purview of the acts regarding mechanics' liens, although the parties might not have struck a balance of the amount due resulting from their mutual dealings. A debt may be contracted, though it may be the subject of set-off founded on a quantum meruit, in which case the amount due is liquidated. *McCall v. Eastwick* (Pa.) 2 Miles, 45, 47.

#### Costs.

"Debts contracted," as used in Rev. St. U. S. § 2296 [U. S. Comp. St. 1901, p. 1398], providing that lands acquired under the homestead act shall not in any event become liable to the satisfaction of any debts contracted prior to the issue of the patent therefor, does not necessarily mean debts or obligations incurred by an agreement of parties. The word "contract" has a more extensive signification than to make an agreement. "Debts contracted," in the ordinary acceptance of the term, will include liabilities incurred. Costs in the proceedings for bigamy, which are taxed against a homesteader prior to the issue of his patents, are debts contracted, within the meaning of the statute. *State v. O'Neil*, 7 Or. 141, 143.

#### Delivery necessary.

As used in 2 Rev. St. p. 493, entitled "An act in relation to demands against ships and vessels," and providing that, whenever a debt amounting to \$50 or upwards shall be contracted in the manner specified in the act, such debt shall be a lien, means not only the agreement to furnish goods to a vessel, but the actual delivery thereof; and there is no debt contracted until the goods are delivered. *Veltman v. Thompson*, 3 N. Y. (3 Comst.) 438, 440.

#### Fine.

Under a provision of the Constitution exempting a homestead from sale under execution or other process issued on any demand for any "debt contracted," a fine imposed by statute for the violation of the law cannot in any just sense be designated as

a debt contracted. The ordinary meaning of the word "debt" is a sum of money due to another by contract, and a "debt contracted," necessarily means that the debtor has come under a voluntary obligation to pay it. The relation of debtor and creditor implies that the one has given credit to the other in contract. It would be a solecism to observe and say that the fine imposed as a punishment for a penal offense was a debt contracted. Contracted how? Contracted with whom? A debt contracted implies the voluntary action of debtor and creditor founded on a valuable consideration. This cannot be predicated upon a fine imposed by mere punishment. The very essence of a contract is taken away when the amount is assessed as a penalty for violating law claimed as a punishment for crime. *Whiteacre v. Rector* (Va.) 29 Grat. 714-716, 26 Am. Rep. 420.

#### Judgment in *scire facias*.

The term "debt contracted," as used in Gen. St. 1866, p. 174, tit. 7, § 416, making the president, directors, or secretary of any corporation who shall intentionally neglect or refuse to comply with the provisions of the act liable for all debts of such corporation during the period of such neglect or refusal, does not include a judgment in *scire facias*. "There cannot be a debt contracted without two or more contracting parties, one of whom in this case must be the corporation. The phrase, therefore, necessarily implies some act on the part of the corporation with some party dealing with it whereby an obligation is incurred; the company receiving, and the other party giving, credit on the faith of their solvency and proper organization as a corporation." *Armstrong v. Cowles*, 44 Conn. 44, 48.

#### Judgment for tort.

The term "debts contracted," as used in a statute which provided that the stockholders of every company incorporated under the act should be jointly and severally liable for the debts of the company for an amount equal to the amount of any unpaid stock in the company held by them at the time any debt was contracted, meant claims against the company arising from contract, and did not embrace a judgment for tort. *Bohn v. Brown*, 33 Mich. 257, 263; *Leighton v. Campbell*, 20 Atl. 14, 15, 17 R. I. 51, 9 L. R. A. 187.

There is no language to be found in the act relating to exemptions indicating an intention to exempt from sale any property on judgments, except for debts contracted. If the intention had been to extend the exemption to sales under all judgments recovered, it would have been quite easy to have so expressed it, and it is most likely, if that had been the intention, that it would have been

so expressed in the act. The omission to do so, and the limitation in words to debts contracted, afford pregnant evidence that the Legislature did not intend to extend its operation beyond the cases expressed. Therefore a homestead is not exempt from sale on execution issued upon a judgment for a cause of action sounding in tort, nor on an execution issued in such action on a judgment for the defendant for costs. *Lathrop v. Singer* (N. Y.) 39 Barb. 396, 398, 399.

Const. 1862, art. 14, § 2, exempting homestead from liability for any debt contracted after the adoption of the Constitution, has no application to judgments for torts or liabilities in the nature of torts. *Schuessler v. Dudley*, 2 South. 526, 527, 80 Ala. 547, 60 Am. Rep. 124.

The phrase "debts contracted," as used in the homestead act of 1851, that exempted the homestead from forced sale under any process or order from any court of law or equity for debts contracted after the 4th of July, 1851, embraces a judgment for slander. *Conroy v. Sullivan*, 44 Ill. 451, 452.

Const. art. 16, § 2, provides that every homestead shall be exempt from forced sale on execution or any other final process from a court for any debts contracted after the adoption of the Constitution. Held, that the word "contracted" was often used in a broader sense than as meaning a debt arising out of a contract. Thus a disease may be contracted, while not contracted for. The words "liability contracted," etc., have been held to have a broader signification than the words "debt contracted"; but a contract liability is as much a liability growing out of a contract as is a contract debt a debt founded on contract. Therefore the word "contract" as used in the statute, did not limit the word "debt" to debts founded purely on contract, but included all debts which had become ripened into contract liabilities, thus including debts founded on torts which had been reduced to judgment. *Mertz v. Berry*, 59 N. W. 445, 446, 101 Mich. 32, 24 L. R. A. 789, 45 Am. St. Rep. 379.

#### Obligation *ex delicto*.

A statute allowing the head of a family to hold, exempt from levy on any "debt contracted," property not to exceed a certain value, should be construed to include every judgment, whatever may have been the nature of the action in which it was obtained, whether arising *ex contractu* or *ex delicto*. Bouvier says: "Debt is a sum of money due by certain and express agreement." In a less technical sense it means any claim for money. In a still more enlarged sense, it denotes any kind of a just demand, as the debts of a bankrupt. One of the meanings given in our dictionaries of the word "contract," as a verb, is, "to incur"; so that a "debt con-

tracted" in an enlarged or literal sense means any kind of just demand incurred. The words "debt contracted" are not to be taken in their narrowest meaning, as describing only debts which are expressly agreed to be paid by the debtor. In re Radway (U. S.) 20 Fed. Cas. 154, 162.

Within the provision that no homestead on public lands shall become liable for the satisfaction of any debt or debts contracted prior to the issue of a patent therefor, the word "contract" has a more extensive signification than to make an agreement. The words "debts contracted" do not necessarily mean debts or obligations incurred by the agreement of the parties. "Debts contracted," in the ordinary acceptation of the term, will include liability incurred. *State v. O'Neill*, 7 Or. 141. And the liability for a tort growing out of the breach of a contract warranting the title of certain personal property is included. *Flanagan v. Forsythe*, 50 Pac. 152, 153, 6 Okl. 225.

Under a statute allowing a homestead exemption as against "debts contracted," it is held that a demand for damages for breach of promise to marry is not a debt contracted, within the meaning of the statute. *Burton v. Mill*, 78 Va. 468, 481.

A statute providing that no property shall be exempt from sale for nonpayment of taxes or assessments, or for a debt contracted for the purchase thereof, would not include a claim by reason of a good cause of action for a breach of promise of marriage; for, though the action is founded on a promise, so far as form is concerned, it is substantially an action of tort. *Cook v. Newman* (N. Y.) 8 How. Prac. 523, 524; *Newman v. Cook*, 11 N. Y. Leg. Obs. 62.

#### DEBT CREATED BY FRAUD.

See, also, "Fraud."

The bankruptcy act, providing that no debt created by fraud shall be discharged by proceedings in bankruptcy, should be construed to include the liability of one with whom money had been left to keep until called for, and which he had used in his own business. *Hammond v. Noble*, 57 Vt. 193, 199.

A debt created by fraud is a debt created by positive fraud, involving moral turpitude or intentional wrong, as distinguished from implied fraud or fraud in law, which may exist without the imputation of bad faith or dishonesty. *Gibson v. Gorman*, 44 N. J. Law (15 Vroom) 325, 327.

#### DEBT CREATED IN A FIDUCIARY CHARACTER.

See "Fiduciary Capacity or Character."

#### DEBT, DEFAULT, OR MISCARRIAGE OF ANOTHER.

The term "debt, default, or miscarriage of another," as used in the statute of frauds, requiring such promises to be in writing, means only promises made to the person to whom another is answerable. *Pratt v. Humphrey*, 22 Conn. 317, 325.

The requirement of the statute of frauds that a promise to answer for the debt, default, or miscarriage of another must be in writing means a promise to the creditor of the third person, and does not include a promise to the debtor himself. The theory of the statute of frauds is that, when a third party promises the creditor to pay him a debt due to him from a person named, the effect of such a promise is to become a surety or guarantor only, and shall be manifested by written evidence. The promise in such a case is to the creditor, not to the debtor. *Aldrich v. Ames*, 75 Mass. (9 Gray) 76, 77; *Mersereau v. Lewis* (N. Y.) 25 Wend. 243, 247.

A promise to a debtor, or to one who may on a certain contingency become a debtor, made on a valuable consideration moving from the debtor, to pay the debt and save the debtor harmless, is not a promise to pay the debt of another, within the meaning of the statute of frauds. Neither does the promise to pay the debt of another come within the statute when the party promising has for his object a benefit which he did not before enjoy, accruing immediately to himself. And so, where by a verbal contract A. agreed to transfer to S. his stock, it being the greater part of all the stock in a certain corporation, and S. agreed to convey to A. certain property and to take A.'s interest in the corporation and to indemnify A. against his indorsements on the outstanding notes of the corporation, and the trade was made, the promise in relation to indemnification against the indorsements was not a promise to answer the debt, default, or miscarriage of another, within the meaning of the statute. *Alger v. Scoville*, 67 Mass. (1 Gray) 391, 394.

Rev. St. p. 264, providing that no one shall be liable for the debt, default, or miscarriage of another, unless they have so agreed in writing, means undertakings made to the person to whom another is bound, and has no application to a case where one promises a subscriber to stock in a corporation to be answerable to the corporation for all liability on the subscription. *North v. Robinson*, 62 Ky. (1 Duv.) 71, 73.

The term "debt of another," within the meaning of the statute of frauds, requiring a promise to pay the debt of another to be in writing, does not characterize the obligation of the purchaser of land arising from agreement by him, with a debtor of the grantor, whose debt was a lien on the land,

to pay such debt. *Taylor v. Preston*, 79 Pa. (29 P. F. Smith) 436, 441.

C., who was a large stockholder of a corporation, verbally promised M. that, if he would subscribe and pay \$500 to the capital stock of the company, he should within one year receive 15 per cent. on what he invested. M., in consideration of this promise, subscribed and paid for the stock. No dividends were made or earned within the year. Held, that the contract was not one to answer for the debt, default, or miscarriage of another, as used in the statute of frauds, inasmuch as there was no debt or legal duty owing by the corporation to plaintiff for which C. undertook to answer on defendant's default, but the contract being entirely distinct and independent of any obligation of the corporation. *Moorehouse v. Crangle*, 36 Ohio St. 130, 132, 38 Am. Rep. 564.

### DEBT DUE.

See "Debt Actually Due"; "Due."

### DEBT DUE TO THE PUBLIC.

The phrase "debts due to the public" as used in the act of 1789 (Gen. St. 1872, p. 457), relating to priority of payment out of assets, includes a debt due by a surety on the county treasurer's bond, at the time of his death, for the default of his principal. *Baxter v. Baxter*, 23 S. C. 114, 116.

### DEBT FOR PENALTIES.

A debt for penalties is distinguished from other debts, in that it is in its nature *ex delicto*, while all other debts are *ex contractu*. *Corry v. Pennsylvania R. Co.*, 45 Atl. 341, 342, 194 Pa. 516; *Osborn v. First Nat. Bank*, 28 Atl. 289, 290, 154 Pa. 184, 137.

### DEBT FOUNDED ON CONTRACT.

As used in Const. art. 1, § 16, providing that no person shall be imprisoned for debt arising out of or founded on a contract, express or implied, is to be "taken in its broad and popular sense, as indicating a right accrued, a sum of money or other thing due or delivered by virtue of a contract expressed between the parties or implied from their acts and circumstances, or on account of a breach of it in respect to some matter provided for or contemplated by them when it was made, something springing out of contract and for the enforcement of which resort must be had to it, and seems not to include damages for those wrongful acts which either party may possibly do, and which, when done, are remotely connected with it, but were not anticipated by them at the time of making of it." In *re Mowry*, 12 Wis. 52, 57.

Laws 1831 provide that, in order to authorize the issuance of a verdict, it must

appear by the affidavit presented that the judgment is founded on contract, or that the cause of action is to recover damages for nonperformance of a contract, express or implied. Held, that a contract within the statute must be one resulting from the voluntary arrangement of the parties, and not one implied in law for the purpose of giving a remedy for a wrong. *People v. Speir*, 77 N. Y. 144, 151.

A judgment recovered by a woman for breach of marriage contract is founded on contract, and is provable against his estate in bankruptcy. In *re McCauley* (U. S.) 101 Fed. 223, 224.

A judgment obtained on breach of marriage promise is a "debt founded on contract," and barred by discharge in bankruptcy. In *re Sidle* (U. S.) 22 Fed. Cas. 102.

Where, in an action for breach of promise of marriage, a verdict was recovered before defendant filed his petition in bankruptcy, on which judgment was entered before he applied for discharge, such claim was provable under section 63 of the bankruptcy law, since it was founded on a contract and reduced to judgment after the filing of the petition and before the consideration of his application for discharge. In *re Fife* (U. S.) 109 Fed. 890, 881.

The liability of stockholders of a corporation for the debts of the corporation under the statutes of Ohio is not only a liability created by statute, but is also founded on an implied contract, as that expression is used in Bankr. Act July 1, 1898, c. 541, § 63a, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447], and is provable in bankruptcy, if the circumstances are such that the claimant could have maintained a suit to enforce the stockholder's liability. In *re Rouse* (U. S.) 1 Am. Bankr. Rep. 393, 397.

### Alimony.

A decree of alimony to be performed by the payment of money is not evidence of a "debt founded on contract," express or implied, so as to be discharged by a discharge in insolvency. *Noyes v. Hubbard*, 23 Atl. 727, 64 Vt. 302, 15 L. R. A. 394, 33 Am. St. Rep. 928.

The term "debt founded on contract," as used in Bankr. Act July 1, 1898, c. 541, § 63, 30 Stat. 562 [U. S. Comp. St. 1901, p. 3447], does not include a decree granting alimony, and therefore it is not affected by the discharge of the husband in bankruptcy. *People v. Grell*, 65 N. Y. Supp. 522.

### Costs.

Statutes, exempting certain property from execution sale under a judgment for a "debt growing out of or founded on a contract, express or implied," cannot be construed to include a debt arising out of a

judgment for costs on the reversal of another judgment. *Ross v. Banta*, 34 N. E. 865, 871, 140 Ind. 120; *In re Owens* (U. S.) 18 Fed. Cas. 925.

#### Penalty.

A statute exempting certain property from execution for debts growing out of or founded upon a contract does not include a statutory liability or penalty for using a toll road without paying toll therefor, as prohibited by statute, as such liability is not a debt, but merely a statutory liability for the violation of law. *Keller v. McMahan*, 77 Ind. 62, 64.

#### Tax.

As used in Code Civ. Proc. § 2223, defining the jurisdiction of the city court of Albany, and declaring that it shall have jurisdiction of all actions for debt on implied contracts, includes an action to recover a tax assessed on personalty. *Bowe v. Jenkins*, 23 N. Y. Supp. 548, 549, 69 Hun, 458.

#### DEBT OF ESTATE.

The words "debts of the estate" naturally import debts owed by the decedent's estate. *Cotton v. Holloway*, 12 South. 172, 176, 96 Ala. 544.

#### DEBT OF RECORD.

Blackstone says a debt of record is a contract of the highest nature, "being established by the sentence of a court of judicature. . . . It includes a judgment." *Burnes v. Simpson*, 9 Kan. 658, 664.

A debt of record is a sum of money which appears to be due by the evidence of a court of record. *Kimball v. Whitney*, 15 Ind. 280, 282; *Tyler's Ex'rs v. Winalow*, 15 Ohio St. 364, 366.

In the classification of legal subjects, a judgment is called a "debt of record," because of the obligation to pay it which is imposed on the party against whom it is rendered; but the nature of the transaction is not changed by the reduction of it to a judgment. *Atrill v. Huntington*, 16 Atl. 651, 654, 70 Md. 191, 2 L. R. A. 779, 14 Am. St. Rep. 344. See, also, *Bennett v. Bennett*, 49 Atl. 501, 502, 63 N. J. Eq. 306; *Provident Sav. Life Assur. Soc. v. Ford*, 5 Sup. Ct. 1104, 1107, 114 U. S. 635, 29 L. Ed. 261; *Davidson v. Smith* (U. S.) 7 Fed. Cas. 88.

#### DEBT OR DAMAGES DEMANDED.

The words "debt or damages demanded," as used in the various statutes defining the jurisdiction of the courts, have repeatedly been held to refer to the ad damnum of the right, and not to the amount claimed in

the declaration or proved at the trial. *Wright v. Potomska Mills Corp.*, 138 Mass. 328, 329 (citing *Clay v. Barlow*, 123 Mass. 378); *Clay v. Barlow*, 123 Mass. 378, 379.

#### DEBT OR DEMAND.

A debt or demand means "any debt or demand," and is of universal application. *Van Ingen v. Parmenter*, 44 N. E. 121, 166 Mass. 128.

#### DEBT PAYABLE IN THE FUTURE.

A "debt payable in the future" is one which neither the debtor has a right to pay nor the creditor a right to demand instantly. *Seymour v. Dunham* (N. Y.) 24 Hun, 93, 94.

#### DEBT RECOVERED.

Where a judgment in an action against a married woman recites that the principal sum mentioned in the note sued on "is due" the plaintiff, and it is "ordered, adjudged, and decreed that" such sum "be paid to the plaintiff," etc., nothing is wanting to the identification of such sum as the debt which has been recovered, within the meaning of the statute providing that an appeal bond, to operate as a stay of execution, must be in double the amount of "whatever debts have been recovered" by the judgment. *Gawtry v. Adams*, 10 Mo. App. 29, 32, 34.

#### DEBT SECURED.

Mortgage distinguished, see "Mortgage."

#### DEBTOR.

See "Delinquent Debtor"; "Joint Debtor"; "Judgment Debtor"; "Primary Debtor"; "Principal Debtor."  
Any debtor, see "Any."

A debtor is one who owes a debt. *Jaqua v. Shewalter*, 37 N. E. 1072, 1073, 10 Ind. App. 234; *In re Nicolin*, 56 N. W. 587, 588, 55 Minn. 130; *Scott v. City of Davenport*, 34 Iowa, 208, 213 (citing *Bouv. Law Dict.* 380).

A debtor is one who, by reason of an existing obligation, is or may become liable to pay money to another, whether such liability is certain or contingent. Civ. Code Mont. 1895, § 4480; Civ. Code Cal. 1903, § 3429; Rev. Codes N. D. 1899, § 5047; Civ. Code S. D. 1903, § 2363; Rev. St. Okl. 1903, § 2769.

Every one who owes to another the performance of an obligation is called a "debtor," and one to whom he owes it is called a "creditor." Rev. St. Okl. 1903, § 2786; Rev. Codes N. D. 1899, § 5113; Civ. Code S. D. 1903, § 2447.

An obligor or debtor is the person who has engaged to perform some obligation. Civ. Code La. 1900, art. 3556, subd. 21.

A debtor is one who owes another anything, or is under obligation, arising from express agreement, implication of law, or the principles of natural justice, to render and pay a sum of money to another. *Stanly v. Ogden* (Conn.) 2 Root, 259, 262; *Keith v. Hiner*, 38 S. W. 13, 14, 63 Ark. 244.

"Debtor," as used in a statute in relation to fraudulent conveyances by debtors, includes any one liable upon a contract, express or implied, though only contingently. *Schmidt v. Opie*, 33 N. J. Eq. (6 Stew.) 138, 139.

A debtor is one who owes anything, or who is under obligation, arising from express agreement, implication of law, or the principles of natural justice, to render and pay a sum of money to another. *Melvin v. State*, 53 Pac. 416, 419, 121 Cal. 16.

The word "debtor," in its broad sense, implies liability. *Rudd v. Ford*, 15 S. W. 179, 91 Ky. 183.

St. 1838, c. 163, § 3, declares that, when any creditor shall have any mortgage or pledge of any real or personal estate of the debtor for securing the payment of any debt claimed by him, the property so held as security shall, if he require it, be sold, and the proceeds applied to the payment of his debt, and he shall be admitted as a creditor in insolvency proceedings for the residue thereof. Held, that the term "debtor," in such section, was not necessarily limited to an insolvent debtor whose estate is in progress of settlement, but it was equally consistent with the manifest equity and policy of the statute to construe it to mean any person liable for the debt. *Lanckton v. Wolcott*, 47 Mass. (6 Metc.) 305, 307.

As used in Bankrupt Act U. S. § 56, providing that, "in all cases where the assignees shall prosecute any debtor of the bankrupt for any debt, duty, or demand, the commission, or a certified copy thereof, the assignment of the commissioners of the bankrupt's estate shall be conclusive evidence of the issuing of the commission," by "debtor" is to be understood any person against whom a judgment exists in favor of the assignees of the bankrupt, and not merely a person who owes a debt or duty. *Barstow v. Adams* (Conn.) 2 Day, 70, 98. The word "debtor" as so used seems to have been intended as a correlative to the words "debt, duty or demand"; and hence, if the defendants had fraudulently possessed themselves of the property of the bankrupt, they ought to be held debtors. *Sands v. Codwise* (N. Y.) 4 Johns. 536, 558.

Where an affidavit in poor debtor proceedings alleges that the debtors have property which they do not intend to apply in payment of the judgment, the allegation is to be construed as used in a distributive sense,

and as meaning that the debtors each have property. *Stearns v. Hemenway*, 37 N. E. 766, 162 Mass. 17.

By the term "debtors to the bank," as used in discussing the rules of equity which should control the settlement of its affairs, is meant all those who at the appointment of the receiver were liable to the bank for the payment of money, whether their liability had matured or not, and without any regard to the exact nature of the liability, whether as principal or surety. It does not include those who become indebted to the receiver, for the same reason that a person who has become a debtor to the administrator of an insolvent estate is not considered a debtor to the intestate; nor is it intended to include stockholders or officers of the corporation, against whom the receiver may be directed to bring action to recover sums due for subscription for stock or other like claims. In all matters pertaining to set-offs, such indebtedness or liability as that last named is considered as due strictly to the receiver, and not to the corporation. *Davis v. Industrial Mfg. Co.*, 19 S. E. 371, 372, 114 N. C. 321, 23 L. R. A. 322.

Rev. St. c. 35, § 4, providing that it shall be lawful for the debtor (the creditor being living) to become a witness, and that he shall be admitted as such in the trial of any action wherein the fact of unlawful interest having been reserved or taken is to be in issue, etc., does not mean only debtors and creditors, between whom the relation of debtor and creditor actually subsists at the time of the trial, but is meant to signify the parties to the original contract alleged to be usurious or, in other words, the original debtor and creditor. *Gifford v. Whitcomb*, 63 Mass. (9 Cush.) 482, 483.

"Debtor," as used in a statute authorizing the garnishment of the debtors of execution defendants, does not include a person with whom the debtor has made a special deposit of coin. *Wood v. Edgar*, 13 Mo. 451, 452.

As used in the Connecticut foreign attachment law, a debtor was construed to include an absent person liable for damages or breach of covenant. *Pollard v. Dwight*, 8 U. S. (4 Cranch) 421, 2 L. Ed. 666.

#### Assignor synonyms.

Section 3, subd. 5, of the act relating to assignments for the benefit of creditors, provides that the debtor should make an inventory of his property within a certain time after making the assignment, and, in case he shall fail to do so within such time, that the assignee shall then make a schedule, and that, if he should fail to do so, he shall be removed by the judge, and then further provides that "the books and papers of such delinquent debtor shall at all times be subject to the inspection and examination of any

creditor," and "the county judge is authorized by order to require such debtor or assignor to allow such inspection or examination." Held that, by providing that the books and papers should "at all times be subject to inspection," an intention was expressed that the words "debtor" and "delinquent debtor," should be taken as synonymous with "assignor," and that such inspection might be made by a creditor prior to the refusal of the debtor to make the inventory, as well as after such refusal. *In re H. Herrmann Lumber Co.*, 48 N. Y. Supp. 509, 510, 21 App. Div. 514.

#### **Bankrupt.**

A bankrupt, in the sense of the bankruptcy act, is a debtor, and something more. He is a debtor who has committed an act of bankruptcy, declared to be such by the bankruptcy law. Consequently section 44 of the bankruptcy act of 1867, providing for the punishment of any fraudulent disposition of the goods of a debtor or bankrupt within 3 months next before the commencement of bankruptcy proceedings, refers not only to bankrupts, but to those who had not at the time of committing the offense become bankrupt. *United States v. Pusey* (U. S.) 27 Fed. Cas. 631, 633.

#### **Corporation.**

Rev. Code 1819, c. 123, directing the method of proceeding in courts of equity against absent debtors, includes corporations. *United States Bank v. Merchants' Bank*, 40 Va. 573, 576.

The term "debtor," as used in a statute authorizing the attachment of the property of a debtor, includes a corporation, as well as a natural person. *South Carolina R. Co. v. McDonald*, 5 Ga. 531, 535. Contra, see *McQueen v. Middletown Mfg. Co.* (N. Y.) 16 Johns. 5.

Within the provisions of Civ. Code, § 3432, providing that a debtor may pay one of the creditors in preference to another, or may give to one creditor security for the payment of his demand in preference to another, the term "debtor" is a broad one, and must include corporations likewise with individuals and partnerships. *Merced Bank v. Ivett*, 59 Pac. 393, 394, 127 Cal. 134.

The term "debtor," as used in insolvency law, includes partnerships and corporations. *In re Levin* (Cal.) 63 Pac. 335, 336.

#### **Heir.**

Rev. Laws, p. 835, § 1, providing that, if any creditor shall make oath, etc., that his debtor absconds from his creditors, it shall be the duty of the clerk to issue a writ of attachment, does not include an heir of an ancestor who was a creditor of a person making such affidavit; for thus to consider him would make him liable at all events for the

debt of his ancestor, whether he had land by descent or not. *Peacock v. Wildes*, 8 N. J. Law (3 Halst.) 179, 180.

#### **Indorser of note.**

A debtor is defined to be one who owes a debt; one who is indebted. *Webst. Dict.* The term would include an indorser of a promissory note before his liability became absolute by dishonor and notice. *Dodson v. Taylor*, 21 Atl. 293, 294, 53 N. J. Law (24 Vroom) 200.

#### **Nonresident.**

The term "debtor not found or summoned," in a statute authorizing service by publication of notice of attachment when the debtor has not been found or summoned, applies as well to a nonresident as to absconding or fraudulent debtors. It includes every debtor described in the seven enumerations of causes of attachment in the second article of the attachment law. *Moore v. Williams*, 44 Miss. 61, 63.

#### **Personal representative.**

Though the act of 1873 contained no express provisions for the revival of a judgment against the executor of a deceased judgment debtor, the word "debtor," in the phrase "by service of summons on the debtor," includes the personal representative of a deceased judgment debtor; the word "debtor" being used as a generic term, in a condensed and general form, to embrace all proceedings necessary. *Chester & C. R. Co. v. Marshall*, 18 S. E. 247, 249, 40 S. C. 59.

#### **Individual partner.**

Each partner of a firm is not a debtor for the amount of the partnership debt, in such sense that a creditor may proceed against him in attachment, if the rest of the partners are in the state. The individual partner will be liable and bound to the extent of his separate property for the partnership debts, but he is only constructively or consequentially a debtor. They are not his debts, strictly speaking, though he is liable for them. *Hollingshead v. Curtis*, 14 N. J. Law (2 J. S. Green) 402, 409.

#### **DEBTOR'S LIBERTIES.**

Jail yard synonymous, see "Jail Yard."

#### **DEBTS TO BE FIRST PAID.**

"Debts to be first paid," as used in a will, could not be construed as an implied power given to the personal representative to sell land for the payment of debts. *Owen v. Ellis*, 64 Mo. 77, 88.

#### **DECAY.**

Decay is defined to be a gradual failure of health, strength, soundness, prosperity;



any species of excellence or perfection declined to a worse or less perfect state. *Fisk v. Spring* (N. Y.) 25 Hun, 367, 369, 62 How. Prac. 510, 512.

Under a clause in a policy of insurance providing that "if the vessel, after regular survey, should be condemned for being unsound or rotten, the assurers shall not be bound to pay their subscription," a finding on a survey that her stern, apron, bends, and the most part of her timbers are decayed is equivalent to finding that the vessel is unsound or rotten, although those terms are not used, as "decayed" is the same as "rotten." *Steinmetz v. United States Ins. Co.* (Pa.) 2 Serg. & R. 293, 296.

## DECEASE.

Webster defines the word "decease" as follows: "To depart from this life; to die." The word "decease" cannot be construed to include the civil death of one sentenced to state prison for life. In *re Zeph's Estate*, 3 N. Y. Supp. 460, 50 Hun, 523.

A will providing that, after the death of testator's daughter, the residue and remainder of his property should go to his surviving grandchildren, and to the legal issue of "any deceased grandchild or grandchildren," means such as may die during the life of one or both of the daughters. *Scott v. West*, 25 N. W. 18, 20, 63 Wis. 529.

In a will in which the testator divided his estate between his three children, with a proviso that, in the event of the decease of either of them without having issue at his or her decease, the portion of said deceased is to be shared equally by the survivors or their issue, the words "in the event of the decease" meant the decease of either of the legatees before the decease of the testator, and were not words limiting the estate devised to the life of the legatees. *Phelps v. Phelps*, 11 Atl. 596, 597, 55 Conn. 359.

In a will in which testator bequeathed his residuary personalty to trustees in trust for the children of one L., to be divided equally between them, and directing that in case of the decease of either of them, leaving a family, then such share as the parents would have taken should be equally divided amongst the children of such deceased parents, the term "decease" means decease during the testator's life—that the children of L. who survived the testator took absolutely, and that the children of one child of L., who died between the date of the will and the death of the testator, took the share that his parent would have taken if living at his death. *Rickards v. Gray* (Del.) 6 Houst. 232, 271.

"The issue of any deceased child," in a will in which testator directs that the inter-

est of a sum of money shall be paid to his son A. for life, and on A.'s death that the principal shall be divided among testator's other then surviving children and issue of any deceased child, includes the issue of A. *Bell v. Smalley*, 18 Atl. 70, 45 N. J. Eq. (18 Stew.) 478.

## DECEDENT.

The word "decendent," as used in Code Civ. Proc. § 2660 et seq., relating to the granting of letters of administration upon the estate of a decedent, should be construed in its usual and ordinary sense, which, as defined by Webster, means a deceased person—that is, one dead; departed from this life. Hence one, though civilly dead, by reason of imprisonment for life, is not a decedent, within the meaning of the statute. In *re Zeph's Estate*, 3 N. Y. Supp. 460, 50 Hun, 523.

The word "decendent" means either a testator or a person dying intestate. Pub. Gen. Laws Md. 1888, p. 2, art. 1, § 5.

## DECEIT.

Action for, see "Action for Deceit or Fraud."

"Deceit, in business transactions, consists in fraudulent representations or contrivances by which one man deceives another who has a right to rely on the representations, or has no means of detecting such fraud." *Reynolds v. Palmer* (U. S.) 21 Fed. 483, 434.

Deceit is a fraudulent and cheating misrepresentation, artifice, or device used by one or more persons to deceive and trick another, who is ignorant of the true facts, to the prejudice and damage of the party imposed on. *French v. Vining*, 102 Mass. 182, 135, 3 Am. Rep. 440 (citing Black, Dict.).

"Deceit is a fraudulent misrepresentation by which one man deceives another to the injury of the latter. Where false statements are made with intent to deceive and defraud, the necessary implication is that the person making such false statements with such intent has knowledge of their falsity." *Farwell v. Metcalf*, 61 Ill. 372, 374.

"Deceit" is a species of fraud, and consists of any false representation or contrivance whereby one person overreaches and misleads another to his hurt. *Swift v. Rounds*, 35 Atl. 45, 19 R. I. 527, 33 L. R. A. 561, 61 Am. St. Rep. 791.

The phrase "legal fraud" has sometimes been interpreted as meaning fraud by construction, and as indicating that something less than actual fraud may sustain an action for deceit; but, to sustain an action for deceit, intentional fraud must be shown, as

fraud without damage, or damage without fraud, gives no cause of action, but, when these two concur, an action lies. *Kountze v. Kennedy*, 41 N. E. 414, 147 N. Y. 124, 29 L. R. A. 380, 49 Am. St. Rep. 651.

"Deceit," as used in Code Civ. Proc. § 67, providing that an attorney or counselor who is guilty of any deceit may be suspended from practice or removed from office by the Supreme Court at a general term, implies concealment or false suggestion of an attorney or counselor to injure a party or mislead a court while acting in a professional capacity or in the course of professional employment. *In re Post*, 7 N. Y. Supp. 438, 54 Hun, 634.

Where an attorney procured a pension for his client, and received the arrears, amounting to about \$1,700, and retained \$1,200, under an alleged agreement with his client that he was to retain all over \$8 per month that was recovered, and it did not appear that the client was informed as to the amount recovered, it constituted deceit and malpractice, under a statute authorizing disbarment for such offenses. *In re —*, 86 N. Y. 568, 574.

The term "deceit," in Code, § 67, providing that an attorney or counselor who is guilty of any deceit, etc., may be suspended or removed, implies concealment or false suggestion as an attorney or counselor to injure a party or mislead the court while acting in a professional capacity, or in the course of professional employment. *In re Post*, 7 N. Y. Supp. 438, 54 Hun, 634.

In the application of the rule that if a lessor has knowledge of defects in the premises which are not discoverable by the tenant, and which will imperil his person or property, a liability arises from the fraudulent concealment thereof, the terms "fraud," "fraudulent concealment," "constructive fraud," and "deceit" are synonymous. *Shinkle, Wilson & Kreis Co. v. Birney & Seymour*, 67 N. E. 715, 716, 68 Ohio St. 328.

A "deceit" is either (1) the suggestion as a fact of that which is not true by one who does not believe it to be true; (2) the assertion as a fact of that which is not true by one who has no reasonable grounds for believing it to be true; (3) the suppression of a fact by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or (4) a promise made without any intention of performing it. Civ. Code Mont. 1895, § 2292; Rev. Codes N. D. 1899, § 3942; Civ. Code S. D. 1903, § 1298; Rev. St. Okl. 1903, § 835. Under such a definition, a complaint alleging that plaintiff bought a county warrant from defendant upon defendant's representation that it had a legal, bona fide charge against the county, whereas defendant well knew that the warrant was illegal, and that payment thereof

would be enjoined, is a sufficient allegation of deceit. *Parker v. Ausland*, 82 N. W. 402, 403, 13 S. D. 169.

#### Alteration of court order.

While many definitions of "deceit" are given in the books, and in some that a person practicing deceit must accomplish something in the way of damage to another, it does not seem to me that it necessarily follows that a party may not be guilty of deceit, in a criminal sense, even though no damage results. As used in Pen. Code, § 148, providing that an attorney or counselor who is guilty of any deceit or collusion with intent to deceive the court or any party is guilty of a misdemeanor, it means the quality of being false or misleading. The concealment or perversion of the truth; a trick or device which tends to mislead another, although not necessarily accomplishing that result. When a person uses means which are deceitful, or which tend to deceive the court or another person, such as writing or producing false papers, it would be too strict a definition to hold that, although he intended to deceive, but as he failed in accomplishing any result, he was not, in fact, guilty of using deceit. *In Loeff v. Lawton*, 14 Hun, 588, the courts say that there seems to be no good reason for confining deceit to common-law or statutory cheats. The common law, as well as the statute of obtaining property by false pretenses, was adequate to the punishment of all such offenses, whether committed by lawyers or laymen. To mislead a court or jury is to deceive it, and, if knowingly done, constitutes criminal deceit. The alteration of an order of the Surrogate's Court so as to make it false and misleading is a deceit, within the statute. *People v. Olshei*, 45 N. Y. Supp. 49, 52, 20 Misc. Rep. 163.

#### As cheating by false tokens.

"Deceit," as used in Act 1836 (Rev. St. c. 35, § 8), providing that in all trespasses and other misdemeanors, except the offenses of perjury, forgery, malicious mischief, and deceit, prosecution shall commence within two years after the commission, means the same as cheating by false tokens, which is a distinct offense from that of a conspiracy to commit a fraud or cheat or deceive. *State v. Christianbury*, 44 N. C. 46, 47.

#### False answer.

Interposing a verified false answer is not deceit or abuse of a mandate or proceeding of the court, punishable under Code Civ. Proc. § 14, subd. 2, as a contempt, since a false answer does not in any sense deceive the court. *Fromme v. Gray*, 43 N. E. 215, 216, 148 N. Y. 696.

#### Silence.

Deceit may sometimes take a negative form, and there may be circumstances where

silence would have all the legal characteristics of actual misrepresentations. *French v. Vining*, 102 Mass. 132, 135, 3 Am. Rep. 440.

Deceit may consist in either the suppression of the truth, or the suggestion of a falsehood. *Brown v. Manning*, 3 Minn. 35, 44 (Gil. 13, 15), 74 Am. Dec. 736.

#### DECEITFUL PLEA.

A deceitful plea is the sham plea mentioned in the English books, and is when the facts stated are obviously false on the face of the plea. *Gray v. Gidlere* (S. C.) 4 Strob. 438, 443.

#### DECEIVE

In Civ. Code, § 1709, providing that one who willfully deceives another, with intent to induce him to alter his position to his injury or risk, is liable for any damages he thereby suffers, "deceive" means the suggesting as a fact that which is not true by one who does not believe it to be true. *Daley v. Quick*, 83 Pac. 859, 862, 99 Cal. 179.

#### DECEPTION.

Deception is the act of deceiving. The intentional misleading of another by falsehood spoken or acted. *Suther v. State*, 24 South. 43, 44, 46, 118 Ala. 88; *Hall v. State*, 32 South. 750, 759, 134 Ala. 90.

#### DECENCY.

The power of a town to enact ordinances for the preservation of good order, decency, and decorum within its limits is sufficient to authorize the town to pass an ordinance prohibiting the sale of intoxicating liquors therein; the sale of such liquors being prohibited in the rest of the county. *Fortner v. Duncan*, 15 S. W. 55, 91 Ky. 171, 11 L. R. A. 188.

#### DECIDE.

To decide is to determine; to form a definite opinion. *Darden v. Lines*, 2 Fla. 569, 571 (citing *Webst. Dict.*).

As used in St. 1855, c. 152, declaring it to be the duty of the jury, after having received the instructions of the court, to decide, at their discretion, by general verdict, both the law and the facts involved in the issue, or to find a special verdict, at their election, to "decide" includes the power and the right to deliberate, to weigh the reasons for and against, to see which preponderates, and to be governed by that preponderance. The word is used in the same sense as it is employed in that part of the statute making it the duty of the court to decide on the admission and re-

jection of evidence. *Commonwealth v. Antea*, 71 Mass. (5 Gray) 185, 253.

Where the record shows that the tax board met to levy taxes, and "decide" what should be the rate of taxation for various purposes, such act was a levy of the required tax. *Tallman v. Cooke*, 43 Iowa, 330, 331.

Within Rev. St. 1889, § 4707, providing that, in every case of a pending contesting election, the person holding the certificate of election may perform the duty of the office until the contest shall be decided, the word "decided" will be held to mean the entry of a final judgment against him in the trial court, so that his right to the office terminates then and does not refer to a decision on appeal. *State ex rel. Craig v. Woodson*, 31 S. W. 105, 107, 128 Mo. 497.

The phrase, "If they [the court] decide the public good requires the proposed railroad, the Secretary of State shall issue to the corporation a certificate," etc., as used in Pub. St. c. 156, does not mean, "If they find as a fact," etc., nor does it mean, "If the referees find as a fact," there must be a judicial decision—a judgment or decree—conclusively establishing the public need of the proposed railroad. Facts are not established by the findings of referees, judges acting as triers of fact, or by the verdict of a jury, but by a judgment on the report, finding, or verdict. *Clough v. Moore*, 63 N. H. 111, 113. The court, in each case alike, must decide—i. e., adjudge—whether the facts are lawfully and properly found, and all other questions raised by the petition or other form of proceeding. "If they render judgment" may be a more technical, as well as more cumbersome, mode of expression, but does not differ in meaning from "if they decide." By Webster "to decide" is defined, "To render judgment." *Internat. Dict.* A decision is "a judgment of a court." *Rap. & L. Law Dict.* In *re Milford & M. R. R.*, 36 Atl. 545, 548, 66 N. H. 570.

Under a statute providing that no judge shall decide or take part in the decision of any question which shall have been argued when he was not present as a judge, the fact that a judge was present as one of the judges of the court, but did not hear the argument while the other two judges, who did hear the argument, made the decision, did not make the judgment invalid on the ground that the third judge assisted to decide the case. *Coring v. Slosson*, 16 N. Y. 294, 296.

A notice by town surveyors that they will meet on a certain day, at a place named, to make an examination and survey of a proposed highway, is not in compliance with Rev. St. c. 16, § 53, requiring them to give notice of a time and place at which they will meet and decide on such application. *Austin v. Allen*, 6 Wis. 134, 141.

**DECIDED UPON LEGAL PRINCIPLES.**

A direction by a court to referees that the matters submitted to them for decision are to be decided upon legal principles is construed as directory, and leaves the judgment of the referees conclusive as to the law. *Walker v. Simpson*, 13 Atl. 580, 582, 80 Me. 143.

**DECIDED UPON PRINCIPLES OF JUSTICE AND GOOD FAITH.**

A special act authorizing the complainant to file a bill as in chancery against the state, and requiring the cause "to be decided upon principles of justice and good faith," will be construed as intending to relieve the complainant of all technical objections that might arise in a proceeding according to the known usages of law and chancery, and as conferring power upon the court to examine the claim in the same spirit of liberality which would be proper for the general assembly to exercise. *Seely v. State*, 11 Ohio, 501, 502, 507, 12 Ohio, 496, 523.

**DECISION.**

See "Final Decision"; "Judicial Decision."

**Of benefit association.**

The expulsion of a member of a benefit association without notice and hearing is not a decision, within the constitution of the order, providing that any member aggrieved by a decision of the order may appeal within three months to the grand committee. *Kohler v. Klein*, 79 N. Y. Supp. 866, 39 Misc. Rep. 353.

**Of collector of customs.**

"Decision," as used in Act Cong. 1864, § 14, providing that the "decision of the collector of customs" shall be conclusive, unless the party, if dissatisfied with his decision, gives notice thereof within 10 days after the ascertainment and liquidation of the duties by the proper officers of the customs, and within 30 days after the date of such ascertainment and liquidation appeals therefrom to the Secretary of the Treasury, is equivalent to, and synonymous with, "ascertainment and liquidation of the duties by the proper officers of the customs." Such ascertainment and liquidation of the duties by the proper officers of the customs (that is, the proper officers in the collector's office or department) is the decision of the collector. When the duties are ascertained and liquidated in the usual manner by such officers, and the usual indicia thereof, by checks and stamps, are placed on the usual papers in the collector's office, such transaction is the decision of the collector of customs in the premises. *United States v. Cousinery* (U. S.) 25 Fed. Cas. 677, 679.

Rev. St. § 2931, requiring an importer suing to recover an assessment of duties within 90 days after the "decision on the appeal" to the Secretary of State, is not restricted to a decision on the merits of the claim thereby presented, but includes the decision on the sufficiency of the appeal itself. *The John Shillito v. McClung* (U. S.) 51 Fed. 868, 874, 2 C. C. A. 526.

The ascertainment and liquidation of duties by the collector is a decision, within the meaning of the customs administrative act of June 10, 1890, c. 407, §§ 13, 14, 26 Stat. 136, 137 [U. S. Comp. St. 1901, pp. 1932, 1933]. *United States v. Beebe* (U. S.) 117 Fed. 670, 679.

**Of county commissioners.**

"Decision," as used in Pol. Code, c. 20, § 46, providing that from all decisions of the board of county commissioners on matters properly before them there shall be allowed an appeal to the District Court by any person aggrieved, means the determination of the board on matters of a quasi judicial character, and not those of an executive, administrative, or legislative character, and includes the decisions of the board sitting as a board of equalization, since they are quasi judicial. The word "decision" is a very comprehensive term. Webster defines it to be an account or report of a conclusion—especially of a legal adjudication, as a decision of arbitrators; a decision of the Supreme Court. Taken in its common and most comprehensive meaning, it would include every determination of the board in the construction of the question before them, but such is not its meaning in the statute. *Pierre Waterworks Co. v. Hughes County*, 37 N. W. 733, 739, 5 Dak. 145.

"Decision" as used in Rev. St. 1894, § 7858 (Rev. St. 1881, § 5771), providing for appeals from all decisions of the county commissioners from allowances, etc., does not include actions by the board in matters of a purely ministerial or business character, wherein the board acts solely as a corporation, and not as a court, and not judicially, and does not include an order directing the property of a county to be insured in certain companies, though allowances are made for the payment of the premiums. *Potts v. Bennett*, 39 N. E. 518, 520, 140 Ind. 71.

An order of sale made by the board of county commissioners, selling certain stock owned by the county, is not a decision, within the meaning a statute authorizing appeals from the decisions of county commissioners in a large class of cases. 1 Rev. St. 1876, p. 357, § 31. The discretionary power of county commissioners over the property of their respective counties has been held to be analogous to the legislative power possessed by many municipal bodies, and is distinguishable from the judicial or quasi judicial powers conferred upon such commissioners.

*O'Boyle v. Shannon*, 80 Ind. 159, 161 (citing *Hanna v. Putnam County Com'rs*, 29 Ind. 170).

#### **Of pension board.**

Within the meaning of the statute prohibiting the bribery of a United States officer with intent to influence his decision or action on any question, matter, or proceeding, the certificate which a pension board is required to make out is, in effect, both a decision of the board and an action by the board and the members thereof upon the question or matter submitted to them for their official action and decision. It is true that the board of surgeons cannot decide the question of the granting or increasing of a pension, nor do they finally decide the rating of the applicant; but they are required to thoroughly examine the claimant, and to give a certificate containing a full description of the physical condition of the claimant, and of all structural changes. This requires of the board a proper consideration of the symptoms or evidences of disease or disability, and the result thereof is a decision of the board upon the question of the claimant's physical condition. *United States v. Van Leuven* (U. S.) 62 Fed. 62, 66.

#### **DECISION (Of Court).**

The word "decision," as used in Const. 1894, art. 6, § 9, providing that "no unanimous decision of the Appellate Division that there is evidence sustaining or tending to sustain the finding of fact or a verdict not directed by the court shall be reviewed by the Court of Appeals," applies to special proceedings as well as to actions. It is not confined to judgments or orders, but covers both. *People v. Barker*, 46 N. E. 875, 880, 152 N. Y. 417.

Within the provisions of St. 1879, § 408, providing that an exception to a decision or a verdict on the ground that it is not supported by the evidence cannot be reviewed on appeal, unless, etc., the verdict or decision referred to relates exclusively to findings alleged to be erroneous for want of sufficient support in the evidence. *Kleinschmidt v. McAndrews*, 6 Sup. Ct. 761, 763, 117 U. S. 282, 29 L. Ed. 903.

#### **Dismissal of action.**

Gen. St. 1878, c. 66, § 253, providing that a verdict, report, or decision may be vacated and a new trial granted on the ground that the verdict, report, or decision is not justified by the evidence, should be construed to include the dismissal of an action for insufficiency of evidence. *Volmer v. Satgerman*, 25 Minn. 234, 245.

#### **Dismissal of appeal.**

Laws 1860, c. 264, § 7, provides that the clerk of the Supreme Court shall remit to the court from which an appeal was taken the

papers transmitted to the Supreme Court on the appeal, together with the judgment or decision of the Supreme Court thereon, within 30 days after the same shall have been made, etc. Held, that the term "decision," as used in such act, included an order dismissing the appeal, and, after the entry of such order, it was the duty of the clerk to remit the papers to the court within 30 days after the order was entered. *Estay v. Sheckler*, 36 Wis. 434, 436.

#### **As final decision.**

Code Civ. Proc. § 279, defining an exception as being an objection taken on the trial to a decision on a matter of law at any time from the calling of the action for trial to the rendition of the verdict or decision, means final decision. *Kleinschmidt v. McAndrews*, 5 Pac. 281, 286, 4 Mont. 8.

The word "decision" has no fixed legal meaning. It may be a final judgment, or a mere determination or opinion, or even a report of an opinion; but as used in Code, § 227, declaring that the decision of a referee shall stand as the decision of the court, the word does not mean a mere interlocutory decision in the progress of a cause as to the admission or rejection of evidence, etc., but refers to that part of the decision of the referee which states his conclusions of law. *Deming v. Post* (N. Y.) 1 Code Rep. City Ct. R. 121.

A bond on appeal to the Supreme Court contained the conditions required by Gen. St. c. 86, § 10, and, in addition, obligated the sureties "to pay the amount, if any, which shall be finally recovered in such municipal court against defendant after the decision of said Supreme Court." The appeal was dismissed, on motion of the respondent, for failure of appellant to serve his paper book and points and authorities as required by rules 7 and 13 of the Supreme Court. Held, that the term "decision," as used in such extra condition, meant a final decision on the merits, and thereby, by reason of such extra condition, the plaintiff was entitled to recover from the sureties on the bond the amount of the judgment subsequently entered in the municipal court, unappealed from. *Kimball Printing Co. v. Southern Land Improvement Co.*, 58 N. W. 868, 869, 57 Minn. 37.

#### **As finding of facts and conclusions of law.**

Code Civ. Proc. § 1033, requires the party in whose favor judgment is rendered to file and serve a memorandum of his costs and disbursements within five days after notice of the decision of the court, when the case is tried without a jury. Held, that the word "decision" means the findings of the facts and conclusions of law signed by the court and filed with the clerk as a basis of the judgment entered. *Porter v. Hopkins*, 63 Cal. 53, 55. "Decision," as used in Code Civ.

Proc. § 1033, providing that the party in whose favor judgment is rendered, and who claims his costs, must deliver to the clerk and serve on the adverse party, within five days after the verdict or notice of the decision of the court or referee, a memorandum of the items of his costs and necessary disbursements in the action or proceeding, means the finding of facts and conclusions of law signed by the court and filed with the clerk as the basis of the judgment. *Mullally v. Irish-American Ben. Soc.*, 11 Pac. 215, 216, 69 Cal. 559.

The word "decision," as used in a statement of the grounds of a motion for a new trial that the evidence was insufficient to justify the "decision," includes not only the conclusions of law, but the facts found. *Hibernia Sav. & Loan Soc. v. Moore*, 8 Pac. 824, 825, 68 Cal. 156.

#### As finding of facts by the court.

The word "decision," as used in statutes providing that an application for a new trial must be made at the term the verdict or decision is rendered, is used in the sense of "finding on the facts," where the cause is tried by the court. *Wilson v. Vance*, 55 Ind. 394, 396; *Rodefer v. Fletcher*, 89 Ind. 563, 564; *Evansville & R. R. Co. v. Maddux*, 83 N. E. 845, 846, 184 Ind. 571; *Allen v. Adams*, 50 N. E. 887, 888, 150 Ind. 409; *Olement, Bane & Co. v. Hartzell*, 56 Pac. 504, 505, 60 Kan. 317; *Corbett v. Twenty-Third St. Ry. Co.*, 21 N. E. 1033, 1034, 114 N. Y. 579. Such is likewise its meaning as used in statutes making it a cause for new trial that the verdict or decision is not sustained by sufficient evidence or is contrary to law. *Hubbs v. State*, 50 N. E. 402, 20 Ind. App. 181; *Gates v. Baltimore & O. S. W. Ry. Co.*, 56 N. E. 722, 724, 154 Ind. 338; *Weaver v. Apple*, 46 N. E. 642, 643, 147 Ind. 304.

The word "decision," when used in connection with a trial or other inquiry or a judgment, means the decision of the court upon a hearing, or the trial of an issue before the court without a jury. *Code Civ. Proc. N. Y. 1899*, § 3343, subd. 5.

Within the meaning of *Code Civ. Proc.* § 763, providing that if either party to an action die after a verdict or decision, or before final judgment is entered, the court must enter final judgment in the name of the original parties, the word "decision" refers to a decision made by the court upon a trial of issues without a jury. *Corbett v. Twenty-Third St. Ry. Co.*, 114 N. Y. 579, 21 N. E. 1033. Thus an affirmance by a general term upon the hearing and trial of the issues is a decision. *Peetsch v. Quinn*, 26 N. Y. Supp. 723, 729, 6 Misc. Rep. 50.

#### Findings synonymous.

Under *Code Civ. Proc.* § 1171, providing that a new trial may be had on the ground

of "insufficiency of evidence to justify the verdict or other decision," a notice of intention to move for a new trial on the ground that the evidence was insufficient "to justify the finding and judgment," is sufficient, for the word "finding," as used in the notice, is equivalent to the word "decision," as used in the statute, a new trial being the re-examination of an issue of fact after trial and decision. *Cobban v. Hecklen*, 70 Pac. 805, 809, 27 Mont. 245.

#### Findings distinguished.

"Decision," as used in *Prac. Act*, § 195 (*Comp. Laws*, § 1256), requiring the party moving for a new trial to give notice of his intention within 10 days after receiving written notice of the rendering of the decision of the judge, is the announcement by the court of its judgment, and is distinct from the findings. The decision may be rendered after or before the filing of findings, or, as is frequently the case, no findings may be made. *Elder v. Frevert*, 3 Pac. 237, 238, 18 Nev. 278.

#### Judgment synonymous.

The "decision" of a court is its judgment. *Adams v. Yazoo & M. V. R. Co.*, 24 South. 317, 318, 77 Miss. 194, 60 L. R. A. 33.

A "decision" is a judgment of a court. *Rap. & L. Law Dict.* Webster defines "to decide" as "to render judgment." *Internat. Dict.* There is no substantial difference between the phrase "a petition for a decision of the question," as used in *Pub. St. c. 156*, § 8, providing that a provisional corporation may file in the office of the clerk of the Supreme Court a petition to the court for a decision of the question whether the public good requires the proposed railroad, and the phrase "a petition to determine the question," as used in *Laws 1833*, § 7. Each asks for an adjudication. *In re Milford & M. R. R.*, 36 Atl. 545, 548, 68 N. H. 570.

Within *Code Civ. Proc.* § 4403, providing that an application for a new trial must be made at the term at which the verdict, report, or decision is rendered, the word "decision" has the same meaning as the word "judgment." A decision of the court is its judgment. *Board of Education of City of Emporia v. State*, 52 Pac. 466, 467, 7 Kan. App. 620.

The terms "judgment," "decree," "decision," and "order" are more or less cognate as applied in legal proceedings, and closely allied in meaning, especially under our system of practice, where we do not distinguish between forms of actions at law or suits in chancery. We generally, almost invariably, both bench and bar, express or refer to the judicial determination of the controversy by the word "judgment." The term "order" is not infrequently used in a more restricted sense than the word "judgment." It may be defined to be a command, direction, or deci-

sion of the court or judge on some intermediate point or issue in the case, but without finally disposing of the main issue or issues in the cause. Then it is merely interlocutory, but the term is sometimes given a more extensive signification, even in legal controversies, and is occasionally used as a synonym of "judgment" or "decree." A "judgment" is a final determination of a cause given by any competent tribunal. Judgments, like decrees, are either final or interlocutory, and in the latter sense also include orders. A judgment is the decision or sentence of the law pronounced by a court, or other competent tribunal, upon the matter contained in the record. According to the common-law rule, by a "final judgment" is to be understood, not a final determination of the rights of the parties, but merely of the particular suit or controversy depending between them before the court. A "decision" has been defined to be a judgment given by a competent tribunal. This word also includes in legal parlance both orders and judgments, as well as the report or account of the opinions or judicial determinations of courts. A decree is the judgment or sentence of a court of equity. It is either interlocutory or final. It embraces, therefore, orders as well as decrees in equity or admiralty. Hence a bond conditioned merely for the performance of the decree or judgment is sufficient, under a statute providing that the appeal bond shall be conditioned that the appellant perform the decision, order, decree, or judgment of the district court, the word "judgment" and the word "decree" both being broad enough to include decisions and orders. *Halbert v. Alford* (Tex.) 16 S. W. 814, 815.

In the abstract sense, there is a shade of difference between the import of the word "decision" and the word "judgment," as expressed by *Abbott's Law Dict.* 351. The decision is the resolution of the principles which determine the controversy; the judgment is the formal paper applying them to the rights of the parties. But the same author gives the general definition of "decision" as the result of the deliberations of a tribunal; the "judgment" is the determination of the question or case. The term "judgment" may properly be used in a motion for new trial, though the statute on which the motion is based provides that a new trial may be granted when the verdict, report, or decision is not sustained by sufficient evidence, or is contrary to law. *Buckeye Pipe Line Co. v. Fee*, 57 N. E. 448, 447, 62 Ohio St. 543, 78 Am. St. Rep. 743.

#### Law distinguished.

The decisions of courts are not the law. They are only evidences of the law, and this evidence is stronger or weaker according to the number and uniformity of adjudications, the unanimity or dissension of the judges, the solidity of the reasons on which the de-

cisions are founded, and the perspicuity and precision with which those reasons are expressed. The weight and authority of judicial decisions depend also on the character and temper of the times in which they are pronounced. An adjudication at a moment when turbulent passions or revolutionary frenzies prevail deserves much less respect than if it were made at a season propitious to impartial inquiry and calm deliberation. The peculiar organization and practice of this court renders it difficult to establish a system of precedents. In the supreme courts the judges confer together, compare opinions, weigh each other's reasons, and elicit light from each other. If they agree, one is usually delegated by the others not only to pronounce judgment, but to assign reasons for the whole bench. In the court of errors the members never hold any previous consultation together. They vote for the most part as in a legislative capacity. Few assign any reasons, and fewer still give written opinions which may be reported. For these reasons it would be extravagant and dangerous to consider the dicta and opinions of a single member as settling definitely the law of the land on all the points on which he chooses to give opinions or to assign reasons. *Yates v. Lansing* (N. Y.) 9 Johns. 395, 415, 6 Am. Dec. 290. See, also, *United States Savings & Loan Co. v. Harris* (U. S.) 113 Fed. 27, 35; *Swift v. Tyson*, 41 U. S. (16 Pet.) 1, 18, 10 L. Ed. 865; *Phipps v. Harding* (U. S.) 70 Fed. 468, 473, 17 C. C. A. 203, 30 L. R. A. 513; *Falconer v. Simmons*, 41 S. E. 193, 194, 51 W. Va. 172.

The term "law" includes decisions of the courts. *Miller v. Dunn*, 14 Pac. 27, 29, 72 Cal. 462, 1 Am. St. Rep. 67; *Nelson v. Kerr* (N. Y.) 2 Thomp. & C. 299, 301.

The thirty-fourth section of the judiciary act of 1789, c. 20, provides that "the laws of the several states, except where the Constitution and treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply," and it was claimed that this furnished a rule obligatory on the court to follow the decisions of the state tribunals in all cases to which they apply. In order to maintain the argument, it is essential, therefore, to hold that the word "laws" in this section includes within the scope of its meaning decisions of the local tribunals. In the ordinary use of language, it will hardly be contended that the decisions of courts constitute "laws." They are, at most, only evidence of what the laws are, and are not of themselves laws. The laws of a state are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-established local customs having the force of laws. In all the various cases which have hitherto come before us

for decision, this court had uniformly supposed that the true interpretation of this section limited its application to state laws strictly local; that is to say, to the positive statutes of the state and the construction thereof adopted by the local tribunals, and to rights and titles to things having a permanent locality, such as the rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did apply or was designed to apply to questions of a more general nature, not at all depending upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial laws, where the state tribunals are called upon to perform the like functions as ourselves; that is, to ascertain, upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. *Swift v. Tyson*, 41 U. S. (16 Pet.) 1, 18, 19, 10 L. Ed. 865.

#### **Ministerial act.**

The refusal of a judge to do a ministerial act, such as to issue a certificate of competency to teach, is not a "ruling or decision," within Sayles' Civ. St. art. 3715, providing that the state superintendent shall hear and determine all appeals from the "rulings and decisions" of subordinate school officers. *Cruse v. McQueen* (Tex.) 25 S. W. 711, 712.

"Decisions," as used in Code, § 875, providing that the decisions of the county court given or made in the transaction of county business shall only be reviewed by the writ of review provided by the Code, means those judicial in their nature or character, and which concern public affairs. When the law prescribes the services of an officer and the fees to be paid therefor, and declares that the county must pay such fees when the services are rendered the county, the county court, as the agent of the county, has nothing to do but to pay such fees. The occasion is not one which confers jurisdiction on the county court to render a decision either for or against its principal. *Crossen v. Wasco County*, 10 Or. 111, 114.

#### **Opinion synonymous.**

The terms "opinion" and "decision" are sometimes used interchangeably in the Code. The provision in section 1846 is that the prosecuting attorney may except to any "opinion" of the court and reserve a point of law for the decision of the Supreme Court, and in section 1845 it is provided that a defendant may take an exception to any decision of the court; so that an exception to the opinion of the court overruling a motion for a new trial is sufficient as an ex-

ception to the decision as required by statute. *Pierce v. State*, 10 N. E. 302, 303, 109 Ind. 535.

#### **Opinion distinguished.**

"The terms 'opinion' and 'decision' are often confounded, yet there is a wide difference between them, and in ignorance of this, or by overlooking it, what has been a mere revision of an opinion has been sometimes regarded as a mutilation of a record. A decision of the court is its judgment; the opinion is the reasons given for that judgment. The former is entered of record immediately upon its rendition, and can only be changed through a regular application to the court upon a petition for a rehearing or a modification. The latter is the property of the judges, subject to their revision, correction, and modification in any particular deemed advisable, until, with the approbation of the writer, it is transcribed in the records." The term "opinion," in a legal sense, so far as it applies to judges and courts, has a well-defined meaning, which is given in Webster's International Dictionary as "the expression of views of the judge." *Craig v. Bennett*, 62 N. E. 273, 274, 158 Ind. 9; *Houston v. Williams*, 13 Cal. 24, 27, 73 Am. Dec. 565; *Coffey v. Gamble*, 91 N. W. 813, 814, 117 Iowa, 545.

A "decision" embraces the findings of the court upon which a decree or judgment may be entered. It differs from an "opinion," which contains the views of a judge in relation to a given subject. In *re Winslow's Estate*, 34 N. Y. Supp. 637, 638, 12 Misc. Rep. 254.

The terms "opinion" and "decision" are sometimes used interchangeably in the statute. The provision in section 1846 is that the prosecuting attorney may except to any opinion of the court and reserve a point of law for the decision of the Supreme Court, and in section 1845 it is provided that a defendant may take an exception to any decision of the court; so that an exception to the opinion of the court overruling a motion for a new trial is sufficient as an exception to the decision as required by statute. *Pierce v. State*, 10 N. E. 302, 303, 109 Ind. 535.

"Decision," as used in Prac. Act, § 182, defining the findings of fact and conclusions of law of the district judge as a "written decision," means something which must precede the judgment, and upon which it is entered as upon the verdict of a jury, and is something different than the written opinion referred to in section 340, relating to the written opinion placed on file in rendering judgment. *Corbett v. Job*, 5 Nev. 201, 205.

#### **As order for judgment.**

The decision of a court is, among other things, an order for judgment. It actually determines the judgment to be entered



Garr, Scott & Co. v. Spaulding, 51 N. W. 867, 868, 2 N. D. 414.

#### Order of probate court.

Within the statute providing that appeals shall be allowed from the decision of the probate court to the district court in the following cases, and in all other cases where there shall be a final decision of any matter, the word "decision" is of broader significance than "judgment." It is generic in meaning, and includes rulings of the probate court, whether technically termed "orders" or "judgments"; so that an order of the probate court classifying a demand allowed against the estate of a deceased person is a "decision," and a subsequent order vacating it, and assigning the demand to a different class, is likewise a "decision." Wolfley v. McPherson, 59 Pac. 1054, 1055, 61 Kan. 492.

#### Ruling on admissibility of evidence.

Rulings of the district court upon matters of law in the exclusion or admission of testimony involving the merits of the case have not been included in the words "decision or intermediate order," within the statute authorizing an appeal from any decision or intermediate order. State v. O'Brien, 48 Pac. 1091, 18 Mont. 1.

#### DECISION UPON THE MERITS.

A "decision upon the merits" is a decision upon the justice of the case, and not upon technical grounds only. A "nonsuit" is not a judgment, nor the final determination of the cause on the merits, and, under Civ. Code, § 379, specifying the cases in which an action may be dismissed without prejudice, a district court has no authority to order a peremptory nonsuit against the will of the plaintiff. Mulhern v. Union Pac. R. Co., 2 Wyo. 465, 472.

#### DECKS.

Hay placed in the engine or deck room of a passenger steamer, though the room be inclosed by bulkheads, is upon the "decks or guards" of the steamer, within the meaning of Act July 25, 1886 (14 Stat. 227), prohibiting ignitable commodities from being carried on the decks and guards of passenger steamers, unless protected, etc. Union Ins. Co. v. Shaw (U. S.) 24 Fed. Cas. 580, 582.

#### DECLARATION.

See "Dying Declarations."

Confession distinguished, see "Confession."

Rev. St. § 5392 [U. S. Comp. St. 1901, p. 3653], provides that every person who, having

taken an oath before a competent tribunal, officer, or person, that he will testify truly, or that any written declaration is true, willfully states or subscribes any material matter which he does not believe to be true, shall be guilty of perjury. Held, that the word "declaration" is not used as a term of art, or in any technical sense, but in its ordinary and popular sense, to signify any statement of material matter of fact sworn to and subscribed by the party charged. United States v. Ambrose, 2 Sup. Ct. 682, 684, 106 U. S. 336, 27 L. Ed. 746.

#### DECLARATION (In Pleading).

A declaration is an exposition of the plaintiff's original writ, wherein he expresses at large his cause of action or complaint, with the additional circumstances of time and place when and where an injury was committed. Cheetham v. Tillotson (N. Y.) 5 Johns. 430, 434.

"Declaration," as a word of art in the law, is generally used to signify the plea by which plaintiff in the suit at law sets out his cause of action, as the word "complaint" is, in the same sense, the technical name of a bill in chancery. United States v. Ambrose, 2 Sup. Ct. 682, 683, 106 U. S. 336, 27 L. Ed. 746.

The term "declaration" is used to designate the statement of plaintiff's claim which is made in every case tried before the court and jury. The statement is generally presented in several forms, called "counts." Buckingham v. Murray's Ex'r (Del.) 30 Atl. 779, 780, 7 Houst. 176.

"The declaration is a statement in legal form of the plaintiff's cause of action. It consists of five parts: First, the title; second, the venue; third, the commencement; fourth, the statement of the cause of action; fifth, the conclusion." Smith v. Fowle (N. Y.) 12 Wend. 9, 10.

A declaration should contain a statement of all the facts necessary in a point of law to sustain the action, and no more, and these facts should be set forth with certainty. All that is essential in a declaration is an allegation of the facts necessary to give a complete right of action in such a manner that such right necessarily arises therefrom, and in such manner as to be capable of denial or avoidance by plea. Beardale v. Southmayd, 14 N. J. Law (2 J. S. Green) 534-541.

The term "declaration," as used in the removal statute, providing that any party who desires to remove a cause may file his petition at any time before the defendant is required, by law of the state in which the suit is brought, to answer or plead to the declaration or complaint of the plaintiff, is not used as synonymous with the words "writ" or "summons," which is at common law the process of commencing the suit, and

is the first step taken to bring the parties into court, while the declaration or complaint is necessarily the second step, which manifests the cause of action and sets out a narrative of the case, so that such petition need not be filed within the time when pleas for abatement must be filed under the state practice. *Wilson v. Winchester & P. R. Co.* (U. S.) 82 Fed. 15, 17.

A declaration is a specification, in methodical and legal form, which constitutes the plaintiff's cause of action. 2 Chit. Pl. 240. Under this rule the declaration which charged defendant with so negligently operating a certain electric car running for the carriage of persons for hire that thereby plaintiff, who was then and there a passenger on such car, was, through the negligence of the said defendant as aforesaid, thrown from the car and injured, is insufficient, since the statement of facts admits of almost any proof to sustain it. *King v. Wilmington & N. C. Electric Ry. Co.* (Del.) 41 Atl. 975, 976, 1 Pennewill, 452.

A declaration is simply the statement of the plaintiff's cause of action, and it has nothing to do with the mode of trial. Strictly, the declaration should contain no averments or statements beyond those that are necessary to set forth the cause of action, and hence a distinct step in the case, relating only to the mode of trial, ought not to be made a part of the declaration, with which it has no concern. *Baltimore City Pass. Ry. Co. v. Nugent*, 38 Atl. 779, 783, 86 Md. 349, 89 L. R. A. 161.

The province of a declaration is to fully and specifically set out, in a methodical and logical form, the facts which constitute the plaintiff's cause of action, in order that the defendant may be informed of what he is to meet, and also that he may intelligently prepare his defense; but it is not necessary to incorporate into the declaration all matters which may be proved at the trial. *Stone v. Pendleton*, 43 Atl. 643, 644, 21 R. I. 332.

By Rev. Laws, § 846, a declaration is a part of the writ, so that the writ may be referred to to aid a defective averment in the declaration, and the declaration may be referred to whenever necessary to aid in the identification of the party sued. *Moulthrop's Adm'r v. School Dist.*, 9 Atl. 608, 610, 59 Vt. 381.

The term "declaration" is applicable only to civil procedure. *State v. McCann*, 67 Me. 372, 374.

#### Statement distinguished.

A statement is different from a declaration, which is a specification, in legal and technical form, of the circumstances which constitute plaintiff's cause of action. A statement is an immethodical declaration

stating in substance the time of the contract, the sum, on what founded, whether a verbal promise, book account, note, bond, penal or single bill, with a certificate of the belief of the plaintiff, or his agent, of what is really due. *Dixon v. Sturgeon* (Pa.) 6 Serg. & R. 25, 28.

#### DECLARATION OF DECEASED PERSON.

A report of a physician, since deceased, describing the condition of a person injured in an accident at the time of visiting him for examination, is a "declaration" within St. 1898, c. 535, providing that a declaration of a deceased person shall not be excluded as hearsay if made in good faith before the beginning of the suit, and upon declarant's personal knowledge, though it is in writing, and not by word of mouth. *O'Driscoll v. Lynn & B. R. Co.*, 62 N. E. 3, 180 Mass. 187.

#### DECLARATION OF DIVIDEND.

A "declaration of dividend" is one of the most important acts of a corporation. It is an assignment pro tanto of its property. It clearly implies corporate action to that effect. It is an action of such a character that it ought to appear upon the books of the company. *Dennis v. Joslin Mfg. Co.*, 36 Atl. 129, 130, 19 R. I. 666, 61 Am. St. Rep. 805.

#### DECLARATION OF RIGHTS.

Prof. Tiedeman defines the Declaration of Rights to be a "formal declaration enumerating somewhat in detail the rights of the citizen which the state government must respect." *McMasters v. West Chester Normal School*, 13 Pa. Co. Ct. R. 481, 487.

#### DECLARATION OF TRUST.

As conveyance, see "Conveyance."

A declaration of trust or use is an act by which a person acknowledges that a property, the title to which he holds, is held by him for the use of another. *Griffith v. Maxfield*, 51 S. W. 382, 334, 66 Ark. 513.

A declaration of trust is not a grant, and therefore, under a statute requiring that a trust should be created or declared by deed or conveyance, in writing, subscribed by the party creating or declaring the trust, it may appear in the recitative part of the conveyance as well as any other. *Wright v. Douglass*, 7 N. Y. (3 Seld.) 564, 569.

A declaration of trust as effectually passes the equitable title of the trust fund to the cestui que trust as a gift inter vivos passes the legal title to the donee. *Bath Sav. Inst. v. Hathorn*, 33 Atl. 836, 837, 88 Me. 122, 32 L. R. A. 377, 51 Am. St. Rep. 382.

## DECLARATORY STATUTE.

A "declaratory" statute is one which is expressive of the common law. *Gray v. Bennett*, 44 Mass. (3 Metc.) 522, 527.

## DECLARE.

"Declare," as used in a statute of sales, 2 Rev. St. p. 63, § 40, subd. 4, providing that a testator, at the time of making his subscription to his will, shall declare the instrument so subscribed to be his last will and testament, means "to signify; to make known; to show forth in any manner by words or by acts." *Lane v. Lane*, 95 N. Y. 494, 498.

The word "declare" signifies to make known, to assert to others; to show forth; "and this in any manner by words or by acts in writing, or by signs." Thus in our English Bible we read: "Declare ye among the heathen, publish, conceal not;" and again the declaration: "By signs or other indications it is said, Ye are manifestly declared to be the epistle of God." *Remsen v. Brinckerhoff* (N. Y.) 26 Wend. 325, 336, 37 Am. Dec. 251.

As used in the minutes of proceedings relating to the publishing of a will in Germany, stating that the applicant asked leave to deposit his last will in writing, which being granted the applicant declared, "declared" will be held to mean "exhibited" or "published," and not that the testator made an oral will. *Koopman v. Carroll*, 70 N. W. 395, 50 Neb. 824.

"Acknowledged," when used in an acknowledgment, is not sufficient to meet the requirements of Code, c. 73, § 4, requiring a married woman to acknowledge a conveyance to be her free act, and to "declare" that she had willingly executed the same and does not wish to retract it, since either the acknowledgment or declaration is wanting, as the word "acknowledged" cannot be construed to mean "acknowledged and declared," and the act acknowledged refers to a previous act, and the acknowledgment and declaration cannot be blended. *Blair v. Sayre*, 2 S. E. 97, 100, 29 W. Va. 604.

### As promise.

An oath by a surveyor of highways which recited that he "declared and affirmed," instead of "promised and affirmed," in the form of the statute, was sufficient, since "to declare" that a thing shall be done is equivalent to a promise that such thing will be done. *Bassett v. Denn*, 17 N. J. Law (2 Har.) 432, 433.

In an application for insurance the applicant declared that he would not practice any pernicious habit that would obviously tend to the shortening of life. Held, that the word "declare" meant "to state; to assert; to ut-

ter; to announce some opinion"; and hence the declaration did not amount to a covenant or agreement on the part of the applicant that he would not practice any pernicious habit. *Knecht v. Mutual Life Ins. Co.*, 90 Pa. 118, 121, 35 Am. Rep. 641.

## DECLARE THE LAW.

The constitutional provision that the judge may state the evidence and "declare the law" means that he is to charge the law arising upon the evidence so stated by him. He is not to charge every principle of law which may be insisted upon by counsel, whether it have application to the case under consideration or not, how sound soever such principle may be in the abstract. His discussion of legal questions should be confined to such only as are directly raised by the evidence in the case. *Conner v. State*, 12 Tenn. (4 Yerg.) 137, 141, 26 Am. Dec. 217; *Crabtree v. State*, 69 Tenn. (1 Lea) 267, 270.

The provision of the Constitution which compels the judge to declare the law, where its language is "shall declare the law," means "shall declare the law applicable to the case then before him." *Wagener v. Parrott*, 29 S. E. 240, 241, 51 S. C. 489, 64 Am. St. Rep. 695.

## DECLINE.

Rev. St. c. 101, § 29, providing that creditors, legatees, or heirs may appeal from the decision of the commissioners appointed by the county to pass upon claims against the estate of a deceased person when the executor or administrator "declines to appeal," does not require that there shall be an expressed demand and refusal by such executor or administrator, but where the executor or administrator has allowed the time limited for appeal to expire without appealing, he has "declined" to appeal within the meaning of the statute. "A neglect to appeal until the right was barred would be declining in the most effectual manner." *Groner v. Held*, 22 Wis. 200, 204.

## DECOCTION.

According to the dictionaries a "decoction" is an extract prepared by boiling something in water, and an "extract" is anything drawn from a substance by heat solution, dissolution, or chemical process, as essences, tinctures, and the like. In the absence of evidence, the word "decoction" in a tariff act in reference to duties on decoctions of logwood, is to be understood according to the meaning given by the dictionaries. *Sykes v. Magone* (U. S.) 38 Fed. 494, 497.

## DECORATED CHINA.

The decorated or ornamented porcelain dutiable at 50 per cent. under Rev. St. § 2504.

does not apply to paintings on porcelain, which does not in itself constitute an article of china ware, and therefore it is only dutiable under another provision of the act as "paintings not otherwise provided for." *Arthur v. Jacoby*, 103 U. S. 677, 678, 26 L. Ed. 454.

## DECORUM.

The power of a town to enact ordinances for the preservation of good order, decency, and decorum within its limits is sufficient to authorize the town to pass an ordinance prohibiting the sale of intoxicating liquors therein, the sale of such liquors being prohibited in the rest of the county. *Fortner v. Duncan*, 15 S. W. 55, 91 Ky. 171, 11 L. R. A. 188.

## DECOY.

"Decoy" is the term applied to certain conveniences for decoying and catching wild fowl. *Sterling v. Jackson*, 37 N. W. 845, 851, 69 Mich. 488, 18 Am. St. Rep. 405.

### Force.

The word "decoy" means to entice, tempt, lure, or allure. There can be no such thing as "forcibly decoying" a person from his place of residence. *Eberling v. State*, 35 N. E. 1023, 1024, 136 Ind. 117.

To "decoy" is to entice, tempt, lure, or allure; and hence to convict one of the charge of kidnapping, under Sess. Laws 1890, § 25, defining the offense of whoever kidnaps, or forcibly or fraudulently carries off or decoys from his place of residence, any person, etc., it is not necessary that the act should be done forcibly, and the injured party may give his consent as to such carrying away and the act still be kidnapping. *John v. State*, 44 Pac. 51, 53, 6 Wyo. 203 (citing *Eberling v. State*, 136 Ind. 117, 35 N. E. 1023, 1025.)

### As inveigle.

An allegation that defendant was decoyed into a certain county is a statement of fact. The word "decoyed" is synonymous with "inveigled," and in *Higgins v. Dewey*, 13 N. Y. Supp. 570, "inveigled" is held to mean, in its legal sense, to induce a party to come within the jurisdiction of the court by some scheme, subterfuge, fraud, trick, device, or misrepresentation, that he may be served with process. *Campbell v. Hudson*, 64 N. W. 483, 484, 106 Mich. 523.

## DECOY POND.

A "decoy pond" frequented by ducks is a kind of trade, and of great profit to the owner; and, by the same reason that an action will lie for malicious words spoken by

one tradesman to another, it will lie for a malicious act done by one to another, and therefore will lie for depriving the owner of the use and benefit of the pond. *Keeble v. Hickeringhall*, 8 Salk. 10.

## DECREASED CAPACITY.

An instruction, in an action for personal injuries, authorizing the jury to allow as damages the value of plaintiff's time for such period as he was entirely incapacitated for work, and for any "decreased capacity" to earn money in the past, did not authorize a double recovery. The "decreased capacity" could only be construed as applying to that part of the time when he was able to work, but not to his full capacity. *Haden v. Sioux City & P. Ry. Co.*, 60 N. W. 537, 538, 92 Iowa, 226.

## DECREE.

See "Consent Decree"; "Definitive Decree"; "Final Decree"; "Foreclosure Decree"; "Interlocutory Decree"; "Joint Decree"; "Judicial Decree"; "Money Decree."

All decrees, see "All."

A decree is the fiat or sentence of law determining the matter in controversy. *Blundon v. Crosier*, 49 Atl. 1, 2, 93 Md. 355; *State v. Ramsburg*, 43 Md. 325, 333; *Martin v. Evans*, 36 Atl. 258, 260, 85 Md. 8, 36 L. R. A. 218, 60 Am. St. Rep. 292. It is a sentence or order of the court pronounced on hearing and understanding all the points in issue, and determining the right of the parties to the suit according to equity and good conscience. *Wooster v. Handy* (U. S.) 23 Fed. 49, 56; *Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.* (U. S.) 72 Fed. 545, 554, 19 C. C. A. 25. Like a judgment at law, it is the sentence pronounced by the court upon the matter of right between the parties, and is founded on the pleadings and proofs in the cause. *Rowley v. Van Benthuyzen* (N. Y.) 16 Wend. 369, 383 (quoted in *Wing v. Warner* [Mich.] 2 Doug. 288, 291).

A decree is the judgment of the judge in equitable proceedings upon the facts ascertained, and should be signed by him and be entered in the minutes of the court. Civ. Code Ga. 1895, § 4851.

The word "decree" is the proper and usual term to describe the adjudication of a court of equity. *Vance's Heirs v. Rockwell*, 8 Colo. 240, 243.

"Decree," as used in Code Civ. Proc. § 322, rendering a possession of real estate taken under the decree or judgment of a competent court adverse, means a decree or judgment adjudging that a party or his grantor was the owner or seised of some estate in

the lands. *Packard v. Johnson* (Cal.) 4 Pac. 632, 633.

#### **Award of costs and expenses.**

Under the Orphans' Code (Revision, § 176) providing that an appeal from an order or "decree" of the orphans' court "respecting the probate" of a will, etc., shall be demanded within 30 days, such order or decree, etc., includes the award of costs and expenses. *Holt v. Holt*, 5 Atl. 108, 104, 40 N. J. Eq. (18 Stew.) 551.

#### **Confirmation of award.**

The term "decree" is comprehensive enough, when not limited in its use in a statute by any definition therein, to include the judicial determination of the rights of the parties in a legal proceeding for the condemnation of private property for use as public streets under the right of eminent domain; hence a confirmation by a court of an award of damages for property taken to widen a street is a decree. *Donnelly v. City of Brooklyn*, 7 N. Y. Supp. 49.

#### **Decisions and orders included.**

The terms "judgment," "decree," "decision," and "order" are more or less cognate, as applied in legal proceedings, and closely allied in meaning, especially under our system of practice, where we do not distinguish between forms of actions at law or suits in chancery. We generally, almost invariably, both bench and bar, express or refer to the judicial determination of the controversy by the word "judgment." The term "order" is not infrequently used in a more restricted sense than the word "judgment." It may be defined to be a command, direction, or decision of the court or judge on some intermediate point or issue in the case, but without finally disposing of the main issue or issues in the cause. Then it is a mere interlocutor, but the term is sometimes given a more extensive signification, even in legal controversies, and is occasionally used as a synonym of "judgment" or "decree." A "judgment" is a final determination of a cause given by any competent tribunal. Judgments, like decrees, are either final or interlocutory, and in the latter sense also include orders. A "judgment" is the decision or sentence of the law, pronounced by a court or other competent tribunal, upon the matter contained in the record. According to the common-law rule, by a "final judgment" is to be understood, not a final determination of the rights of the parties, but merely of the particular suit or controversy depending between them before the court. A "decision" has been defined to be a judgment given by a competent tribunal. This word also includes, in legal parlance, both orders and judgments, as well as the report or account of the opinions or judicial determinations of courts. A "decree" is the judgment or sentence of a court of equity.

It is either interlocutory or final. It embraces, therefore, orders as well as decrees in equity or admiralty. Hence a bond conditioned merely for the performance of the decree or judgment is sufficient, under a statute providing that the appeal bond shall be conditioned that the appellant perform the decision, order, decree, or judgment of the district court, the word "judgment" and the word "decree" both being broad enough to include decision and order. *Halbert v. Alford* (Tex.) 16 S. W. 814, 815.

The word "decree" on the clerk's docket as follows: "Bill dismissed as to A. and B. Decree"—means that the judge has announced his decision in the case, and therefore an appeal may be taken therefrom at once, though no opinion containing a full statement of the judge's reasons has then been filed. *Fairbanks v. Amoskeag Nat. Bank* (U. S.) 32 Fed. 572, 573.

#### **As decree in cases of admiralty and maritime jurisdiction.**

As used in 2 Stat. 244, c. 40, authorizing an appeal to the Circuit Court from all final "judgments and decrees" in any of the District Courts of the United States when the matter in dispute, exclusive of costs, shall exceed the sum of \$50, means "decrees and judgments in cases of admiralty and maritime jurisdiction only." *United States v. Wonson* (U. S.) 28 Fed. 745, 747.

#### **As decree of court of record.**

In a statute relating to appeals, and requiring proof of service of notice with the notice to be filed with the clerk where the judgment or decree is entered, the terms "judgments" and "decrees" import of themselves judgments and decrees of a court of record. "Judgments," in a general sense, would doubtless include all judgments given in a court of justice, but when the words "judgments or decrees" are used, they can hardly be supposed to include a justice's court judgment. *Odell v. Gotfrey*, 11 Pac. 190, 192, 13 Or. 468.

#### **Determination in condemnation proceedings.**

The term "decree" is sufficiently broad to include a judicial determination of the rights of the parties in legal proceedings for the condemnation of private lands under the right of eminent domain. *Donnelly v. City of Brooklyn*, 26 N. Y. St. Rep. 27, 28.

#### **As final decree.**

A "decree" is final and made at the hearing of the cause. *People v. Circuit Court of Cook County*, 48 N. E. 717, 722, 169 Ill. 201.

How. & H. St. p. 541, § 50, authorizing a writ of error to any judgment or decree upon proper application, etc., means a final decree. *Heckingbottom v. Shell*, 11 Min. S. Smedes & M.) 588, 590.

The term "decree or judgment," as used in a contract whereby a person agreed to pay an inventor a certain amount as soon as a decree or judgment establishing the validity of said patent shall have been obtained, means a final judgment or decree. *Russell v. Lathrop*, 122 Mass. 300, 302.

A decree in chancery, like a judgment at law, is the sentence pronounced by the court on the matter of right between the parties, and this sentence is founded on the pleadings and proof in the cause. None of the various orders which are so often made in the progress of the cause for time to answer or produce witnesses, for leave to amend, setting aside a default, or the like, have been, or can, with the least degree of propriety, be called "decrees." *Rowley v. Van Benthuyssen* (N. Y.) 16 Wend. 369, 383.

As used in Gen. St. 1886, c. 56, § 4, providing that after certain payments from a decedent's estate the probate court shall assign the residue of the estate by "a decree," such decree is the final distribution to be made when the estate is fully settled. *Wood v. Myrick*, 16 Minn. 494, 499 (Gil. 447, 451).

Comp. Laws, § 5099, provides that the court may enforce the performance of any decree by execution, and by section 4745 it may decree trusts against either party, and award execution for the same. Held, that the term "decree" is not applicable to interlocutory orders made in furtherance of suits, but belongs to such adjudications as settle some right or liability pertaining to the substance under controversy. *Haines v. Haines*, 35 Mich. 138, 145.

A decree which not only enjoins, but also directs, certain acts which defendant shall do, is more in the nature of a final than of a preliminary decree. Appeal of Mammoth Vein Consol. Coal Co., 54 Pa. (4 P. F. Smith) 183, 188.

A decree may be final or interlocutory; but in either case it is an adjudication upon the merits, and not an order in relation to some collateral matter. *Rowley v. Van Benthuyssen*, 16 Wend. 369, 383 (quoted in *Wing v. Warner* [Mich.] 2 Doug. 288, 291).

#### As judgment.

The word "decree," when found in the Code of Civil Procedure, shall mean "judgment." *Cobbey's Ann. St. Neb.* 1903, § 1851.

The word "judgment" is usually applied to a determination of the rights of the parties in an action at law, and the word "decree" to a similar determination in equity; but the words are interchangeable in this Code, each embracing both classes of determination, unless limited expressly or by the context. *Shannon's Code Tenn.* 1896, § 4698.

The terms "judgment" and "decree," while, strictly speaking, applicable, the for-

mer to suits in law and the latter to suits in chancery, are usually employed as convertible terms. *Lamson v. Hutchings* (U. S.) 118 Fed. 321, 323, 55 C. C. A. 245.

A "decree" is a judgment according to the definition of a judgment contained in Code Prac. § 397. *Hughes v. Shreve*, 60 Ky. (3 Metc.) 547, 548.

A decree for divorce, with an allowance for alimony or support, is as much a judgment as if it had been obtained in a common-law court. *Bennett v. Bennett*, 49 Atl. 501, 503, 63 N. J. Eq. 806.

#### Judgment distinguished.

See, also, "Judgment."

"Decree" is frequently used by the Legislature and courts of the state, and is employed to distinguish a sentence or judgment of the court in the suit in equity, or in respect to the equitable branch of an action or proceeding at law, from a judgment in an action or a branch of the action determined on legal as contradistinguished from equitable principles, the term being employed not as a designation, as something different from a "judgment," but as a judgment of a particular character. *McGarrahan v. Maxwell*, 28 Cal. 75, 85.

Within the provision of Code 1874, § 1010, that the attorney in an action, suit, or proceeding may be changed at any time before judgment or decree or final determination, the words "action, suit, or proceeding" are referred to distributively in the section. Each has its peculiar meaning, and the words "judgment, decree, and determination" apply equally to each. Thus "judgment" is the final result of action, "decree" of suit, and "determination" of proceeding. *Shirley v. Birch*, 18 Pac. 344, 345, 16 Or. 1.

#### Opinion included.

In the case of *Durant v. Essex Co.*, 74 U. S. (7 Wall.) 107, 19 L. Ed. 154, it was said the reason for the signing of a decree "is no part of the judgment itself." The decree, and not the opinion, is the instrument through which the courts act. The opinion of the judge is the expression of the reasons by which he reaches his conclusions, and these may be sustained or contradictory, clear or confused. Where the opinion, after stating that the judge has examined the case on the merits, and that he would dismiss the bill without regard to technicalities, continues: "But it seems to me to be clear that this proceeding could not be sustained at any rate, as, at best, it would be simply a conversion of plaintiff's property, for which she had an ample remedy at law"—such language cannot qualify the decree dismissing the bill, without showing the cause of the dismissal, so as to make it a dismissal for want of jurisdiction. *Martin v. Evans*, 36 Atl. 258, 260, 85 Md. 8, 36 L. R. A. 218, 60 Am. St. Rep. 292.

**Order in probate.**

An order directing an executrix to pay a claim against an estate is a "decree," it being a final determination of the rights of the parties to a special proceeding in the Surrogate's Court. *In re Bernhard*, 1 N. Y. Supp. 225, 226, 48 Hun, 620, 14 Civ. Proc. R. 195.

**DECREE OF INSOLVENCY.**

A "decree of insolvency" in a court of probate merely ascertains as between the personal representative and the creditors, the status of the estate, and its operation is to transfer to the court of probate exclusive jurisdiction of all claims against the estate, for the whole proceeding is founded on the fact that the assets are insufficient for the payment of the debts to which they are primarily liable. *Bush v. Coleman*, 25 South. 569, 570, 121 Ala. 548.

**DECREE OF NULLITY.**

As divorce, see "Divorce."

**DECREE OF SALE.**

As process, see "Process."

**DECREE PRO CONFESSO.**

A decree pro confesso is not a decree as of course, according to the prayer of the bill, nor merely such as the complainant chooses to take it; but it is made, or should be made, by the court, according to what is proper to be decreed upon the statement of the bill, assumed to be true. *Ohio Cent. R. Co. v. Central Trust Co.*, 10 Sup. Ct. 235, 237, 133 U. S. 83, 33 L. Ed. 561 (citing *Thomson v. Wooster*, 114 U. S. 104, 5 Sup. Ct. 788, 29 L. Ed. 105).

**DECREEED INSOLVENT.**

"Decreed insolvent," as used in Rev. St. c. 76, § 49, authorizing a levy on a decedent's estate, unless prior thereto the estate had been decreed insolvent, means the appointment of commissioners to adjudicate on claims against the estate, as provided for by Rev. St. c. 66, § 3. *Walker v. Newton*, 27 Atl. 347, 348, 85 Me. 458.

**DECREPIT.**

"Decrepit," as used in Pen. Code, art. 496, making an assault on such a person an aggravated assault, means a person who is disabled, incapable, or incompetent, from either physical or mental weakness or some defect, whether produced by age or other causes, to such an extent as to render the individual comparatively helpless in a personal conflict with one possessed of ordinary health and strength. It is not necessary that his condition should be due to old age, as is supposed from the definitions given by lexicographers, but any disability sufficient to in-

capacitate a person is sufficient to render him "decrepit" within the statute. *Hall v. State*, 16 Tex. App. 6, 11, 49 Am. Rep. 824.

A person who is 50 years of age, and disabled by rheumatism to such an extent that he was compelled to carry his arm in an unnatural position, and in such manner as to render it almost useless to him, is "decrepit." *Bowden v. State*, 2 Tex. App. 56, 57.

**DECRETAL ORDER.**

A "decretal order" is such an order as finally determines some right between the parties. *Thompson v. McKim* (Md.) 6 Har. & J. 302, 319.

A primary order by which no question is determined upon the merits and no rights established is termed a "decretal order," in distinction from an "interlocutory decree," by which something touching the merits is adjudged. *Bissell Carpet-Sweeper Co. v. Goshen Sweeper Co.* (U. S.) 72 Fed. 545, 554, 19 C. C. A. 25.

**DEDI.**

Originally the word "dedi" in a feoffment amounted to a warranty of title. *Burwell v. Jackson*, 9 N. Y. 535, 541.

At the common law a covenant of warranty was implied from the word "dedi." *Koch v. Hustis*, 87 N. W. 834, 835, 113 Wis. 599.

The words "dedi," "concessi," and "demissi," when used in a conveyance of real estate, at common law imported a covenant in law. *Kinney v. Watts* (N. Y.) 14 Wend. 33, 40.

The word "dedi" in a deed of land means "to give," and does not imply a covenant against incumbrances, but means a warranty of title. *Roebuck v. Duprey*, 2 Ala. 535, 538.

"Dedi" means "I have given." It was used in deeds and other instruments of conveyance when such instruments were written in Latin. The term was anciently held to imply a warranty of title. Where, however, the conveyance only purports to pass the right to the grantor to real estate, and not to pass title to the land itself, such term cannot be held to import a warranty. *Deakins v. Hollis* (Md.) 7 Gill & J. 311, 315; *Kent v. Welch* (N. Y.) 7 Johns. 258, 259, 5 Am. Dec. 266.

**DEDICATION.**

See "Actual Dedication"; "Express Dedication"; "Implied Dedication"; "Statutory Dedication"; "Way by Dedication."

A "dedication" is defined to be the act of devoting or giving property for some principal

object, in such a manner as to conclude the owner. *State v. Otoe County Com'rs*, 6 Neb. 129, 133; *Village of Mankato v. Willard*, 13 Minn. 13, 19 (Gil. 1, 7), 97 Am. Dec. 208; *Oswald v. Grenet*, 22 Tex. 94, 100. Dedication is the setting apart of land for public use, and an essential requisite to its validity is that it must be of such a character as to conclude the owner. There are two kinds of dedication, viz., statutory and common-law dedication. *People v. Marin County*, 37 Pac. 203, 204, 103 Cal. 223, 26 L. R. A. 659. Dedication of land for public purposes is simply a devotion of it, or of an easement in it, to such purposes by the owner, manifested by some clear declaration of the fact. *Grogan v. Town of Hayward (U. S.)* 4 Fed. 161, 163; *Bessemer Land & Improvement Co. v. Jenkins*, 18 South. 565, 568, 111 Ala. 135, 56 Am. St. Rep. 26; *Hunter v. Trustees of Village of Sandy (N. Y.)* 6 Hill, 407, 411.

Dedication of a street must arise from some act of the owner of the land, and may be made cum onere. *Avis v. Borough of Vine-land*, 28 Atl. 1039, 1040, 56 N. J. Law (27 Vroom) 474, 23 L. R. A. 685.

The anomalous doctrine of "dedication" to public use, or, more properly, of a grant to the public without the intervention of a trustee, began as late as 1732, and its growth is still more modern. The first trace of its use was found in *Rex v. Hudson*, 2 Strange, 909, decided in that year, and the next in *Lade v. Shepherd*, 2 Strange, 1004, decided three years afterward. It was then suffered to sleep until 1790, when it was awakened by *Trustees of Rugby Charity v. Merryweather*, 11 East, 375, note. Thereafter, for 80 years, the subject was frequently agitated in regard to grants of highways, and was most prolific in decisions without having its principles definitely settled, but it was thereafter agreed that an owner might dedicate his ground to public use by any act which sufficiently evinced his will, without a previous adverse user by the public, which, however, might be evidence, but not conclusively so, of a grant, and that he might restrict the enjoyment to particular seisinors or to particular things and places, etc. *Gowen v. Philadelphia Exch. Co. (Pa.)* 5 Watts & S. 141, 142, 40 Am. Dec. 489.

Dedication with respect to public highways, etc., is the act of devoting or giving property for some proper object, and in such manner as to conclude the owner. The law which governs such cases is anomalous. Under it rights are parted with and acquired in modes and by means unusual and peculiar. Ordinarily some conveyance or written instrument is required to transmit a right to real property, but the law applicable to dedications is different. A dedication may be made without writing, by act in pais as well as by deed. It is not at all necessary that the owner should part with the title

which he has, for dedication has respect to the possession, and not the permanent estate. Its effect is not to deprive a party of title to his land, but to estop him, while the dedication continues in force, from asserting that right of exclusive possession and enjoyment which the owner of property ordinarily has. The principle upon which the estoppel rests is that it would be dishonest, immoral, or indecent, and in some cases even sacrilegious, to reclaim at pleasure property which has been solemnly devoted to the use of the public, or in furtherance of some charitable or pious object. *Hunter v. Trustees of Village of Sandy Hill (N. Y.)* 6 Hill, 407, 411.

To constitute a dedication of land to public use no particular form or ceremony is necessary. All that is required is the assent of the owner of the land, and the fact of its being used for the public purpose intended by the appropriation. *City of Baton Rouge v. Bird*, 21 La. Ann. 244, 245.

The manner of making a dedication is immaterial. It may be established by parol. *Town of Warren v. Town of Jacksonville*, 15 Ill. (5 Peck) 236, 58 Am. Dec. 610; *Smith v. Town of Flora*, 64 Ill. 93; *Kyle v. Town of Logan*, 87 Ill. 64; *McIntyre v. Storey*, 80 Ill. 127; *Moffett v. South Park Com'rs*, 138 Ill. 620, 28 N. E. 975; *Alden Coal Co. v. Chollis (Ill.)* 65 N. E. 665, 666.

"In order to constitute a dedication of land for the purpose of a street or alley in a municipal corporation it is not necessary that any statutory course should be pursued. Any act by the owner setting apart to the public a portion of his property, clearly showing that such was his intention, vests the use of the property in the public for the purposes indicated, and, if actually thrown open, the public may take possession. In such case no ordinance or formal evidence of dedication is necessary." *Rose v. City of St. Charles*, 49 Mo. 509, 510.

The term "dedication," when applied to a street, imports a dedication thereof in its entirety. *Borough of South Amboy v. New York & L. B. R. Co.*, 50 Atl. 363, 369, 66 N. J. Law, 623.

"Dedicated," as used in an instruction, in an action for injuries from a defective highway, that evidence that a certain place had been used as a street by the public for 20 years was evidence from which the jury might infer that it had been located and dedicated to public use as a street, means "appropriated," and not of necessity a dedication by a private proprietor. *Commonwealth v. Matthews*, 122 Mass. 60, 64.

A common-law dedication—that is, a dedication inferred from acts of the parties—is not usually designated as a "legal dedication." A dedication in such cases arises by



reason of estoppel. *Sweatman v. Bathrick* (S. D.) 95 N. W. 422, 424.

A common-law dedication to public use may be made by grant or other written instrument, by acts or declarations, or by a survey and plat recorded without being acknowledged. Whatever evidences a purpose on the part of the proprietor of land to set off certain parts thereof for the use of the public will be sufficient to evidence an intent to dedicate it to such use. *Marsh v. Village of Fairbury*, 45 N. E. 236, 237, 163 Ill. 401.

The principles upon which the doctrine of dedication rests are peculiar. A dedication does not take place upon the idea that there has been a grant, for it may take place where there is no grantee in being to take at the time of dedication. *Beatty v. Kurtz*, 27 U. S. (2 Pet.) 568, 7 L. Ed. 521. A dedication is a devotion, to public uses, of the land, or easement in it, by any unequivocal act of the owner of the fee manifesting such clear intention. As no grantee or body politic is necessary to accept the dedication immediately, it follows that it may be a dedication designed by the owner to be accepted by the public in present or in futuro. The character and scope of the dedication depend upon the intention of the dedicator expressly manifested or to be gathered from all the circumstances of the case. There is nothing in the nature of the legal act of dedication to prevent its being a dedication in present to be accepted and used in futuro. *Jersey City v. Morris Canal & Banking Co.*, 12 N. J. Eq. (1 Beas.) 547, 562.

In *Burrill's Law Dictionary* the definition given to "dedication" is "Appropriation to a certain use or uses." Ordinarily, it is true, it is limited to a strictly public use, and yet it may have a broader signification, or at least the principle which underlies and supports it may be invoked to support an appropriation to uses not strictly and technically public. Where a county laid out a city, filing a plat on which three lots were marked "Church Lots," and in the dedication written on the plat, and duly acknowledged, the lots were said to be dedicated to church purposes, a resolution of the county appearing on its records, that the lots "be and the same hereby are appropriated as church lots," there was a good appropriation for pious purposes, enforceable at the instance of any church proving its right to be regarded as the personal beneficiary, whether it was a statutory dedication or not. *Wyandotte County Com'rs v. First Presbyterian Church*, 80 Kan. 620, 637, 1 Pac. 109, 112.

As used in St. 1846, c. 203, limiting the liability of an owner for damages from any defects in any ways opened and dedicated to public use, means a way over land dedicated by the owner thereof to the use of the public as a way, and does not include a way which was taken by a town into its own hands for

a public way, and on which it made repairs under the mistaken belief that it had done what was necessary to make it a legal public way. *Hayden v. Inhabitants of Attleborough*, 78 Mass. (7 Gray) 338, 344.

#### **Abandonment by owner implied.**

A dedication implies that the owner abandons the use of the property himself, and gives it over to the public for the purpose designed. As was said in *Niagara Falls Suspension Bridge Co. v. Bachman*, 66 N. Y. 261, "To constitute a public highway by dedication there must not only be an absolute dedication and setting apart and a surrender to the public use of the land by the proprietors, but there must be an acceptance and a formal opening by the proper authorities, or a user." *City of Buffalo v. Delaware, L. & W. R. Co.*, 74 N. Y. Supp. 343, 353, 68 App. Div. 488.

To constitute a dedication there must be an abandonment by the owner to the use of the public exclusively, and not a mere use by the public in connection with a user by the owners in such measure as they may desire. *California Nav. & Imp. Co. v. Union Transp. Co.*, 58 Pac. 936, 939, 126 Cal. 433, 46 L. R. A. 825.

A dedication to the public of the use of land must rest on the intention or clear assent of the owner, which may be manifested by writing, sealed or unsealed, or by parol, or by acts inconsistent or irreconcilable with any inference except such consent. But the dedication must be under such circumstances as to indicate an abandonment of the use to the grantee by the owner, and the acts and declarations, to effect a dedication, must be unambiguous and unequivocal. *Patterson v. People's Natural Gas Co.*, 33 Atl. 575, 172 Pa. 554 (citing *Dovaston v. Payne*, 2 Smith's Lead. Cas. 142, 155).

#### **As an appropriation for a charitable use.**

"In the case of *Benn v. Hatcher*, 81 Va. 25, 59 Am. Rep. 645, it was held that a dedication of land for a cemetery was valid, and it was said that, in its technical legal sense, dedication is an appropriation of land for a public use, as for a highway, a common, or the like, and may be effectual, it seems, when made to a pious or charitable use, though not distinctly a public one." In *Hunter v. Trustees of Village of Sandy Hill* (N. Y.) 6 Hill, 407, 411, it is said, "Land may be dedicated to pious and charitable purposes as well as for public ways, commons, and other easements in the nature of ways, so as to conclude the owner who makes the dedication." At common law a dedication did not convey a fee, but it was held in trust by the owner, but now, by virtue of statute, the fee passes by a dedication. *Patrick v. Young Men's Christian Ass'n of Kalamazoo*, 79 N. W. 206, 210, 120 Mich. 185.

**As an appropriation for a public use.**

Dedication is the appropriation of land by the owner to some public use. *Venable v. Wabash Western Ry. Co.*, 20 S. W. 498, 498, 112 Mo. 108, 18 L. R. A. 68; *Rees v. City of Chicago*, 88 Ill. 822, 385; *Barteau v. West*, 28 Wis. 416, 420.

"Dedication" means an appropriation by the owner of his land for public uses. The public does not take the land when it is 'dedicated,' within the meaning of that word—that is, does not deprive a person by some legal proceeding of his property—for the obvious reason that the property is given or devoted by the owner himself for public use or enjoyment." *Barteau v. West*, 28 Wis. 416, 420.

According to its strict significance, a dedication involves only the devotion by a private person of his property to a definite public use. It is a devotion by a private person of his own property to public uses inconsistent with the exercise thereafter by the owner of a personal dominion over the same; and, where property was claimed to have been dedicated to public authorities for public usage generally, the mere appropriation by the public authorities of this public property to an indefinite public use is no such irrevocable abdication by the public authorities of all their power and control over the same as will prevent the subsequent appropriation of the same property to such other public uses as the interests of the public may thereafter require. *Pettitt v. City of Macon*, 23 S. E. 198, 200, 95 Ga. 645.

The term "dedication" is used generally in relation only to such rights as may be acquired in this manner by the public, and not private rights. *Toyaho Creek Irrigation Co. v. Hutchins*, 52 S. W. 101, 105, 21 Tex. Civ. App. 274.

Dedication is "the deliberate appropriation of land by its owner for any general and public usage, reserving to himself no other rights in the soil than such as are perfectly compatible with the full exercise and enjoyment of the public uses to which he has devoted his property." A public landing on the bank of a river to enable passengers and freight to be taken from steamboats to the shore may be the subject of dedication. *Gardiner v. Tisdale*, 2 Wis. 153, 187, 60 Am. Dec. 407.

There can be no common-law dedication to a railway company, which is but a private corporation, though engaged in a public service. *Lake Erie & W. R. Co. v. Whitham*, 40 N. E. 1014, 1018, 155 Ill. 514, 28 L. R. A. 612, 46 Am. St. Rep. 355.

"Dedication is an appropriation to a certain use or uses. Ordinarily it is limited to a strictly public sense, and yet it may have

a broader signification; or, at least, the principle which underlies and supports it may be invoked to support an appropriation to uses not strictly and technically public." *Wyandotte County Com'rs v. Presbyterian Church*, 1 Pac. 109, 112, 80 Kan. 620.

Dedication is a matter purely between the owner and the public. There is no such thing as a dedication between the owner and individuals. The public must be a party to every dedication, and though some of the cases say that platting a tract of land, recording the plat, and selling lots by reference to such plats, constitute a dedication of the streets in favor of the purchasers of these lots, even though a dedication to the public is not perfected and completed, such statement is not absolutely correct as a legal principle. *Prescott v. Edwards*, 49 Pac. 178, 117 Cal. 298, 59 Am. St. Rep. 186.

Dedication is the appropriation to public uses of some right of property, as dedication of a highway, landing, square, park, land for school purposes, etc. The act of giving or devoting property to some public use, an appropriation of realty by the owner to the use of the public, and the adoption thereof by the public, as the dedication of soil for a highway, has respect to the possession of the land, not to the permanent estate—express when explicitly made by ordinary declaration, deed, or vote; implied when there is acquiescence in the public use. A public square in a town or village, which for more than 80 years has been treated as such by the county court of the county, has been recognized as such by the municipal authorities of the town, and used as a public square by the court and the public generally, must be considered as dedicated as a public square for the use of the public. *Sturmer v. Randolph County Court*, 26 S. E. 532, 534, 42 W. Va. 724, 36 L. R. A. 300.

**Condemnation distinguished.**

See "Condemn—Condemnation."

**As either express or implied.**

A dedication of land for the public highway may be either expressed, as where the owner manifests his purpose by grant evidenced in writing, or implied, when the acts and conduct of the owner clearly manifests the intention on his part to devote land to the public use; but in either case it is always a question of intention, and no particular formality or form of words is necessary. *Schetler v. Lynch*, 64 Pac. 955, 23 Utah, 305.

Common-law dedications are divided into two classes, express and implied. In both it is necessary and essential that there should be a surrender or an appropriation of the land by the owner to the public use. The former, or express, dedication is evidenced and shown by some explicit or positive declaration.

ration or manifestation of intention to surrender the land, and the latter, or implied, dedication, by some act or course of conduct on the part of the owner from which a reasonable inference of intent may be drawn. A showing of intent to dedicate is indispensable, and without it, express or implied, there can be no valid dedication. *Hurley v. City of West St. Paul*, 86 N. W. 427, 430, 83 Minn. 401.

Common-law dedications are, for convenience of description, frequently subdivided into two classes—express dedications and implied dedications. The substantial difference between the two consists in the mode of proof. In the former case the intention to appropriate the land to public use is manifested by some outward act of the owner, manifesting his purpose, while in the latter it is usually by such acts or conduct not directly manifesting the intention, but from which the law will imply the intention. Evidence that the owner of land petitions the county supervisors to declare a road over his land a highway; that the board did so, though without following the statutory requirements; and that the road was so used and worked by the public for 25 years—shows a dedication. *People v. Marin County*, 37 Pac. 203, 204, 103 Cal. 223, 26 L. R. A. 659.

Common-law dedications are of two classes, express and implied. In both it is necessary that there should be an appropriation of the land by the owner to public use—in the one case by some express manifestation of his purpose to devote the land to the public use; in the other, some act or course of conduct from which the law would imply such an intent. *City of San Antonio v. Sullivan*, 57 S. W. 42, 43, 23 Tex. Civ. App. 619.

A dedication may be either express or implied. If the owner of land sets it apart for the use of the public, and declares that such is his intention, or where he conveys it to a municipality, or to a trustee, to hold for the use of the public, the dedication is express. An implied dedication arises by operation of law from the acts of the owner, and is founded on the principle of estoppel in pais. It does not assume a grant, but that the owner, by his conduct, or his acquiescence in the use of the public of the land for the specified purpose, until it would be greatly injured or inconvenienced by a deprivation of the use, is estopped from interfering or preventing the public from continuing the use. *City of Athens v. Burkett* (Tenn.) 59 S. W. 404, 407.

#### Gift distinguished.

A dedication, while involving the essential features of a gift, and inuring to the benefit of the public as a grant, differs from the grant in that no grantee in esse is necessary to its validity. *City of Athens v. Burkett* (Tenn.) 59 S. W. 404, 407.

#### As requiring both intention to dedicate and acceptance.

To constitute a valid and complete dedication, two things must concur, to wit, an intention by the owner, clearly indicated by his words or acts, to dedicate the land to public use, and an acceptance by the public of the dedication. *City of San Francisco v. Canavan*, 42 Cal. 541, 554; *Demartini v. City and County of San Francisco*, 40 Pac. 496, 498, 107 Cal. 402; *People v. Dreher*, 35 Pac. 867, 868, 101 Cal. 271; *People v. Blake*, 60 Cal. 497, 503; *City of Los Angeles v. Kysor*, 58 Pac. 90, 91, 125 Cal. 463; *In re Board of Street Opening & Improvement of City of New York*, 67 N. Y. Supp. 57, 59, 54 App. Div. 479; *Alton v. Meenwenberg*, 66 N. W. 571, 573, 108 Mich. 629; *Irving v. Ford*, 32 N. W. 601, 604, 65 Mich. 241; *Elyton Land Co. v. South & North Alabama R. Co.*, 10 South. 270, 271, 95 Ala. 631; *New York, N. H. & H. R. Co. v. Fair Haven & W. R. Co.*, 40 Atl. 607, 610, 70 Conn. 610; *Town of Kent v. Pratt*, 48 Atl. 418, 420, 73 Conn. 573; *Ayers v. State*, 26 S. W. 19, 59 Ark. 26; *City of Seattle v. Hill*, 62 Pac. 446, 448, 23 Wash. 92; *Lightcap v. Town of North Judson*, 55 N. E. 952, 154 Ind. 43 (citing *City of Columbus v. Dahn*, 36 Ind. 330, 333); *Rees v. City of Chicago*, 38 Ill. 322; *Smith v. Town of Flora*, 64 Ill. 93; *Hiner v. Jeanpert*, 65 Ill. 428; *Wragg v. Penn Tp.*, 94 Ill. 11, 84 Am. Rep. 199; *Town of Lake View v. Le Bahn*, 120 Ill. 92, 9 N. E. 269; *Fairbury Union Agricultural Board v. Holly*, 169 Ill. 9, 48 N. E. 149; *Woodburn v. Town of Sterling*, 184 Ill. 208, 56 N. E. 378; *Alden Coal Co. v. Challis* (Ill.) 65 N. E. 665, 666; *Moffett v. South Park Com'rs*, 135 Ill. 620, 623, 28 N. E. 975.

In order to establish a street by common-law dedication, it takes two to make the bargain—the owner of the land to dedicate or give, and the public to accept. The owner's intent is a vital, and usually the most vital, question in the case, and is thus distinguished from the acquisition of a highway by the provision of a statute making a street a public highway where it has been used, worked, and repaired as a public highway for more than six years. One is a voluntary grant—an acceptance in pais—while the other is merely a species of statutory limitation. *Village of Benson v. St. Paul, M. & M. Ry. Co.*, 64 N. W. 393, 394, 62 Minn. 196.

Dedication is a gift of land by the owner for a way, and an acceptance of the gift by the public, either by some express act of acceptance, or by strong implication arising from obvious convenience or frequent and long-continued use, repairing, lighting, or other significant acts of persons competent to act for the public in that behalf. *Hemphill v. City of Boston*, 62 Mass. (8 Cush.) 195, 196, 54 Am. Dec. 749.

Dedication, as applied to land, is an appropriation of the land to public uses, made

by the owner of the fee and accepted for such use by or on behalf of the public. The vital principle is the *animus dedicandi*. Time, though often a material ingredient of a dedication, is not indispensable, for, if the act of dedication be unequivocal, it may take place immediately. *Ward v. Farwell*, 8 Colo. 66, 69.

The vital principle of dedication is the intention to dedicate, and, whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been made. If accepted and used by the public in the manner intended, the dedication is complete, precluding the owner and all claiming in his right from asserting any ownership inconsistent with such use. *Niles v. City of Los Angeles*, 58 Pac. 190, 192, 125 Cal. 572; *Hibberd v. Mellville* (Cal.) 33 Pac. 201, 202; *Smith v. City of San Luis Obispo*, 30 Pac. 591, 592, 95 Cal. 463 (citing *Harding v. Jasper*, 14 Cal. 642, 648); *Quinn v. Anderson*, 11 Pac. 746, 70 Cal. 454.

In order to constitute a dedication it is not essential that the intention be evidenced by words, either written or spoken. If the acts of the party indicate an intention to dedicate the land to the public use it is sufficient, and if the dedication is accepted by the public, as by use and travel, it is complete. *Wragg v. Penn Tp.*, 94 Ill. 11, 25, 34 Am. Rep. 199 (quoted in *Alden Coal Co. v. Chalks* [Ill.] 65 N. E. 665, 666).

The owner of land cannot, by merely making a plat of it and designating streets thereon, force the public authorities to assume control over it as a highway; in other words, a mere dedication is not of itself sufficient to establish a highway which the local authorities are bound to deal with as a thoroughfare. *City of Baltimore v. Broumel*, 37 Atl. 648, 649, 86 Md. 153.

Dedication is the joint effect of an offer by the owner to dedicate land, and an acceptance of such offer by the public. Only two parties are necessary to a dedication—the owner upon the one side, and the public upon the other. There can be no dedication without the participation of both, and no dedication can be stronger or more binding by the participation or intervention of others. The offer of the owner to dedicate may be manifested in a hundred different ways, and the acceptance of the offer by the public may be manifested in a like number of ways. *City of Los Angeles v. Kysor*, 125 Cal. 463, 466, 58 Pac. 90, 91. Where the owner of land in a city offered to dedicate the same, but the city did nothing for 20 years to show an acceptance, when it commenced suit to establish title to the land, no dedication took place. *City of Anaheim v. Langenherger*, 66 Pac. 855, 856, 134 Cal. 608.

A common-law dedication is a continuous, irrevocable offer to dedicate, which the dedi-

cator cannot retract, but which does not become a street until the properly constituted authorities do some acts showing acceptance thereof. *Downend v. Kansas City*, 56 S. W. 902, 904, 156 Mo. 60, 51 L. R. A. 170.

To constitute a valid dedication of land to the public there must be a clear intention on the part of the owner to dedicate, which may be established in various modes, some of which are provided by statute, and others by such acts or declarations in pais as are satisfactory evidence of such design; and there must be acceptance of such dedication by the public, either by the user for a length of time, more or less according to circumstances, or by its adoption by the public authorities. *Bauman v. Boeckeler*, 24 S. W. 207, 210, 119 Mo. 189.

"Dedication to the public is a question of intention, and the owner is not concluded until his purpose to surrender the land to public use is clearly manifested." *H. B. Anthony Shoe Co. v. West Jersey Ry. Co.*, 42 Atl. 279, 57 N. J. Eq. 607; *Mark v. Village of West Troy*, 27 N. Y. Supp. 543, 544, 76 Hun, 162.

A fair definition of what constitutes dedication is found in 1 Bouv. Law Dict. (15th Ed.) 492, as follows: "An appropriation of land to some public use made by the owner, and accepted for such use by or on behalf of the public. Without acceptance a dedication is incomplete." The rule seems to be abundantly supported by authority in this and other states that the owners of land must have an intention to dedicate, coupled with an actual abandonment of the use of the property exclusively to the public. And the rule is equally well settled that such dedication must be accepted by the public. *Close v. Swanson*, 89 N. W. 1043, 1045, 64 Neb. 389.

Two things are necessary to constitute a dedication, at common law, of private property to public use: First, there must be a plain and unequivocal intention on the part of the public to appropriate the property to public use; secondly, there must be an acceptance, by user or otherwise, on the part of the public. *State v. Hamilton*, 70 S. W. 619, 621, 109 Tenn. 276 (citing *Scott v. Cheatham*, 59 Tenn. [12 Heisk.] 713, 719; *Mathis v. Parham*, 1 Tenn. Ch. 533).

To constitute a valid dedication there must have been an actual intention on the part of the owner or owners, clearly indicated by unequivocal acts or conduct, to dedicate the land to the public for use as an alley, and there must have been an acceptance by the public of the land dedicated. Mere evidentiary facts, such as permitting the public to pass over land with the owner's permission, while he uses the land for his own purposes, or until he chooses to devote it to other uses, do not constitute, of themselves, dedication.

*Shellhouse v. State*, 110 Ind. 509, 512, 11 N. E. 494, 496.

Dedication is a pure question of fact. The intention of the owner to dedicate is a vital element in every case, and that intention also is a pure question of fact. A mere permissive user by the owner of the land for a highway never can amount to a dedication, as that is a user by license, and nothing more, and of itself will never ripen into a dedication, no matter how long continued. *Hartley v. Vermillion* (Cal.) 70 Pac. 278.

The doctrine of dedication rests upon the principle of the common law that, whenever a person has made representations or pursued a line of conduct with a view to lead others to adopt a particular course of action, they shall be binding against him. Its vital principle is the intent to dedicate, and, whenever that is manifested, the dedication is complete. The length of time necessary to raise a presumption of dedication from user must depend upon circumstances of each particular case, but where the only evidence of dedication is user by the public, unaccompanied by any circumstances or act indicating an intention to dedicate, or where the public or individuals have not acted upon the acquiescence in such a way that its retraction would materially affect the public accommodation and private rights, and thus evince bad faith in the owner, the weight of authority is that such user must be for 20 years, to establish the public right. *Wood v. Hurd*, 34 N. J. Law (5 Vroom) 87, 88.

Ordinarily the dedication of a highway is by statutory proceedings, showing both the dedication and the acceptance. A dedication sometimes imposes burdens upon the public as well as grants privileges. *Riley v. Buchanan*, 76 S. W. 527, 528, 25 Ky. Law Rep. 863, 63 L. R. A. 642.

An acceptance may be shown by user by the public, as by travel, or by the acts of the public officers in repairing and keeping up the streets. *Town of Lake View v. Le Bahn*, 120 Ill. 92, 102, 9 N. E. 269, 273 (quoted in *Alden Coal Co. v. Challis* [Ill.] 65 N. E. 665, 666).

Where a road is outside of a municipal corporation, no particular acts are required by the law to constitute an acceptance. Where it is traveled, recognized, and worked upon as a highway, a presumption of acceptance arises, and, where no repairs are needed, use by the public sufficiently long and general to evidence an acceptance will be sufficient. *Fairbury Union Agriculture Board v. Holly*, 169 Ill. 9, 15, 48 N. E. 149, 151 (quoted in *Alden Coal Co. v. Challis* [Ill.] 65 N. E. 665, 666).

#### **As manifested by deed.**

A dedication of property to public use as a street, by a deed recognizing the street,

must contain the following elements: (1) A street designated on a plat made or adopted by the party himself as passing over his lands; (2) a subsequent conveyance of all lots bounding on such street; and (3) the retention, at the time of the conveyance by the owner, of the fee in the bed of the street. Therefore, where a grantor of lands conveyed to the grantee the fee to the middle of a certain street designated in the deed, no dedication of the street to the public arose by implication from such deed. *City of Baltimore v. Northern Cent. Ry. Co.*, 41 Atl. 911, 913, 88 Md. 427.

Dedication of land to public use as a highway may be inferred from the execution of conveyances referring to and adopting a map whereon such highway is delineated. *Vanatta v. Jones*, 42 N. J. Law (13 Vroom) 561, 563.

#### **As manifested by making or filing of map or plat.**

A dedication of a right of way to the public is not shown by the recording of a plat of land with a roadway, and the selling of lots in accordance therewith, although it may create, by implication, a contract of the purchasers that the roadway will remain for their benefit. *Fulton v. Town of Dover* (Del.) 31 Atl. 974, 975, 8 Houst. 78.

As to streets, parks, and public places, the filing of a map on which they are named as such, or their character plainly indicated, and the making of conveyances by reference to such map, will operate conclusively as a dedication. *Palen v. Ocean City*, 46 Atl. 774, 775, 64 N. J. Law, 669.

Dedication implies an intent upon the part of the dedicator to grant to the public an easement, and it may be manifested by a writing, map, or other unmistakable evidence of purpose; and to give validity to the dedication it must be accepted by formal act or implied from user. Where the owner of land made and filed a map showing lots, streets, public squares, etc., and sold by reference to the map, it will be presumed that he intended to dedicate to the public the streets, etc., appearing thereon. *City of Buffalo v. Delaware, L. & W. R. Co.*, 89 N. Y. Supp. 4, 10.

Where the owner of land makes a plat laying it out into lots or blocks with streets clearly shown thereon, and conveys lots with reference to such plat, it constitutes a complete dedication, and the streets cannot be closed up or obstructed. *Price v. Stratton* (Fla.) 33 South. 644, 647 (citing *Porter v. Carpenter*, 39 Fla. 14, 21 South. 788).

Where the owner of land lays out and establishes a town, exhibits a map of the streets and public square, and sells the lots with reference to the map, the purchasers acquire, as appurtenant to their lots, the rights, privileges, easements, and servitudes

represented by such map. *Lamor County v. Clements*, 49 Tex. 247, 855.

A dedication may be made by grant or other written instrument, or it may be evidenced by acts and declarations without writing. No particular form is necessary to the validity of a dedication. It is purely a question of intention. A dedication may be made by a survey and plat alone, without any declaration, either oral or on the plat, when it is evident that it was the intention of the proprietor to set apart certain grounds for the use of the public. *Guttery v. Glenn*, 86 N. E. 305, 309, 201 Ill. 275 (citing *Maywood Co. v. Village of Maywood*, 118 Ill. 61, 6 N. E. 866; *City of Jacksonville v. Jacksonville Ry. Co.*, 67 Ill. 540).

A dedication is a mode of conveyance. To constitute a common-law dedication of land to public purposes by means of a plat, the same certainty of description is required as in other forms of conveyance, and the mere coloring, on a plat drawn to a scale of 400 feet to the inch, of a portion along one side of a strip marked as being 80 feet in width, to indicate that the colored portion was to be devoted to park purposes, is not sufficient to constitute a dedication which will defeat a subsequent conveyance of the entire strip, where the coloring was not of uniform width, and there was nothing marked, either upon the plat or on the ground, by which the width of the intended park portion could be determined with certainty. *Sanders v. Village of Riverside* (U. S.) 118 Fed. 720, 724, 55 C. C. A. 240.

#### Parol dedication.

Dedication is not within the statute of frauds, and need not be by deed or other writing, but may be effectually done by verbal declaration. *City of Winchester v. Carroll*, 40 S. E. 37, 38, 99 Va. 727; *Harding v. Jasper*, 14 Cal. 642, 648.

There is no particular form of making a dedication. It may be done in writing or by parol, or it may be inferred from the owner's acts, or implied in certain cases from long use. A grant is not necessary to create it, and in this consists its main difference from a license to individuals. *City of Macon v. Franklin*, 12 Ga. 239, 244.

A parol dedication is good, and is generally the only one made; and, though there is no grantee to take, it vests in the public, and is different from ordinary grants, and is to be construed on principles to meet the nature of the case. *Curtis v. Keesler* (N. Y.) 14 Barb. 511, 521.

To dedicate property to public use is simply to appropriate or set it apart to such use. There must be not only an intention to dedicate, but an act manifesting such an intention. No particular form or solemnity,

however, is required to constitute a valid dedication. It need not be by writing duly signed and acknowledged, but may be by parol. It is not necessary even that there should be any grantee named or any consideration expressed. Under some circumstances it may be presumed without proof of any act of dedication, from the acquiescence of the owner in the use and occupation of the property by the public. But usually such use and occupation must be adverse to the title of the owner to raise a presumption of dedication. Nor is it necessary that the owner should divest himself of the fee, but a grant of the use and occupancy of real estate, without any restriction as to duration of the writ, is a good dedication, though the fee remains in the grantor. But verbal declarations by an owner that he had surrendered the control of a river landing or beach to the municipal authorities of a town temporarily, and because he was having trouble with those to whom he had leased it, did not import a legal dedication to the public; neither would the consent of such owner to the construction of a road for his own and the public use make out a valid dedication; and where, under the circumstances, the use of such road by the public in common with himself was but a license, such use of the road for any length of time would not deprive the owner of his title and right to the property. *Robertson v. Wellsville* (U. S.) 20 Fed. Cas. 954, 955.

Ordinarily some conveyance or written instrument is required to transmit a right to real property, but the law applicable to dedication is different. A dedication may be made without writing, by act in pais as well as by deed. It is not at all necessary that the owner should part with the title which he has, for dedication has respect to the possession, and not to the permanent estate. Its effect is not to deprive a party of title to his land, but to estop him, while the dedication continues in force, from asserting that right of exclusive possession and enjoyment which the owner of property ordinarily has. *Village of Mankato v. Willard*, 13 Minn. 13, 19 (Gil. 1, 7), 97 Am. Dec. 208.

A dedication may be made without writing. It may be made by acts from which the intention to dedicate may be rightfully presumed, and with which any other presumption would be inconsistent. *McIntyre v. El Paso County Com'rs*, 61 Pac. 237, 240, 15 Colo. App. 78.

#### Prescription distinguished.

"The distinction between 'dedication' and 'prescription' is this: The first is established by proof of an act of dedication and of the animus dedicandi, without reference to the period of use; in the second, long user is an essential ingredient." *State v. Kansas City, St. J. & C. B. R. Co.*, 45 Iowa, 139, 142.

the lands. *Packard v. Johnson* (Cal.) 4 Pac. 632, 633.

#### **Award of costs and expenses.**

Under the Orphans' Code (Revision, § 176) providing that an appeal from an order or "decree" of the orphans' court "respecting the probate" of a will, etc., shall be demanded within 30 days, such order or decree, etc., includes the award of costs and expenses. *Holt v. Holt*, 5 Atl. 103, 104, 40 N. J. Eq. (13 Stew.) 551.

#### **Confirmation of award.**

The term "decree" is comprehensive enough, when not limited in its use in a statute by any definition therein, to include the judicial determination of the rights of the parties in a legal proceeding for the condemnation of private property for use as public streets under the right of eminent domain; hence a confirmation by a court of an award of damages for property taken to widen a street is a decree. *Donnelly v. City of Brooklyn*, 7 N. Y. Supp. 49.

#### **Decisions and orders included.**

The terms "judgment," "decree," "decision," and "order" are more or less cognate, as applied in legal proceedings, and closely allied in meaning, especially under our system of practice, where we do not distinguish between forms of actions at law or suits in chancery. We generally, almost invariably, both bench and bar, express or refer to the judicial determination of the controversy by the word "judgment." The term "order" is not infrequently used in a more restricted sense than the word "judgment." It may be defined to be a command, direction, or decision of the court or judge on some intermediate point or issue in the case, but without finally disposing of the main issue or issues in the cause. Then it is a mere interlocutor, but the term is sometimes given a more extensive signification, even in legal controversies, and is occasionally used as a synonym of "judgment" or "decree." A "judgment" is a final determination of a cause given by any competent tribunal. Judgments, like decrees, are either final or interlocutory, and in the latter sense also include orders. A "judgment" is the decision or sentence of the law, pronounced by a court or other competent tribunal, upon the matter contained in the record. According to the common-law rule, by a "final judgment" is to be understood, not a final determination of the rights of the parties, but merely of the particular suit or controversy depending between them before the court. A "decision" has been defined to be a judgment given by a competent tribunal. This word also includes, in legal parlance, both orders and judgments, as well as the report or account of the opinions or judicial determinations of courts. A "decree" is the judgment or sentence of a court of equity.

It is either interlocutory or final. It embraces, therefore, orders as well as decrees in equity or admiralty. Hence a bond conditioned merely for the performance of the decree or judgment is sufficient, under a statute providing that the appeal bond shall be conditioned that the appellant perform the decision, order, decree, or judgment of the district court, the word "judgment" and the word "decree" both being broad enough to include decision and order. *Halbert v. Alford* (Tex.) 16 S. W. 814, 815.

The word "decree" on the clerk's docket as follows: "Bill dismissed as to A. and B. Decree"—means that the judge has announced his decision in the case, and therefore an appeal may be taken therefrom at once, though no opinion containing a full statement of the judge's reasons has then been filed. *Fairbanks v. Amoskeag Nat. Bank* (U. S.) 32 Fed. 572, 573.

#### **As decree in cases of admiralty and maritime jurisdiction.**

As used in 2 Stat. 244, c. 40, authorizing an appeal to the Circuit Court from all final "judgments and decrees" in any of the District Courts of the United States when the matter in dispute, exclusive of costs, shall exceed the sum of \$50, means "decrees and judgments in cases of admiralty and maritime jurisdiction only." *United States v. Wonson* (U. S.) 28 Fed. 745, 747.

#### **As decree of court of record.**

In a statute relating to appeals, and requiring proof of service of notice with the notice to be filed with the clerk where the judgment or decree is entered, the terms "judgments" and "decrees" import of themselves judgments and decrees of a court of record. "Judgments," in a general sense, would doubtless include all judgments given in a court of justice, but when the words "judgments or decrees" are used, they can hardly be supposed to include a justice's court judgment. *Odell v. Gotfrey*, 11 Pac. 190, 192, 13 Or. 463.

#### **Determination in condemnation proceedings.**

The term "decree" is sufficiently broad to include a judicial determination of the rights of the parties in legal proceedings for the condemnation of private lands under the right of eminent domain. *Donnelly v. City of Brooklyn*, 26 N. Y. St. Rep. 27, 28.

#### **As final decree.**

A "decree" is final and made at the hearing of the cause. *People v. Circuit Court of Cook County*, 48 N. E. 717, 722, 169 Ill. 201.

How. & H. St. p. 541, § 50, authorizing a writ of error to any judgment or decree upon proper application, etc., means a final decree. *Heckingbottom v. Shell*, 11 Min. & Smedes & M.) 533, 530.

The term "decree or judgment," as used in a contract whereby a person agreed to pay an inventor a certain amount as soon as a decree or judgment establishing the validity of said patent shall have been obtained, means a final judgment or decree. *Russell v. Lathrop*, 122 Mass. 300, 302.

A decree in chancery, like a judgment at law, is the sentence pronounced by the court on the matter of right between the parties, and this sentence is founded on the pleadings and proof in the cause. None of the various orders which are so often made in the progress of the cause for time to answer or produce witnesses, for leave to amend, setting aside a default, or the like, have been, or can, with the least degree of propriety, be called "decrees." *Rowley v. Van Benthuyssen* (N. Y.) 16 Wend. 369, 383.

As used in Gen. St. 1886, c. 56, § 4, providing that after certain payments from a decedent's estate the probate court shall assign the residue of the estate by "a decree," such decree is the final distribution to be made when the estate is fully settled. *Wood v. Myrick*, 16 Minn. 494, 499 (Gil. 447, 451).

Comp. Laws, § 5099, provides that the court may enforce the performance of any decree by execution, and by section 4745 it may decree trusts against either party, and award execution for the same. Held, that the term "decree" is not applicable to interlocutory orders made in furtherance of suits, but belongs to such adjudications as settle some right or liability pertaining to the substance under controversy. *Haines v. Haines*, 35 Mich. 138, 145.

A decree which not only enjoins, but also directs, certain acts which defendant shall do, is more in the nature of a final than of a preliminary decree. Appeal of Mammoth Vein Consol. Coal Co., 54 Pa. (4 P. F. Smith) 183, 188.

A decree may be final or interlocutory; but in either case it is an adjudication upon the merits, and not an order in relation to some collateral matter. *Rowley v. Van Benthuyssen*, 16 Wend. 369, 383 (quoted in *Wing v. Warner* [Mich.] 2 Doug. 288, 291).

#### As judgment.

The word "decree," when found in the Code of Civil Procedure, shall mean "judgment." *Cobbey's Ann. St. Neb.* 1903, § 1851.

The word "judgment" is usually applied to a determination of the rights of the parties in an action at law, and the word "decree" to a similar determination in equity; but the words are interchangeable in this Code, each embracing both classes of determination, unless limited expressly or by the context. *Shannon's Code Tenn.* 1896, § 4698.

The terms "judgment" and "decree," while, strictly speaking, applicable, the for-

mer to suits in law and the latter to suits in chancery, are usually employed as convertible terms. *Lamson v. Hutchings* (U. S.) 118 Fed. 321, 323, 55 C. C. A. 245.

A "decree" is a judgment according to the definition of a judgment contained in Code Prac. § 397. *Hughes v. Shreve*, 60 Ky. (3 Metc.) 547, 548.

A decree for divorce, with an allowance for alimony or support, is as much a judgment as if it had been obtained in a common-law court. *Bennett v. Bennett*, 49 Atl. 501, 503, 63 N. J. Eq. 806.

#### Judgment distinguished.

See, also, "Judgment."

"Decree" is frequently used by the Legislature and courts of the state, and is employed to distinguish a sentence or judgment of the court in the suit in equity, or in respect to the equitable branch of an action or proceeding at law, from a judgment in an action or a branch of the action determined on legal as contradistinguished from equitable principles, the term being employed not as a designation, as something different from a "judgment," but as a judgment of a particular character. *McGarrahan v. Maxwell*, 28 Cal. 75, 85.

Within the provision of Code 1874, § 1010, that the attorney in an action, suit, or proceeding may be changed at any time before judgment or decree or final determination, the words "action, suit, or proceeding" are referred to distributively in the section. Each has its peculiar meaning, and the words "judgment, decree, and determination" apply equally to each. Thus "judgment" is the final result of action, "decree" of suit, and "determination" of proceeding. *Shirley v. Birch*, 18 Pac. 344, 345, 16 Or. 1.

#### Opinion included.

In the case of *Durant v. Essex Co.*, 74 U. S. (7 Wall.) 107, 19 L. Ed. 154, it was said the reason for the signing of a decree "is no part of the judgment itself." The decree, and not the opinion, is the instrument through which the courts act. The opinion of the judge is the expression of the reasons by which he reaches his conclusions, and these may be sustained or contradictory, clear or confused. Where the opinion, after stating that the judge has examined the case on the merits, and that he would dismiss the bill without regard to technicalities, continues: "But it seems to me to be clear that this proceeding could not be sustained at any rate, as, at best, it would be simply a conversion of plaintiff's property, for which she had an ample remedy at law"—such language cannot qualify the decree dismissing the bill, without showing the cause of the dismissal, so as to make it a dismissal for want of jurisdiction. *Martin v. Evans*, 36 Atl. 258, 260, 85 Md. 8, 36 L. R. A. 218, 60 Am. St. Rep. 292.



have considered the publication of a work not as such a dedication of it to the public by the author at common law as to deprive him of the exclusive right to republish it. With the greatest respect for these opinions, we think there is a difference in principle between the right to republish a printed work and the exclusive right of the author to publish his own manuscript. A man may write without any intention to publish. His manuscript, however valuable, cannot, without his consent, be seized by his creditors as property. They are valueless to all the world except to the author and his representatives, or to such persons as he shall transfer them. But the author who publishes his work dedicates it to the public. He voluntarily incurs all the responsibility of the publisher. His object is to instruct or amuse mankind, and the more his work is kept circulated, the greater is the compliment to his ability as a writer. There is no reason, then, against a republication of the work by any one, except that it may reduce the profits of the author, and, unless he secures the sole right of republication by copyright under the statute, he cannot complain if others republish the work. *Bartlett v. Crittenden* (U. S.) 2 Fed. Cas. 967, 968.

#### DEDICATION IN PAIS.

The deliberate appropriation of land by the owner for any general and public use, by such act or conduct which evinces such intent, constitutes a dedication in pais absolutely, when followed by use or acceptance. Thus, where a person designates a broad and unplatted space as "Mechanics' Green," and another parcel as "Public Square," and such land was used as such, there arises a dedication in pais. *Bates v. City of Beloit*, 78 N. W. 1102, 1104, 103 Wis. 90.

#### DEDICATION TO PIOUS USES.

The mere appropriation of land by its owner to the uses of a church or of "public worship," in the sense in which that phrase is usually understood, is not sufficient to constitute a "dedication of land to pious uses." There must be a donation by the owner—some unequivocal act united with the intent to devest himself, to some extent, of the ownership or power of control over his property, and vest an independent and irrevocable interest therein in some other person or body. *Attorney General v. Merrimack Mfg. Co.*, 80 Mass. (14 Gray) 586, 609 (citing *Attorney General v. Lord Foley*, 1 Dickens, 363.)

#### DEDUCE.

Mr. Webster says that "deduce" means to derive by logical process; to obtain or arrive at as the result of reasoning; to infer. Reasoning is nothing but the faculty of de-

ducing unknown truths from principles already known; and the word is erroneously used in an instruction to the jury to determine the facts, and, from the facts ascertained, "to deduce the guilt or innocence of defendant." *Hackett v. State*, 18 Tex. App. 406, 413.

#### DEDUCT.

A will devising one-half of testator's estate, not otherwise disposed of, to a certain person, "deducting therefrom" the amount advanced to such person, construed to mean that the share to such devisee is to be diminished by bringing the advancement into hotchpot. *Porter v. Collins*, 7 Conn. 1, 5.

"Deduct" may mean the same thing as "exempt," and whatever is deducted under the provisions of a statute relating to taxation is ipso facto exempted or freed from the burden of taxation. *State v. Bureka Consol. Min. Co.*, 8 Nev. 15, 23.

#### DEDUCTIONS.

The term "deductions," in Act Cong. June 7, 1872, § 23, requiring every master of a vessel paying off or discharging any seaman to deliver to him, or, if he be discharged before a shipping commissioner, to deliver to such shipping commissioner, a true and full account of his wages and all deductions, means deductions from wages to be paid, such as advances, moneys furnished during the voyage, supplies from the slop chest, etc., and expenses occasioned by desertion are not included. *Stevenson v. Hare* (U. S.) 23 Fed. Cas. 47, 48.

By "deduction" is understood a portion or thing which an heir has a right to take from the mass of the succession before any partition takes place. Civ. Code La. 1900, art. 1858.

#### Exemption distinguished.

Deductions and exemptions are two separate and distinct things, having no connection—a deduction being the taking of the subtrahend from the minuend, a subtraction; while exemption is an immunity or privilege, freedom from a charge or burden to which others are subject. *Florer v. Sheridan*, 36 N. E. 365, 369, 187 Ind. 23, 23 L. E. A. 278; *State v. Smith*, 63 N. E. 25, 29, 158 Ind. 543.

Upon the subject of an allowance for debts, Judge Cooley says: "Revenue laws sometimes permit taxpayers to deduct from the property to be taxed the debts owing by them. Sometimes the deductions are from credits only, sometimes from mortgages, sometimes from the aggregate of personal estate. The allowance is not in any proper sense an exemption, but is made by way of reaching the just amount of taxable property." Cooley, Tax'n, 174. Therefore Acts 1899, p. 422, § 1, providing for the deductive

of mortgage indebtedness from the assessed value of real estate, is not an exemption law. *State v. Smith*, 63 N. E. 25, 29, 158 Ind. 548.

## DEED.

See "Ancient Deed"; "Clear Deed"; "Good Deed"; "Good and Perfect Deed"; "Good and Sufficient Deed"; "Good Authentic Deed"; "Good Warranty Deed"; "Joint Deed"; "Latent Deed"; "Lawful Deed"; "Quitclaim Deed"; "Tax Deed"; "Valid and Sufficient Deed"; "Voluntary Deed"; "Warranty Deed."

A deed or contract is an instrument of writing passing a person's interest in real estate, although the right to its possession and enjoyment may not accrue until some future time. *Reed v. Hazleton*, 15 Pac. 177, 180, 87 Kan. 321.

9 Wm. III, c. 7, requiring the registration of deeds and conveyances, comprehends every species of act whereby one man can transfer property in houses and lands from himself to another. *Dudley v. Sumner*, 5 Mass. 438, 470.

A deed is a written instrument, signed, sealed, and delivered by the parties. *Fisher v. Pender*, 52 N. C. 483, 485.

The term "deed," as used in the chapter relating to conveyances, shall be construed to include stocks, leases, releases, and other conveyance or incumbrance under seal. *Mills' Ann. St. Colo.* 1891, § 456.

The term "deed," as used in the chapter relating to real property, shall be construed to embrace every instrument in writing by which any real estate or interest therein is created, aliened, mortgaged, or assigned, or by which the title to any real estate may be affected in law or equity, except last wills, and leases for one year or for a less time. *Cobbe's Ann. St. Neb.* 1903, § 10,247.

A deed is an instrument executed by a private citizen, and is, or was formerly, only known to be his act or deed because he delivered it as such. *United States v. Planter* (U. S.) 27 Fed. Cas. 544, 545.

A deed consists of the names of the parties, the consideration for which the land was sold, a description of the subject granted, the quantity of interest conveyed, and, lastly, the conditions, reservations, and covenants, if there be any. *Evenson v. Webster*, 53 N. W. 747, 749, 3 S. D. 382, 44 Am. St. Rep. 802 (citing 4 Kent, Comm. 460).

### Attestation essential.

The last requisite to the validity of a deed is an attestation or execution of it in the presence of witnesses, though this is necessary rather for preserving the evidence

than for constituting the essence of the deed. The statutes prescribing the requisites of deeds vary in different states, and in some of them a deed, though executed in a manner other than that required by the statute, is sufficient to pass an equitable estate or interest. Thus, where a conveyance in Arkansas was unacknowledged and unattested, but the purchaser was placed in possession thereunder and claimed title, the deed was sufficient to convey an equitable right to the property. *Stirman v. Cravens*, 29 Ark. 548, 557. See, also, *Allston v. Thompson* (S. C.) *Oheves*, 271, 282.

### Delivery and acceptance essential.

A deed is a writing executed and delivered, and delivery is essential to give it legal force. Of old the definition of a deed was "an instrument consisting of three things, namely, writing, sealing, and delivery, comprehending a bargain or contract between party and party, man or woman." *Best v. Brown* (N. Y.) 25 Hun, 228, 224 (citing *Co. Litt.* 171).

Delivery is the final act on the part of the grantor by which he consummates the purpose of his conveyance, and without it all other formalities which have preceded it are impotent to render it effectual as an instrument of title. *Provart v. Harris*, 150 Ill. 40, 36 N. E. 958, 959.

### Conveyance in fee essential.

At common law a "deed" is "a writing sealed and delivered by the parties," but in ordinary language the term is used in a more limited and restricted sense, as a conveyance of a fee in land. Neither a mortgage nor a lease is usually spoken of as a deed. *Devl. Deeds*, § 5. Technically, a conveyance in fee is not necessary to constitute a deed. *Sanders v. Riedinger*, 80 App. Div. 277, 284, 51 N. Y. Supp. 937, 942.

### Execution essential.

It seems to be the better rule that signing is not essential, even in deeds by natural persons, and it is not essential that the deed of a corporation be signed. *Osborne v. Tunis*, 25 N. J. Law (1 Dutch.) 633, 680.

### Grantor and grantee essential.

A deed is a method by which the title and possession of real estate is transferred from one person to another, and there must be a grantor and a grantee. *American Net & Twine Co. v. Mayo*, 38 S. E. 523, 525, 97 Va. 182.

A deed is a writing sealed and delivered by the parties. This definition makes it essential, for an instrument to operate as a deed, that there should be both a grantor and grantee, so that a conveyance uncertain as to the person intended as grantee—as, for instance, where a grant is made to a neighbor-

hood, or to one who is dead at the time of its execution, or to a purely fictitious person—is inoperative and void. *Wiehl v. Robertson*, 37 S. W. 274, 276, 97 Tenn. 453, 39 L. R. A. 423; *Cleveland Nat. Bank v. Same*, Id. (citing *Thomas v. Inhabitants of Marshfield*, 27 Mass. [10 Pick.] 364; *Hunter v. Watson*, 12 Cal. 363, 73 Am. Dec. 543; *David v. Williamsburg City Fire Ins. Co.*, 83 N. Y. 265, 38 Am. Rep. 418).

#### **Writing essential.**

The word "deed" necessarily imports that there is a written instrument. *Pierson v. Townsend* (N. Y.) 2 Hill, 550, 551.

Where a statute speaks of a "deed," it must be taken in its technical sense, as understood at common law—that is, a writing sealed and delivered by the parties. *Grogan v. Garrison*, 27 Ohio St. 50, 63.

#### **As agreement.**

See "Agreement."

#### **Assignment of mortgage.**

The term "deed," as used in Comp. St. c. 78, § 16, requiring deeds, mortgages, and other instruments to be recorded in order to be valid as to subsequent purchasers, is defined by section 46 of the same chapter to embrace every instrument in writing by which any real estate or interest therein is created, aliened, mortgaged, or assigned, or by which the title to any real estate may be affected in law or in equity, except last wills and leases for one year or for a less time. An assignment of a real-estate mortgage securing a negotiable promissory note, to the indorsee of such note, is an instrument affecting the title to real estate, within the meaning of this definition. *Ames v. Miller* (Neb.) 91 N. W. 250, 251.

#### **Chattel mortgage.**

The word "deed," in a statute providing that every person who shall make or utter and publish any foreign record, deed, etc., shall be punished, must have the common-law definition. A deed is construed at common law to be a written instrument under seal, containing a contract or agreement which has been delivered by the party to be bound, and accepted by the obligee or covenantee; and within this definition is included a chattel mortgage. *People v. Watkins*, 64 N. W. 324, 106 Mich. 437.

#### **As complete instrument.**

The term "deed," as used in an indictment for the larceny thereof, imports a complete instrument, and it is therefore sufficient to describe it by name. *State v. Hall*, 85 Mo. 669, 671.

The word "deed," used in an indictment for forgery of itself, imports a completed instrument; and hence the indictment need not

state that the instrument is genuine or operated to convey the land, it being sufficient to say that it purported to convey it. *State v. Fisher*, 65 Mo. 437, 438.

#### **As contract.**

A deed is the contract between the grantor and the grantee, although the grantee does not sign it. *Wierengo v. American Fire Ins. Co.*, 57 N. W. 833, 835, 98 Mich. 621.

A deed is a contract executed. Even if not recorded, it passes the title as against the grantor, his heirs and devisees. *Watkins v. Nugen* (Ga.) 45 S. E. 262, 263.

A deed is a contract which derives its binding force from, and becomes operative by, the mutual assent of the parties to it, and hence without the acceptance of it by the grantee there can be no delivery. *Tyler v. Cate*, 45 Pac. 800, 802, 29 Or. 515.

A deed of land is intended to convey the title to the land, and is not intended to express the contract between the parties in pursuance of which the deed is given. *Lynch v. Moser*, 46 Atl. 153, 155, 72 Conn. 714.

#### **As conveyance by way of gift.**

The word "deed," as used in a transfer tax law, providing that a tax shall be paid when the transfer is of property made by a resident or nonresident, when such nonresident's property is within the state, by deed, grant, bargain, sale, or gift, made in contemplation of the death of the grantor, vendor, or donor, or intended to take effect in possession or enjoyment at or after such death, does not refer to conveyances of property by a deed made in the ordinary course of business for a valuable consideration, but is confined to conveyances of real property intended as gifts. In re *Birdsall's Estate*, 42 N. Y. Supp. 450, 461, 22 Misc. Rep. 180.

#### **General assignment distinguished.**

See "General Assignment."

#### **Land patent.**

See "Patent (Of Land)."

#### **Lease.**

A lease for years under seal is a deed and, if it were a deed in relation to lands, tenements, or hereditaments, would be included in the fourteenth section of our act concerning conveyances (Revision, p. 155) providing that every deed or conveyance of or for land, tenements, or hereditaments, to any purchaser of the same, shall be recorded though under the same section a lease for a term of years not under seal would not be included. *Bramhall v. Hutchinson* (N. J.) 7 Atl. 873, 875.

#### **Mortgage.**

"Deed," as used in a provision in a deed conveying land in fee simple, that, in case of

a grantee's death without having disposed of the land by deed or will, the title should pass to certain others, is commonly understood to mean an instrument in writing, duly executed, conveying real estate, and does not include a mortgage. *Lockridge v. McCommon*, 38 S. W. 33, 35, 90 Tex. 234 (citing *Hellman v. Howard*, 44 Cal. 110).

Rev. St. Mo. § 699, providing that a husband and wife may convey the real estate of the wife, and the wife may relinquish her dower in the real estate of her husband, by their joint deed, includes a mortgage. *Parsons v. Denis* (U. S.) 7 Fed. 317.

Laws 1887, c. 47 (Gen. St. c. 40, § 2) providing that the validity of a deed of a wife's separate real estate, executed jointly with her husband, shall not be affected by the fact of her minority, should be construed to include a mortgage of real estate. *Daley v. Minnesota Loan & Investment Co.*, 45 N. W. 1100, 1101, 48 Minn. 517.

A mortgage contained a reservation as follows: "Excepting so much out of said tracts of land as have been conveyed by M. by deed to different individuals." Held, that while the word "deed" is sometimes generic, and includes every writing or instrument under seal, in which sense a mortgage is included, it is frequently used in a much more limited sense, signifying a writing by which lands are conveyed; and, the latter being the more popular and usual signification, it should be construed as used in the mortgage with such signification, and hence it did not embrace prior mortgages. *Eaton v. White*, 18 Wis. 517, 519.

Comp. Laws 1857, § 4803, providing for the punishment of any person who shall utter any false or forged deed, means not only deeds of lands conveying the legal title, but includes a mortgage; the word "deed" having been employed in the broad legal sense in which it is understood at the common law. *People v. Caton*, 25 Mich. 388, 391.

In Code Pub. Gen. Laws, art. 16, § 23, relating to the recording of deeds, the word "deeds" is used in its general sense, and includes mortgages as well. *Pfeaff v. Jones*, 50 Md. 263, 271.

The term "deed," as generally understood, and as used in Rev. St. § 4106, providing the manner of executing a deed, mortgage, or lease of any estate or interest in real property, does not include an instrument purporting in the habendum clause to pass title absolutely in a certain bank, but afterward providing that it is in trust that the mortgagor is to hold possession of the premises until sold by the mortgagee, the proceeds to be applied in the payment of certain debts, etc. *National Bank v. Tennessee Coal, Iron & R. Co.*, 57 N. E. 450, 452, 62 Ohio St. 564.

A mortgage is an executed or conditional transfer of the estate mortgaged. A mortgage is not to be regarded as a disposition of land by deed, within the meaning of the article of the Revised Statutes respecting uses and trusts. *Bucklin v. Bucklin*, \*40 N. Y. (1 Keyes) 141, 145.

The term "deed," as used in St. § 2185, providing that a wife shall not be endowed with lands sold to satisfy a lien or incumbrance created by deed in which she joined, is not used in the ordinary sense of that term, as by it no lien is created against the grantors to satisfy which a sale of the land can be made. A mortgage of land is conveyance of it for the purpose of securing the payment of a debt. It is a deed creating a lien, and seems to be the very instrument described by the statute in which, if the wife joins, she is divested of dower, save in the surplus proceeds of the sale, if one be made to satisfy the lien so created. *Morgan v. Wickliffe* (Ky.) 72 S. W. 1122.

#### Satisfaction of mortgage.

Gen. St. c. 162, §§ 1, 2, making the forging of a deed a punishable offense, includes an instrument by which a mortgagee acknowledges payment and satisfaction of the mortgage, cancels and discharges the same, and releases and quitclaims to the mortgagor the premises conveyed. *Merserve v. Commonwealth*, 137 Mass. 109, 111.

#### Sealed instrument implied.

A deed is a writing or instrument written on paper or parchment, sealed, and delivered. *Jeffery v. Underwood*, 1 Ark. (1 Pike) 108, 112.

It is one of the necessary elements of a deed that it contain a seal; and a paper intended as a deed, though signed by the party, is not a deed unless sealed. *Davis v. Brandon*, 2 Miss. (1 How.) 154, 155.

A deed is a writing sealed and delivered by the parties. 2 Bl. Comm. 295. So that, in the definition of a bond as a deed, the word "deed" imports that the bond is sealed. *Rondot v. Rogers Tp.* (U. S.) 99 Fed. 202, 209, 39 C. C. A. 462.

A deed is an instrument in writing, signed, sealed, and delivered. The seal is what distinguishes it from a parol or simple contract. A paper in the form of a deed is not a deed without a seal. *Strain v. Fitzgerald*, 34 S. E. 929, 930, 128 N. C. 396.

The words "deed or writing obligatory" were said in *Jackson v. Perkins* (N. Y.) 2 Wend. 308, 317, to imply the sealing and delivery of the deed; and therefore all that is necessary in a pleading is to allege the execution of the deed or writing obligatory, and it is not necessary to allege sealing or delivery. *Egan v. Horrigan*, 51 Atl. 246, 248, 96 Me. 46.

In considering the validity of a deed executed in a foreign country, the court said: "We do not necessarily mean an instrument under seal. In many countries seals are unknown." *Steingenberger v. Carr*, 3 Man. & G. 191, 199.

An instrument without a seal does not constitute a deed, though in the body of the writing it is said that the parties have set their hands and seals. *Williams v. State*, 6 South. 831, 832, 25 Fla. 734, 6 L. R. A. 821.

Blackstone says that deeds serve to convey the property of lands and tenements from man to man, and that they are commonly denominated "conveyances." In England the word "conveyance" carries with it the idea of a sealed instrument. *McCabe v. Hunter's Heirs*, 7 Mo. 355, 357.

The use of the word "deed" *ex vi termini* implies a sealing and delivery, and whatever is necessary to constitute the solemnity of a deed; and a declaration is not insufficient because the instrument declared on is not alleged to have been sealed with the seal of the obligors. *Hammond v. Alexander*, 4 Ky. (1 Bibb) 333.

A "deed," in its legal sense, is an instrument in writing on paper or parchment, between parties able to contract, subscribed, sealed, and delivered. By 1 Rev. St. 1876, p. 368, note 1 (Act Dec. 23, 1859), the seal or ink scroll required at common law to the validity of a deed is no longer required. *American Ins. Co. v. Avery*, 60 Ind. 566, 572.

A "deed," at common law, is defined to be a written instrument under seal, containing a contract or agreement, which has been delivered by the party to be bound, and accepted by the obligee or covenantee. It must be between competent parties, and must be made without constraint. *McMurtry v. Brown*, 6 Neb. 368, 376.

A deed is a writing or instrument, written on paper or parchment, sealed and delivered, to prove and testify the agreement of the parties whose deed it is to the things contained in the deed. *American Buttonhole, Overseaming & Sewing Mach. Co. v. Burlack*, 14 S. E. 819, 820, 35 W. Va. 647.

The term "deed," in Oregon, is synonymous with "sealed instrument." *McLeod v. Lloyd*, 71 Pac. 796, 798, 43 Or. 260.

The very term "deed" implies a sealed instrument. *Floyd v. Ricks*, 14 Ark. 286, 295, 58 Am. Dec. 374.

The word "deed," when used in statutes, is applied to an instrument conveying lands, but does not imply a sealed instrument. Code Iowa 1897, § 48, subd. 20; Gen. St. Kan. 1901, § 7342, subd. 20.

All sealed instruments are deeds. *Jerome v. Ortman*, 33 N. W. 759, 66 Mich. 668.

### Title bond distinguished.

There is a wide difference between a deed for land and a title bond. The one is the evidence of an executed contract; the other is the evidence of an unexecuted contract. The former is evidence that a sale has been made; the latter that a sale is to be made. The one is a sale, and the other a contract for a sale. *Peterson v. Reichman*, 23 S. W. 53, 54, 93 Tenn. 71 (citing *Moseby v. Partee*, 52 Tenn. [5 Heisk.] 30).

### Warranty of title imported.

The word "deed," in a bond calling for a conveyance by deed, will not necessarily be construed to mean a deed in fee simple with covenants. *Carver v. Williams*, 10 Ind. 267, 268.

A stipulation to give a "deed" of premises contracted to be sold is fulfilled by executing a conveyance of the property without warranty or personal conveyances. A deed does not, *ex vi termini*, mean a deed with covenants of warranty, but only an instrument with apt terms conveying the property sold. *Ketchum v. Evertson* (N. Y.) 13 Johns. 359, 363, 7 Am. Dec. 384.

Where a contract proposed the erection of sixteen tenement buildings on certain property, of a certain description, and for a certain amount, for which the promisor agreed to give a deed for three of the tenements, the term "deed" meant a deed in fee simple. *Ellis v. Burden*, 1 Ala. 458, 467.

"Deed," as used in a contract to convey land, obligating the vendor to make a good and sufficient deed thereto, should be construed as requiring a conveyance in fee simple with covenants of warranty; and a deed without warranty or a union of the grantor's wife does not fulfill the contract. *Tremain v. Liming* (Ohio) 1 Wright, 644.

"Deed," as used in a contract for the sale of land obligating the vendor to make to the said vendee a "deed for the following land," etc., does not require that the deed should be a deed with covenants of warranty, but only requires an instrument which with apt terms was sufficient to convey the property sold. *Bowen v. Vickers*, 2 N. J. Eq. (1 H. W. Green) 520, 525, 35 Am. Dec. 516.

The word "deed," as used in an answer to an interrogatory in an application for insurance, asking the insured what his title or interest in the property was, did not constitute a warranty that the applicant had a grant in fee of a freehold estate, but merely that he had an interest in the land resting primarily on a deed or some title derived from a deed. *Merrill v. Agricultural Ins. Co.*, 73 N. Y. 452, 456, 29 Am. Rep. 184.

The word "deed," as used in a contract whereby one of the parties obligates himself to make a deed to the other, imports that

the conveyance shall give a sufficient title. *Parker v. McAllister*, 14 Ind. 12, 16.

Under a contract of sale of real estate providing that upon the purchaser making certain payments a deed will be executed for the land, by covenanting to execute a deed no greater duty can be intended than to execute a conveyance or assurance of the property which may be good and perfect without warranty or personal covenants. Its meaning in such contract is clear and decisive, and will not, even by implication, admit of a more extended construction or definition. *Van Eps v. Schenectady City* (N. Y.) 12 Johns. 436, 442, 443, 7 Am. Dec. 330.

#### Will distinguished.

A deed must pass a present interest in the property, although the right to possession and enjoyment may not accrue until some future time. It is distinguished from a will, which does not pass any interest until after the death of the maker. Thus, an instrument which purports to be a deed, uses the language ordinarily implied in deeds, conveys a present interest to trustees named, and is executed and acknowledged as a deed, is a deed, notwithstanding a reservation of the power of revocation, modification, or substitution of the trusts thereby exercised within a certain time. *Bowdoin College v. Merritt* (U. S.) 75 Fed. 480, 483.

In determining whether an instrument be a will or a deed, the main question is, did the maker intend any estate or interest whatever to vest before his death and upon the execution of the paper, or, in other words, did he intend that all the interest and estate should take effect only after his death? If the former, it is a deed; if the latter, a will; and it is immaterial whether he call it a deed or will. *Whitten v. McFall*, 26 South. 131, 132, 122 Ala. 619; *Abney v. Moore*, 18 South. 60, 61, 106 Ala. 131. See, also, *Adair v. Craig*, 33 South. 902, 135 Ala. 332.

It may be laid down as a general rule that a written instrument which discloses the intention of the maker respecting the posthumous determination of his property, and which is not to operate until after his death, is testamentary in its character, and not a deed or contract, and may be revoked. *Hazleton v. Reed*, 26 Pac. 450, 451, 46 Kan. 73, 26 Am. St. Rep. 86.

A will is an instrument by which a person makes a disposition of property to take effect after his death, and, as its operation is postponed during life, it is ambulatory and revocable; and it is this quality which distinguishes it from deeds and similar instruments taking effect, if at all, at the time of execution. *Jordan v. Jordan's Adm'r*, 65 Ala. 301, 305; *McDaniels v. Johns*, 45 Miss. 631, 641. See, also, *Macrae v. Macrae* (Tenn.) 57 S. W. 423, 424.

In order that a paper be held a deed, it must convey an interest to take effect in present, though the enjoyment of this interest may rest in futuro. It is otherwise as to a will. It speaks as of the death of the testator. The instrument may be in the form of a deed; it may be supported by a consideration, and by its maker be called a deed; yet, if it purports to convey a title which does not arise until the death of the maker, it is nevertheless a will. Whether a paper is to operate as a will or deed depends upon the intention of the maker, to be gathered from its language. An instrument executed by a husband, reciting a gift of land to the wife, to take effect after her husband's death, and reserving the right to sell or dispose of it during his life, in which event the instrument is to be void, is a testamentary devise, and not a deed, and hence did not vest any present interest in the land in the wife which would pass by her conveyance during the life of the husband. *Ellis v. Pearson*, 58 S. W. 313, 104 Tenn. 591.

An instrument in the form of a deed, providing, "This deed is to go into effect after the death of [the grantor], she claiming her right to hold the same as long as she lives," is a deed, and not a will. *Seals v. Pierce*, 10 S. E. 589, 83 Ga. 787, 20 Am. St. Rep. 344.

An instrument purporting to be a deed, by which the grantor gives to his son certain property after his death and the death of his wife, is not a deed, but a testamentary paper, and cannot be read to the jury, in any case affecting the title to personalty in a court of common law, until it has passed to probate before the ordinary. *Hester v. Young*, 2 Ga. (2 Kelly) 31, 50.

#### DEED IN BLANK.

Two conditions are essential to make a deed executed in blank operate as a conveyance of the property described in it: The blank must be filled by the parties authorized to fill it, and this must be done before or at the time of the delivery of the deed to the grantee named. *Allen v. Whitrow*, 3 Sup. Ct. 517, 523, 110 U. S. 119, 28 L. Ed. 90.

#### DEED IN FEE.

A bond for a deed of conveyance in fee of the legal title means a good and sufficient conveyance with the usual covenants of the vendor. *Rudd v. Savelli*, 44 Ark. 145, 152.

A contract for the sale of land, providing for its conveyance by "deed in fee simple and free from all incumbrances," does not mean a deed with a covenant against incumbrances, there being a mortgage on the land, but requires the land to be actually free from incumbrances. *Moody v. Spokane & U. H. St. Ry. Co.*, 32 Pac. 751, 5 Wash. 699.

**DEED IN WRITING.**

The expression "deed in writing" is but a common mode of expressing fully and explicitly to the popular understanding the technical idea legally implied by a single deed—that is, a writing sealed. *Taylor v. Morton*, 35 Ky. (5 Dana) 365, 368.

**DEED INTER PARTES.**

A deed inter partes, whereby an estate is conveyed, if accepted by the grantee, is in legal effect the deed of both parties; and a stipulation in such a deed by the grantee that he will assume and pay the debt secured by the mortgage on the premises, for the payment of which the grantor is personally liable, is a contract by the grantee with the grantor to pay the mortgage debt, especially where the mortgage debt is computed as part of the consideration money for the conveyance. *Green v. Stone*, 34 Atl. 1099, 1100, 54 N. J. Eq. 387, 55 Am. St. Rep. 577.

**DEED OF BARGAIN AND SALE.**

See "Bargain and Sale."

**DEED OF SEPARATION.**

Deeds of separation are instruments by which, through the medium of some third party acting as a trustee, provision is made by a husband for separation from his wife. *Whitney v. Whitney*, 86 N. Y. Supp. 891, 892, 15 Misc. Rep. 72.

**DEED OF TRUST.**

See "Trust Deed."

**DEED POLL.**

The proprietors of the province of Pennsylvania, in the beginning, allowed no one man to locate and survey more than 300 acres. To evade this rule in after times it was the custom of speculators in land to make application in the name of a third person, and, after obtaining the warrant, to take from them what was called a "deed poll," or a brief conveyance of their inchoate, equitable claim. *Herron v. Dater*, 7 Sup. Ct. 620, 624, 120 U. S. 464, 30 L. Ed. 748 (citing *Evans v. Patterson*, 71 U. S. [4 Wall.] 224, 18 L. Ed. 393).

**DEED WITH COVENANT OF WARRANTY.**

The use of the phrase "deed with covenant of warranty," in a contract to convey land by a deed with covenant of warranty, means, not merely that the lands will be conveyed by a deed containing such a covenant, but that the grantee has the power to give a deed which will carry with it an indefeasible title to the property. *Judson v. Wass* (N. Y.) 11 Johns. 525, 528, 6 Am. Dec. 392.

**DEEDED.**

The word "deeded" is an apt word to signify the transmission of real estate. *Dunham v. Marsh*, 30 Atl. 473, 474, 52 N. J. Eq. (7 Dick.) 256.

**DEEM.**

The use of the word "deem," in a charter granting a municipality the right to charge such sums as they shall deem fit for licenses, confers full power over the subject, and authorizes the use of the power to license as a means for taxation if the corporation sees fit so to do. *Adams Exp. Co. v. City of Owensboro*, 85 Ky. 265, 3 S. W. 370, 371.

**As adjudge or determine.**

The word "deemed" means to hold in belief, estimation, or opinion; to judge; adjudge; decide; sentence; condemn; to have or to be of an opinion. Its synonyms are "esteem" and "suppose." *Cory v. Spencer*, 73 Pac. 920, 921, 67 Kan. 648, 63 L. R. A. 275.

"Deemed," as used in legislative expression, is not materially different in meaning than "adjudged." To damn or condemn is synonymous with to "deem," "think," or "judge" any one to be guilty or to be criminal; to give judgment or sentence, or to declare the penalty of punishment. *Blaufus v. People*, 69 N. Y. 107, 111, 25 Am. Rep. 148 (citing Rich. Dict.).

"Deem" means to hold in belief, estimation, or opinion; to have or be of an opinion. Its synonyms are "esteem" and "suppose"; and as used in Const. Kan. art. 5, § 3, providing that for the purpose of voting no person shall be deemed to have acquired a residence while kept at any almshouse or other asylum at public expense, means shall be adjudged or declared to have gained a residence, and not merely raise a presumption of disqualification. *Lawrence v. Leidigh*, 50 Pac. 600, 602, 58 Kan. 594, 62 Am. St. Rep. 631 (citing *Commonwealth v. Pratt*, 132 Mass. 246; *Blaufus v. People*, 69 N. Y. 107, 111, 25 Am. Rep. 148; *Leonard v. Grant* [U. S.] 5 Fed. 11).

In Rev. St. § 2922, relating to the valuation of goods, imported, by appraisers, and authorizing the appraisers to examine any person on oath touching any matter or thing which they may deem material in ascertaining the value, "deem" means judge; determine on consideration. "The primary meaning of the word is to form a judgment; to conclude on consideration." *United States v. Doherty* (U. S.) 27 Fed. 730, 734 (citing *Worcester's Dict.*).

In a resolution of a common council directing an assessment for a street improvement, requiring the assessors to assess the amount to the property deemed benefited, "deem" should be construed to mean a direction to the assessors to investigate, consider.

and determine, from which they may pronounce a proper judgment. *Broezel v. City of Buffalo*, 6 N. Y. Supp. 723, 728, 58 Hun, 631, note.

"Deemed" is the equivalent of "considered" or "adjudged," and whatever an act requires to be deemed or taken as true of any person or thing must in law be considered as having been duly considered or adjudged, and have full force and effect accordingly." *Leonard v. Grant* (U. S.) 5 Fed. 11, 16.

"Deemed," as used in 14 Stat. 144, declaring that dealers in canned goods under certain circumstances shall be deemed the manufacturers thereof, means judged; determined. The word imports that such dealers shall be considered, treated, and held liable under the act as if they were manufacturers, notwithstanding they are not such in fact. *Cardinel v. Smith* (U. S.) 5 Fed. Cas. 45, 47.

To "deem" means to think, judge, or hold as an opinion; decide or believe on consideration. A person doubting the occurrence of a proposition cannot be said to "deem" it incorrect, and hence the expression of a doubt by the judge of the Court of Appeals as to whether the conclusion reached in the cause on appeal can be harmonized with the former opinion of the Supreme Court is insufficient to confer jurisdiction on the Supreme Court, under Const. § 6, providing that when the Court of Appeals shall render a decision which a judge shall "deem" contrary to any previous decision of the Supreme Court it must transfer the case to the Supreme Court. *Smith v. Missouri Pac. Ry. Co.*, 44 S. W. 718, 719, 143 Mo. 33.

#### As believe.

Where a chattel mortgage provides that, if the mortgagee at any time "deem himself in danger" of losing the debt by delaying the collection thereof until the time limited by the mortgage for the payment thereof, he may take possession of the goods wherever found at any time, it means that the mortgagee may take possession whenever he, acting in good faith, believes he is in danger. *Barrett v. Hart*, 42 Ohio St. 41, 45, 51 Am. Rep. 801.

#### As considered or taken to be.

"Deemed" is the past participle of the transitive verb "deem," which is defined as "to account, to esteem"; and hence, as used in Const. art. 6, § 5, providing that no person shall be "deemed" to have gained or lost a residence while kept at any public asylum or almshouse, means that no person shall be accounted or shall be regarded as having gained or lost his residence. *Powell v. Spackman*, 65 Pac. 503, 504, 7 Idaho, 692, 54 L. R. A. 378.

There is no distinction in point of law between a person who, by Mutiny Act, § 55,

is to be "deemed" to be enlisted as a "soldier in Her Majesty's service," and a person who is actually in all respects a soldier de facto. When an act of Parliament says that a person is to be "deemed" to be in any particular capacity, that must be understood to mean that he is thereafter taken as actually the very person that he is deemed to be. *Wolton v. Gavin*, 16 Q. B. 48, 81.

In an act providing that after the death of the husband the wife's legal settlement shall be "deemed" to be the place where he was last legally settled, it is equivalent to the expression "shall be taken to be." *Burrell Tp. v. Pittsburgh Guardians of the Poor*, 62 Pa. 472, 474, 1 Am. Rep. 441.

Hartley's Dig. art. 2420, providing that every female, under the age of 21 years, who shall marry in accordance with the laws of the state, from and after the time of such marriage "shall be deemed to be of full age," means that the persons spoken of shall be deemed to be of full age for all purposes; that is, it not only gives them all the capacities, rights, and privileges of persons of full age, but also deprives them of any advantage which they might claim by reason of nonage. *Thompson v. Cragg*, 24 Tex. 582, 598.

Code Civ. Proc. § 1187, provides that every one save the contractor must, within 30 days after the completion of any building, file his statement for a lien. That section was amended in 1887 by adding that cessation for labor for 30 days on any unfinished building "shall be deemed equivalent to completion." Held, that the phrase "shall be deemed equivalent to completion" means shall be in legal effect equal to a completion; that is, shall be treated, for the purpose of filing a lien, as an actual completion. *Kerckhoff-Cuzner Mill & Lumber Co. v. Olmstead*, 24 Pac. 648, 649, 85 Cal. 80.

Within the statute providing that a legacy to a creditor shall not be deemed in compensation of the debt, "deemed" simply means that no interpretation unfavorable to the creditor shall be placed on the testament by the fact alone of the legacy to the creditor. It is a question of interpretation whether the testator intended the legacy to be in satisfaction of the debt. Some mention must be made in the testament of the debt, and the testator's intent must be gathered from the testament whether he intended the legacy to be in satisfaction of the debt. *Succession of Jackson*, 17 South. 598, 599, 47 La. Ann. 1089.

"Deemed," as used in a statute providing that the bargainee of the use shall be deemed to be in possession of the land, does not mean actual possession, but merely means that in contemplation of law the possession is in such purchaser. *Egbert v. Chew*, 14 N. J. Law (2 J. S. Green) 446, 461.



**As involving discretion.**

The word "deem," as used in Customs Administrative Act 1890, § 13, providing that the decision of the appraiser shall be final and conclusive as to the dutiable value of merchandise, unless the collector shall deem the payment of the merchandise too low, necessarily involves the exercise of discretion on the part of the collector. His calling and the nature of his business place him in a position where he is necessarily familiar with the value of imported merchandise and with the facts bearing upon questions of appraisal. *United States v. Loeb* (U. S.) 99 Fed. 723, 738.

The act of February 16, 1863, declaring that the board of supervisors "may, if 'deemed' advisable," levy a special tax to pay a judgment against the county, held to be mandatory, and not to give the board discretion in the matter, the decision being based on the construction of "may" as "shall." *Supervisors v. United States*, 71 U. S. (4 Wall.) 435, 446, 18 L. Ed. 419.

In an application by a bank to a surety company for a bond for its teller, one of the questions asked was, "Have you heard or known of anything unfavorable as to his habits or association, past or present, or of any matters concerning him about which you 'deem' it advisable for the company to make inquiry?" It was held that the word "deem" might be said to give a considerable discretion, but it was not a discretion to be abused; and where the president of the bank had heard of speculation by the teller, and knew that speculating was something unfavorable to his habits, his failure to inform the surety company thereof would defeat a recovery on the bond. *Guarantee Co. of North America v. Mechanics' Sav. Bank & Trust Co.*, 22 Sup. Ct. 124, 133, 138 U. S. 402, 46 L. Ed. 253.

**DEEMED BEST.**

A will giving to a certain person the use of testatrix's house and furniture, and providing that "if it shall be deemed best" to have the house sold the beneficiary might have the interest for her use, with the furniture, means that the house should be sold if in the course of the administration of the estate it should be found necessary or advisable to take that course. *Chandler v. Rider*, 102 Mass. 268, 269.

**DEEPEN.**

Land had been conveyed with the privilege of deepening the ditch leading from the premises, to drain the same over the grantor's land as deep as the grantees might desire. Held, that the phrase "with the privilege of deepening the ditch" should be construed as meaning that the grantee should have the usual mode of obtaining such a ditch, and that the privilege was granted of

widening the ditch at the top so far as necessary to deepen it. *Collins v. Driscoll*, 34 Conn. 43, 47.

**DEFACE.**

In a statute fixing the penalty for altering or defacing the brand put on any cattle, the words "altering or defacing" are not synonymous terms. "Defacing" would be the obliterating; "altering" would be changing from what it was before into a different brand. And, where the first brand consisted of two letters, the addition of another letter would be "altering" the brand, but not "defacing" it. *Linney v. State*, 6 Tex. 1, 2, 53 Am. Dec. 756.

**DEFALCATION.**

See, also, "Default."

The word "defalcation" means, according to Johnson, "diminution, abatement, excision of any part of a customary allowance." He derives the verb "defalcate" from the Latin "defalco"—"I mow or cut off with a scythe." *McDonald v. Lee's Adm'r*, 12 La. 435, 436.

"Defalcation" is defined by Bouvier as a reduction of the claim of one of the contracting parties against the other by deducting from it a smaller claim due by the former to the latter; and by Webster as a cutting off, a reduction, a deficit, a withdrawal; or that which is cut off, diminished, or abated. *Council Bluffs Iron Works v. Cuppey*, 41 Iowa, 104, 109.

If there is a debt existing for property or money embezzled or misappropriated by a person occupying a technical fiduciary position, there is a "defalcation" if the money or property is gone and has not been made good. It must be conceded that the word "defalcation" is broader than "embezzlement" or "misappropriation," and the use of the language "defalcation while acting as an officer or in any fiduciary capacity" in the bankruptcy act, forbidding the discharge under such circumstances, would seem to imply and include either embezzlement or misappropriation, or both. It was supposed that the use of the language employed would forbid the discharge of any person from a debt created by his fraud or by his embezzlement or misappropriation of funds or property, in whatsoever capacity or relation acting, and also the debts created by the defalcation of an officer or person occupying the technical trust or fiduciary relation known to and recognized by our law. *In re Butts* (U. S.) 120 Fed. 966, 970.

The word "defalcation" in the bankruptcy act of 1867, excepting from the operation of the discharge debts created by fraud or embezzlement and defalcation, was con-

ined to public officers and those acting in a fiduciary capacity. *Crawford v. Burke*, 66 N. E. 833, 835, 201 Ill. 581.

"Defalcation," as used in a note or bill under seal by which the promisor agreed to pay the same without defalcation, means without the right to set off another account or another contract, and does not mean that the note shall be paid without defense if a valid defense exists thereto, as fraud or want of consideration. *Houk v. Foley*, 2 Pen. & W. 245, 250.

The words "without defalcation or discount," added to a promissory note, do not alter its legal effect. *Cumberland Bank v. Hann*, 18 N. J. Law (8 Har.) 222, 224.

"Defalcation" is a legal right secured to a defendant who has demands against the plaintiff, due in the same right, and payable when suit was commenced. *Tagg v. Bowman* (Pa.) 16 Wkly. Notes Cas. 159, 161.

The words "without defalcation," in a note, imply that it is to be paid to the holder, without any diminution or claim to set off or otherwise, by the maker and indorser. *McDonald v. Lee's Adm'r*, 12 La. 435, 436.

If a man promise to pay a note "without defalcation or discount," the effect is that if there happens to be any failure of consideration between the maker of the note and the person to whom it is made, or any subsequent equities arise between them, they must adjust those matters in a separate action between themselves, without involving the indorsee in their disputes. *Tillou v. Britton*, 9 N. J. Law (4 Halst.) 120, 124.

## DEFALK.

"Defalk" means the act of a debtor in taking a debt due him, or portion thereof, from the fund in his hands belonging to a creditor. *Johnson v. Johnson R. Signal Co.*, 40 Atl. 198-197, 57 N. J. Eq. 79.

As used in a statute giving a right of appeal in case any part of plaintiff's demand or of the defendant's counterclaim or set-off, exceeding \$5, is disallowed or defalked by the justice, the word "defalked" means a letting off or a reduction to some extent of a claim which is proved, whether it be from a claim made and proved by the plaintiff, or from a set-off made and proved by the defendant. The word "defalked" implies proof of an alleged claim—proof of some amount from which the defalcation is to be made. *Pepper v. Warren* (Del.) 43 Atl. 91, 92, 2 Marv. 225.

## DEFAMATION—DEFAMATORY.

See "Public Defamation."

Any written words are defamatory which impute that the plaintiff has been

guilty of any crime, fraud, dishonesty, immorality, vice, or dishonorable conduct, or has been accused or suspected of any such conduct; and so, too, are all words which hold the plaintiff up to contempt, hatred, scorn, or ridicule, and which thus, by engendering an evil opinion of him in the minds of right-thinking men, tend to deprive him of their friendly intercourse and society. *Houston Printing Co. v. Moulden*, 41 S. W. 881, 886, 15 Tex. Civ. App. 574.

It may be safely said that any words, if false and malicious, imputing conduct which injuriously affects a man's reputation, or which tends to degrade him in society or bring him into public hatred or contempt, are in their nature "defamatory," and either actionable per se, or may be made actionable by proper innuendoes, or by alleging and proving special damages. *Young v. McRae*, 3 Best & S. 264; *Lynch v. Knight*, 9 H. L. Cas. 589. A publication that describes a fire in plaintiff's building, and also refers to two previous fires in the same building, and closes with these words: "Every fire in this building has started on the upper floor, and twice in R.'s printing establishment"—contains no defamatory language, and is not capable of meaning to charge R., the owner of the printing office, suing for libel, with incendiarism. *Reid v. Providence Journal Co.*, 37 Atl. 637, 638, 20 R. I. 120.

"Defamatory words," in common parlance, are such as impute some moral delinquency or some disreputable conduct to the person of whom they are spoken. *Gideon v. Dwyer*, 33 N. Y. Supp. 754, 756, 87 Hun, 246 (citing *Moore v. Francis*, 121 N. Y. 199, 23 N. E. 1127, 8 L. R. A. 214, 18 Am. St. Rep. 810); *Gallagher v. Bryant*, 60 N. Y. Supp. 844, 845, 44 App. Div. 527.

Language may be libelous although it imports no criminal offense. It is enough if it is such as to subject the plaintiff to obloquy, reproach, or disgrace. It follows that the imputation of moral turpitude by means of a published writing is clearly libelous. Thus a publication that plaintiff has made a confession concerning a murder by another person, and that plaintiff has all along been suspected of knowing all the details of the criminal's actions, is libelous. *Gallagher v. Bryant*, 60 N. Y. Supp. 844, 845, 44 App. Div. 527.

"Defamation" is defined by Webster as the taking from another's reputation. Words which produce any perceptible injury to the reputation of another are called "defamatory." The defamation is a false publication calculated to bring one into disrepute. To publish of one that he has owed for several years for medical services, and that when sued therefor he has cowardly slunk behind the statute of limitations, does not constitute a defamation. *Hollenbeck v. Hall*,

72 N. W. 518, 519, 103 Iowa, 214, 39 L. R. A. 734, 64 Am. St. Rep. 175.

Words which produce any perceptible injury to the reputation of another are a "defamation," or any false publication calculated to bring one into disrepute. Thus where a letter contained statements which, if true, show that a lawyer is not an honest man and not entitled to public confidence, so that no discreet public man believing such statements would trust him with business, the publication is libelous, if not proven. *Mosnat v. Snyder*, 75 N. W. 356, 358, 105 Iowa, 500.

#### DEFAMATORY PUBLICATION.

"A defamatory publication under the pretext of a privileged communication, where the privilege does not exist, is a publication without just cause or excuse, and in a legal sense malicious, and therefore actionable, though it be made without a malicious motive." *King v. Patterson*, 9 Atl. 705, 706, 49 N. J. Law (20 Vroom) 417, 60 Am. Rep. 622.

The word "defamatory" does not include the element of malice. A defamatory publication is one which is false and calculated to bring the person defamed into disrepute, but it is not necessarily malicious. *Marks v. Baker*, 9 N. W. 678, 680, 28 Minn. 162.

#### DEFAULT.

See, also, "Defalcation."

A default is the failure or omission to do something required. *Bryan v. Alexander* (U. S.) 4 Fed. Cas. 506, 507.

"Default" is defined as a failure in the performance or fulfillment of an obligation, neglect or omission of a legal requirement, a wrong action, fault, transgression, something wrongful, some omission to do that which ought to have been done. As used in Const. art. 14, § 2, rendering one who is in default as custodian or collector of public moneys ineligible to hold office, the term "default" implies more than a civil liability. There must exist a willful omission to account and pay over, with a corrupt intent, or such a flagrant disregard of duty as to fairly justify the inference that his conduct was willful and corrupt. *State v. Moores*, 73 N. W. 299, 305, 52 Neb. 770.

In passing upon the meaning of the words "debt, default, and miscarriage," it is said they apply to guaranties for an existing debt, guaranties for future debts, or to some past or future default in duty by a third person. *Wood on Frauds*, § 114. The word "miscarriage" has a broader meaning than either "debt" or "default," and includes the failure by a third party to succeed in a proposed business, regardless of the fact whether its failure to do so would

entitle the plaintiff to an action at law or not. The requirement that an actionable duty shall exist was made first by the court in cases of debt. The same requirement was later extended to default, meaning default in any duty and for the same reason. But the reason does not exist in the case of miscarriage—that is, the act of a third party—and this requirement should not be made. In other words, if any meaning is to be given to the word, it must mean something different or broader than "debt" or "default," and this is the only distinction that can be made. *Gansey v. Orr*, 73 S. W. 477, 481, 173 Mo. 532.

In an executory contract for the sale of land, the mere fact that the purchase money is due and has not been paid does not create a forfeiture, nor is such neglect regarded by a court of equity as a default until there has been an offer by the other party to pay. *Wakefield v. Johnson*, 26 Ark. 506, 509.

The word "default," in a bill of sale providing that in case of default in any payment the seller may treat the sale as annulled and take the property, must be taken to mean a nonpayment by a party bound to pay, without the consent of the parties having a right to waive the payment; and the omission to pay by the consent of the person who is to receive payment does not constitute a default. *Cole v. Hines*, 32 Atl. 198, 199, 81 Md. 476, 32 L. R. A. 455.

"Default," as used in a stipulation providing that in case a party should make default in the payment of any one of certain notes made by him, according to its terms, then immediately on such default all of the notes remaining due and unpaid should become and be forthwith due and payable, anything in the terms of such notes to the contrary notwithstanding, and the holders of the notes should be at liberty forthwith to enter judgment by default, cannot be construed to mean simply a neglect or refusal to pay on presentation at the appointed place during business hours on the day named, but means a failure to pay after the day at which the note became due had fully elapsed. The maker could not be said to be "in default" until a right of action had accrued against him thereon, and no suit is maintainable on the note until a complete expiration of the last day of payment. *Osborn v. Rogers*, 1 N. Y. Supp. 623, 624, 49 Hun 245.

An improvement certificate of a city provided that the city should make and collect an assessment for the improvement with due diligence, and that, in case the assessment should not be collected to meet the certificate within two years from the date of confirmation, the city would pay the amount of the certificate upon 30 days' notice of the default of the collection of the

certificate. Held, that the word "default" did not necessarily imply culpability, as it often signifies only failure. *Dime Sav. Inst. v. City of Hoboken*, 42 N. J. Law (13 Vroom) 283, 288.

"Default," as used in a sheriff's accountable receipt providing for the payment of the amount of a debt in default of the delivery of the goods for which the receipt is given, means not the mere fact of the non-delivery of the goods, but a failure to deliver amounting to a breach of the contract of bailment. Any fact which would excuse the maker of the receipt from returning the property would exempt him from liability to pay the stipulated measure of damages, for in such case there would be no default. *Mason v. Aldrich*, 30 N. W. 884, 885, 36 Minn. 283.

#### In charter party.

In one sense any failure is a "default," whether it arises from the omission to perform the contract or from a neglect of duty. In many reported cases the omission to pay a debt or to perform a contract is spoken of as a "default." Thus, as used in a charter party providing that demurrage is payable only for each day of detention by default of the charterers or their agent, the word "default" means omission to perform the contract, and not negligence or willful omission. *Burrill v. Crossman* (U. S.) 69 Fed. 747, 752, 16 C. C. A. 381.

"Default," as used in a demurrage clause stipulating that the charterers of the boat shall be answerable only for detention which may result from default, means only a non-performance of contract duty—a failure to do that which such parties had contracted to do. *1,600 Tons of Nitrate of Soda v. McLeod* (U. S.) 61 Fed. 849, 851, 10 C. C. A. 115.

A proviso in a charter party against liability for detention, unless "by default" of the charterers, exonerates the charterer from delay occasioned by superior force acting directly on the discharge of that cargo, and not from the direct action of such force, which by its operation on other vessels has caused a crowded state of the docks. It exempts him only from delay from causes beyond his control, acting directly to retard the discharging. The default does not mean negligence, but a failure of contract on their part, unless it is caused by direct and immediate vis major, or something like it. *Thatcher v. Boston Gaslight Co.* (U. S.) 23 Fed. Cas. 874.

"Default of the charterer," as used in a charter party specifying that the charterer shall pay damage for detention of the vessel, provided such delay shall happen by default of the charterer, does not include a delay caused by the charterer requiring the shipper, after the delivery of a portion of

the goods at one dock, to move to another dock, in which several days are lost by reason of the weather, there being a custom by which the charterer could require the goods to be delivered at the two different docks. *The Mary E. Taber* (U. S.) 16 Fed. Cas. 978, 979.

#### In practice.

"Default," as defined in *Burrill's Law Dictionary*, means: "In practice, an omission, neglect, or failure." When a defendant in an action at law omits to plead within the time allowed, or fails to appear on trial, he is said to "make default." Page v. Sutton, 29 Ark. 304, 306.

The term "default," when used in practice, is defined to be the nonappearance of a plaintiff or defendant at court within the time prescribed by law to prosecute his claim or make his defense. The term when applied to a defendant is frequently used in a much wider sense, and a failure to enter a plea, answer, affidavit of defense, etc., as well as for want of appearance, is included in the definition thereof. *Lawler v. Bashford-Burmister Co.* (Ariz.) 46 Pac. 72, 73. See, also, *Steenrod's Adm'r v. Wheeling, P. & B. R. Co.*, 25 W. Va. 133, 137.

A default admits only what is averred in the declaration. *Schueler v. Mueller*, 61 N. E. 1044, 193 Ill. 402.

The definition of "default" as a failure to appear and contest a point of law or fact by presentation of counter argument or proof has been applied in many cases. *Forgotson v. Becker*, 81 N. Y. Supp. 321, 322, 39 Misc. Rep. 813.

Default is a judgment for want of appearance. *Buena Vista Freestone Co. v. Parrish*, 34 W. Va. 652, 654, 12 S. E. 817.

A default admits the cause of action and the material and traversable averments of a declaration, although not the amount of damages. A judgment by default in assumption, where an account is filed in the declaration, is an admission of indebtedness for the articles charged; but the value of the articles and the amount of indebtedness require to be proved. *Grinnell v. Bebb*, 85 N. W. 467, 468, 126 Mich. 157.

A default, in an action sounding in damages or tort, is an admission that plaintiff has a cause of action as alleged, though by reason of the statute defendant is permitted to controvert the quantum thereof. *Whipple v. Southern Pac. Co.*, 55 Pac. 975, 976, 34 Or. 370.

A default has practically the same effect as a verdict. Until set aside, it is a final determination of the matters set up in a declaration. The default which is an admission of the plaintiff's case stands in the place of a trial in a litigated case. *Hibernia*

*Savings & Loan Soc. v. Churchill*, 61 Pac. 278, 280, 128 Cal. 638, 79 Am. St. Rep. 73.

Section 3886 of the Revision declares that judgment of nonsuit or by default in justice's court may be set aside by the justice, at any time within six days, if the party applying therefor can show satisfactory excuse for the default. Held, that the word "default" means where a defendant does not appear, and cannot be applied to a mere failure to appear on the day to which a cause has been continued, defendant having once appeared and answered. *Douglass v. Langdon*, 29 Iowa, 245, 247.

The word "default" signifies that there has not been an appearance at any stage of the action by the party in default. "Default," as used in our statutes, is an antithesis of appearance. It is distinguished from "absence," which means that the party was not present at a particular time. *Covart v. Haskins*, 18 Pac. 522, 523, 39 Kan. 571.

#### DEFAULT DAY.

Appearance day synonymous, see "Appearance Day."

#### DEFAULT IN OFFICE.

A "default in office" is a noncompliance with the statute in discharging any of the duties proposed. *Carpenter v. Doody* (N. Y.) 1 Hilt. 465, 468.

#### DEFAULT JUDGMENT.

See "Judgment by Default."

#### DEFAULT OF ISSUE.

See "In Default of Issue."

#### DEFAULTER.

Webster defines the word "defaulter" to be one who makes default; who fails to perform a public duty; who fails to account for public money; a delinquent. *Walter v. Erdman*, 4 Pa. Super. Ct. 348, 355.

A "defaulter" is defined in Anderson's Law Dictionary as one whose peculations have brought him within the cognizance of the law, to the extent at least of excluding him from a public trust. *State v. Moores*, 52 Neb. 770, 787, 73 N. W. 299.

When employed to explain a disqualification for holding a public office, the term "defaulter" has but one meaning in the minds of persons of ordinary intelligence who have a common familiarity with the English language and its most popular idioms. No one will naturally connect it with a mere delinquency as to minor social obligations or the payment of ordinary debts. The universal application of the word in that connection

is matter for judicial notice. It describes one whose peculations have brought him within the cognizance of the law, to the extent at least of excluding him from a public trust. *State v. Kountz*, 12 Mo. App. 511, 513.

## DEFEASANCE.

Bouvier in his Law Dictionary defines "defeasance," as applied to contracts, to be an instrument which defeats the force or operation of some other deed or of an estate. That which is in the same deed is called a "condition"; and that which is in another deed is a "defeasance." *Simmons v. West Virginia Ins. Co.*, 8 W. Va. 474, 496 (citing Bouv. Law Dict.).

A "defeasance" is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions upon the performance of which the estate then created may be defeated or totally undone. *Miller v. Quick*, 59 S. W. 955, 956, 158 Mo. 495; *Harrison v. Trustees of Phillips' Academy*, 12 Mass. 458, 463; *Shaw v. Irakin*, 43 Mo. 371, 373; *Flagg v. Mann*, Fed. Cas. No. 4,847.

Lord Coke has given a very correct definition of a "defeasance" in stating its derivation. It is, says he (Co. Litt. 236b), fetched from the French word "defaire," i. e., to defeat or undo, "infertum reddere quod factum." The true meaning of this language is that it is to make void the principal deed. *Flagg v. Mann* (U. S.) 9 Fed. Cas. 202, 222.

"A 'defeasance' is an instrument which avoids or defeats the force and operation of some other deed, and that which in the same deed would be called a 'condition' of it in another deed is a 'defeasance'; but it must contain proper words to defeat or put an end to the deed of which it is intended to be a defeasance, as that it shall be void or of no force or effect." *Lippincott v. Tilton*, 14 N. J. Law (2 J. S. Green) 361, 364 (citing Lacey v. Kynaston, 2 Salk. 557); *Flagg v. Mann* (U. S.) 9 Fed. Cas. 202, 222.

It has often been held that where, upon a conveyance of an estate or interest in land, there is a stipulation in the deed itself, or in a separate deed executed at the same time and constituting, with the conveyance, one transaction, that the estate shall be reconveyed upon the payment of money, such stipulation constitutes a "defeasance," as much as if the words were "on condition" or "provided, however," etc. So a conveyance for a term of years, containing an agreement that the lessee will reconvey the premises to the lessor upon the payment of a specified sum, with interest thereon, is a mortgage, and the relation of the parties is that of mortgagor and mortgagee. *Nugent v. Riley*, 42 Mass. (1 Metc.) 117, 119, 35 Am. Dec. 353.

**Bond for reconveyance.**

In Gen. St. c. 40, § 23, providing that when a deed purports to be an absolute conveyance in terms, but is made or intended to be made defeasible, by force of an instrument of defeasance, as against any person other than the maker of the defeasance, unless the instrument of defeasance is recorded, the expression "instrument of defeasance" should be construed to include a bond for a reconveyance on the payment of a specified sum and interest at a specified date, made at the same time and at the same date as the deed. *Butman v. James*, 27 N. W. 66, 67, 84 Minn. 547.

**Date of.**

"It is not necessary that the dates of the defeasance and the original deed should be alike. It is to be executed at the same time, that it may be a part of the same transaction." *Harrison v. Trustees of Philip's Academy*, 12 Mass. 456, 463.

**Parties to.**

To be valid, a defeasance must be made between the same persons who were parties to the first deed, and must be signed and executed by the person whose estate is to be defeated. *Miller v. Quick*, 59 S. W. 955, 956, 158 Mo. 495.

**DEFEASIBLE FEE.**

A "defeasible fee" is a vested remainder which might be defeated by the death of the remainderman before the time fixed for the taking effect of the devise. *Forsythe v. Lansing's Ex'rs*, 59 S. W. 854, 855, 109 Ky. 518.

A "defeasible fee" is where the devisee becomes invested with the fee-simple title, subject to be divested upon the happening of some contingency provided by the will, as where an estate is devised to A.; and, if A. should die without children, then to B. In such case the devise only takes effect in the event A. dies without children, and B. becomes owner in fee of the estate. *Wills v. Wills*, 8 S. W. 900, 902, 85 Ky. 486 (citing *Hughes v. Hughes*, 51 Ky. [12 B. Mon.] 115).

**DEFEASIBLE TITLE.**

A "defeasible title" is one that is capable of being annulled or made void, not one that is already void or an absolute nullity. *Elder v. Schumacher*, 18 Colo. 433, 448, 83 Pac. 175 (quoting Webster's Dict.).

**DEFEAT.**

"Defeat," as used in an act providing that if any defendant shall conceal himself so as to defeat any person from bringing an action against him, etc., signifies the performance of some act, which will amount to a

prevention or hindrance of a suit, such as the creditor cannot with reasonable diligence overcome, and imports resistance and obstruction to his rights; and, unless the acts complained of are in point of fact such as would hinder and prevent him from bringing the suit notwithstanding his desire so to do, they cannot properly be said to "defeat" the suit. *Coleman v. Walker*, 60 Ky. (3 Metc.) 65, 68, 77 Am. Dec. 163; *Walker v. Sayers*, 68 Ky. (5 Bush) 579, 581.

Gen. St. tit. 1, § 390, providing that no dam shall be erected to the injury of any mill site on the same stream on which a mill-dam has been lawfully erected, unless the right to maintain such mill "shall have been lost or defeated by abandonment or otherwise," did not mean a material loss of the right to use such mill site, inasmuch as a party has absolute dominion over his own property, subject only to the right of eminent domain, and could not therefore literally lose the right to maintain the mill; but the words meant only such a neglect to use it as showed that the owner had no intention of improving it again for milling purposes. *Curtiss v. Smith*, 85 Conn. 156, 158.

**DEFEATED PARTY.**

"Defeated party," as used in Bankr. Act 1867, § 8, providing that no appeal shall be allowed in any case from the district to the circuit court unless it is claimed and notice given thereof to the assignee or to the defeated party in equity, means the opposite, adverse, or successful party. "The defeated party in equity is generally the one who takes the appeal, and does not therefore require notice, but must give it. The purpose of the act, the remainder of the section in which the word is used, and the impossibility of any other reasonable meaning, requires this construction." *Wood v. Bailey*, 88 U. S. (21 Wall.) 640, 642, 22 L. Ed. 689.

**DEFECT.**

See "Formal Defect"; "Latent Defect"; "Mental Defect."  
Any defect, see "Any."

A defect is a fault—the want or absence of something necessary for completion or perfection. *Haney-Campbell Co. v. Preston Creamery Ass'n*, 98 N. W. 297, 300, 119 Iowa 188.

As used in reference to a street, a defect is a lack of reasonable safety. *Peake v. City of Superior*, 82 N. W. 806, 808, 106 Wis. 403.

"A want or absence of something necessary for completeness or perfection." *Webst. Dict.* It also includes the idea of a fault or want of perfection. In the statutory sense, a street or sidewalk is defective when it is

nor in a reasonably safe condition for the use for which it was intended. *Bliven v. City of Sioux City*, 52 N. W. 246, 85 Iowa, 346.

Code, § 2590, which provides that an employer is liable for any injury to his employes caused by a "defect in the condition of the ways," means any inherent defect in the ways or machinery of the employer which would render their use unsafe to the employes—such as, for instance, neglect to have the outer rail on a curve on a railroad track sufficiently raised above the inner rail to make passage at the ordinary rate of speed safe, or allowing a switch to exist in a track after its use had been discontinued, or any other defect or want of repair of the track or way which would tend to make passage over it dangerous. *Kansas City, M. & B. R. Co. v. Webb*, 11 South. 888, 889, 97 Ala. 157.

Where machinery was perfect of its kind, and in good repair, but unsuitable for the purpose for which it was used, it was a "defect," within St. 1887, c. 270, § 1, cl. 1, providing that employers shall be liable for defects, etc. *Geloneck v. Dean Steam Pump Co.*, 43 N. E. 85, 89, 165 Mass. 202.

Code, § 1749, art. 1, which provides that the employer is liable for personal injury to the servant when the injury is caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with or used in the business of the master or employer, means some inherent condition, of a permanent or quasi permanent nature, of the ways, works, machinery, or plant, which unfits the thing for its uses; some weakness of construction with reference to the proposed uses, as where the ordinary appliances for drawing buckets of water from a well are used to lower and hoist men; some inadaptation to its purposes, as where the sides of a coke lift are not sufficiently fenced to safely hoist its burden (citing *Heske v. Samuelson*, 12 Q. B. Div. 30); some break or misplacement of the parts, or the absence of some part; some innate, abnormal quality of the thing which renders its use dangerous, as the viciousness of a horse constituting "plant" in the business of a wharfinger (citing *Yarmouth v. France*, 19 Q. B. Div. 647); some obstacle in the way of use or obstruction to use which is a part of the thing itself, or of the condition of the thing itself, as holes in or ice upon a way, or the like. *Kansas City, M. & B. R. Co. v. Burton*, 12 South. 88, 91, 92, 97 Ala. 240.

#### In cross-walk.

A small ridge of ice on a cross-walk, formed by the trampling of snow and freezing and melting until the surface is uneven, is not a defect in the cross-walk rendering the city liable for injuries received. *McKel-*

*lar v. City of Detroit*, 23 N. W. 621, 622, 57 Mich. 158, 58 Am. Rep. 357.

#### In highway.

Sp. Laws 1881, p. 412, c. 73, § 8, providing that no action shall be maintained against the city of Mankato on account of any injuries received by means of any "defect in the condition of any bridge, street, sidewalk or thoroughfare," unless commenced within one year from the happening of the injury, nor unless notice of the injury has been given, should be construed as referring to defects in such public ways or structures as such, and with reference to their usefulness and safety for the purpose of travel. It has reference to injuries caused by dangerous conditions of that kind, and does not embrace injuries resulting to adjacent property from conditions which do not render the street or highway defective as such. *Pye v. City of Mankato*, 38 N. W. 621, 622, 38 Minn. 536.

Obstructions necessarily erected on highways in order to repair them are not, in any proper sense, "defects." They are the necessary means to a lawful end—means necessary to the pursuance of a duty imposed by law—and, when reasonable notice of their existence is given, create no liabilities on the part of towns for injuries occasioned by them. *Lane v. City of Lewiston*, 39 Atl. 999, 1000, 91 Me. 292 (citing *Morton v. Inhabitants of Frankfort*, 55 Me. 46).

In Gen. St. c. 44, §§ 1, 22, providing that any person who receives an injury from a defect or want of repair in a highway may recover damages therefor from the town or city by law obliged to repair the same, if such town or city had reasonable notice of the defect, or the defect had existed for 24 hours previous to the occurrence of the injury, "defects" should be construed to mean all defects, and is not limited to open and visible defects. *Burt v. City of Boston*, 122 Mass. 223, 226.

Within Laws 1881, c. 700, which imposes a liability on towns for certain damages caused by reason of defective highways or bridges in such towns, includes anything which makes the highway unsafe for public travel, and hence would include awnings over a sidewalk, an advertising banner suspended over a street, a pile of ashes in the street, a pile of stones on the side of the roadway, or a wagon truck left in the highway overnight without being lighted or guarded. *Whitney v. Town of Ticonderoga*, 6 N. Y. Supp. 844, 845, 53 Hun, 214.

Objects within the limits of a highway calculated to frighten horses of ordinary gentleness are defects. *Dimock v. Town of Suffield*, 30 Conn. 129.

Whatever incumbers a highway so as to make it dangerous to public travel is a de-

fect, and, if injury results therefrom, liability will attach to any party whose duty it was to remove it. *Eggleston v. Columbia Turnpike Road* (N. Y.) 18 Hun, 146, 148. And this is so though the object causing the fright of the horse be on the margin of a road—entirely out of the traveled track. *Winship v. Enfield*, 42 N. H. 197. If a pile of stones has a tendency to frighten horses, and is of a dangerous character, though not technically an obstruction in a highway or a defect, the town will be liable for damages caused to travelers thereby after notice of its character, and neglect to remove the same. *Eggleston v. Columbia Turnpike Road*, 82 N. Y. 278, 281, affirming 18 Hun, 146, 148.

If there is a dangerous place, such as a declivity or excavation, so close to a street, or the traveled part thereof, as to render it unsafe for travel in the absence of a railing or barrier, the wanting of such railing or barrier constitutes a defect in the highway itself, for injuries from which the municipality is liable. *City of San Antonio v. Porter*, 59 S. W. 922, 924, 24 Tex. Civ. App. 444 (quoting Dill. Mun. Corp. [4th Ed.] § 1017); *Palmer v. Inhabitants of Andover*, 56 Mass. (2 Cush.) 600, 606; *Davis v. Hill*, 41 N. H. 329, 334; *Jones v. Inhabitants of Waltham*, 58 Mass. (4 Cush.) 299, 301, 50 Am. Dec. 783.

A permanent wooden awning, covering the sidewalk of a street, and resting on posts so insecurely supported as to be dangerous to persons using the street, is a defect for which the city is liable. *Hune v. City of New York*, 74 N. Y. 264, 273.

Where limits of a highway are not connected by any visible object, and there is nothing to show a person in the evening that the course a traveler is pursuing is not within the public way, the town is liable for an injury to a traveler within the general course of travel, though beyond the limits of the located way, when he drove into a cellar. *Hayden v. Inhabitants of Attleborough*, 73 Mass. (7 Gray) 338, 339.

Where a portion of a bridge had been carried away by a freshet, and had been condemned, and a fence built across the highway to turn the travel from it, it constituted a defect, where the bar was not so continued as to effectually warn the public. *Thorp v. Town of Brookfield*, 36 Conn. 320.

A post standing without the limits of a highway, but near the line thereof, and in the general direction of the travel thereon, held a defect. *Cogswell v. Inhabitants of Lexington*, 58 Mass. (4 Cush.) 307.

Where a road is so constructed as to present two paths, both of which seem safe, and one leads to a dangerous precipice, while the other is quite safe, and there is no notice, it constitutes a defect. *Ireland v. Os-*

*wego, H. & S. Plankroad Co.*, 13 N. Y. § Kern.) 526.

Rev. St. c. 25, § 22, relating to injuries from any defect or want of repair in any highway, would not include an injury sustained by the falling of snow and ice from a roof which projected over the highway. It would only extend to injuries received by reason of defects in the surface of the highway, or in the railings which are necessary to guard the same, and injuries arising from like causes. *Hixon v. City of Lowell*, 79 Mass. (13 Gray) 59, 64.

#### In railroad.

In the employers' liability act (St. 1887, c. 270, § 1, cl. 1), making employers liable for injuries to their employes by reason of any defect in the condition of the ways of the employer's business, due to the negligence of the employer, defect cannot be construed to include an awning maintained by a railroad company at a station for the protection of passengers from the rain; there being no defect in the condition of the awning itself. *Fisk v. Fitchburg R. Co.*, 33 N. E. 510, 511, 158 Mass. 238.

#### In vessel.

A contract for the sale of a ship providing that the seller shall not be liable for "any defect whatever" means any defect which is consistent with its being the thing described, but does not relieve the seller from the implied warranty that the vessel is as described. *Per Pollock, C. B., in Taylor v. Bullen*, 5 Exch. 779, 785.

### DEFECT OF FORM.

See "Defect of Substance."

### DEFECT OF PARTIES.

A defect of parties, as a ground of demurrer, does not reach a case where there are too many plaintiffs or too many defendants, but only those cases in which, from the statement of the cause of action, it appears that there are parties omitted who should have been made parties plaintiff or defendant. *Palmer v. Davis*, 28 N. Y. 242, 245; *Tew v. Wolfsohn*, 76 N. Y. Supp. 919, 921, 38 Misc. Rep. 54; *Id.*, 79 N. Y. Supp. 286, 287, 77 App. Div. 454; *Palmer v. Davis*, 28 N. Y. 242, 245; *Potter v. Ellice*, 48 N. Y. 321, 325; *Lowry v. Jackson*, 3 S. E. 473, 475, 27 S. C. 318; *Boldt v. Budwig*, 28 N. W. 280, 281, 19 Neb. 739; *Powers v. Bumcratz*, 12 Ohio St. 273, 287; *Berkshire v. Shultz*, 25 Ind. 523, 526; *Mornan v. Carroll*, 35 Iowa, 22, 24; *Truesdell v. Rhodes*, 26 Wis. 215, 220; *Pomeroy, Rem.* § 287; *Nell v. Trustees of Ohio Agricultural & Mechanical College*, 31 Ohio St. 15, 20.

"A defect of parties to an action" means the absence of one or more of the necessary



parties, and not merely the absence of proper parties. *Beach v. Spokane Ranch & Water Co.*, 65 Pac. 111, 112, 25 Mont. 379.

"A defect of parties is founded on the notion or fact that there are other persons interested in the controversy who should be brought before the court, and whom the court will order to be brought in where the objection is taken in time." *Weatherby v. Melkjohn*, 20 N. W. 374, 375, 61 Wis. 67.

The phrase "defect of parties" does not include joinder of an improper party. *Great Western Compound Co. v. Aetna Ins. Co.*, 40 Wis. 373; *Palmer v. Davis*, 28 N. Y. 242, 245.

The mere joinder of too many persons as defendants, when there is no misjoinder of subjects, is not a ground of demurrer by any one of them against whom the complaint sets forth a good cause of suit. A demurrer may be interposed for the defect of parties, but not for the reason merely that too many are brought in. *New York & N. H. R. Co. v. Schuyler*, 17 N. Y. 592, 604.

#### DEFECT OF SUBSTANCE.

Cr. Proc. Act, § 53, enacting that every objection to any indictment for any defect of substance apparent on the face thereof must be taken by a demurrer before the jury shall be sworn, means defect in any matter that is essential to be set forth to show that an offense has been committed. *State v. Startup*, 39 N. J. Law (10 Vroom) 423, 432.

Under the statute permitting the amendment of an affidavit for attachment in relation to a defect of form, amendments for defects of substance cannot be made. The matters of substance in such an affidavit are the existence of a debt, its amount, and that it is justly due and owing, and a statutory cause for the issue of the writ, with the negation of purpose to vex or harass the defendant. All else is matter of form. *Flexner v. Dickerson*, 65 Ala. 129, 132.

#### DEFECTIVE.

See "Title Defective in Form."

Otherwise defective, see "Otherwise."

#### DEFECTIVE ATTACHMENT AFFIDAVIT.

Within the meaning of Code, § 2464, providing that, where an attachment affidavit is defective, plaintiff shall be allowed to file a new affidavit, which shall be as valid as if given at the commencement of a suit, includes a case where an affidavit for attachment states the debt due, and the declaration is for a debt due in part only. *Dalsheimer v. McDaniel*, 12 South. 333, 69 Miss. 339.

#### DEFECTIVE HIGHWAY.

Defects of Highway, see, also, "Defect."

A highway which is so constituted that travelers will be likely to be allured from it into dangerous paths is defective. *Munson v. Town of Derby*, 37 Conn. 293, 310, 9 Am. Rep. 332.

In order to constitute a public road a defective highway, within the meaning of Gen. St. 1889, p. 7134, giving a right of action against counties and townships in favor of persons who, without contributory negligence, sustained damages by reason of defective highways, it is not necessary that it shall first be improved and put in condition for travel, and then allowed to become defective through lack of repair. A laid-out and opened road is none the less a public highway because not yet put in condition for travel. *Reading Tp. v. Telfer*, 43 Pac. 134, 136, 57 Kan. 798, 57 Am. St. Rep. 355.

A statute making a town liable for injury to any persons by reason of a defective road did not mean everything rendering the highway unsafe or defective, nor on the other hand apply to the roadbed only; but any object in, on, or near the traveled path which would necessarily obstruct or hinder one in the use of the road for the purpose of traveling thereon, or which, from its nature and position, would be likely to produce that result, would generally constitute a defect. *Hewison v. City of New Haven*, 34 Conn. 136, 142, 91 Am. Dec. 713.

"Defective highways," as used in Laws 1881, c. 700, which imposes a liability on a town for certain damages caused by reason of defective highways or bridges in such town in cases in which the commissioner or commissioners of highways of said town are pow by law liable therefor, means highways actually unsafe for public travel. *Whitney v. Town of Ticonderoga*, 6 N. Y. Supp. 844, 845, 53 Hun. 214.

Laws 1881, c. 700, § 1, providing that the several towns in the state shall be liable to any person suffering the same for all damages to person or property by reason of defective highways or bridges in such towns, has reference to their condition for public travel upon them, which their designation as highways imports, and in view of the purpose for which they are established and maintained; and the impairment of a highway for public use may be no less such by an obstruction placed in it than by a physical disturbance or injury to the bed of the roadway. In either case the highway is in a defective condition, and such condition is within the meaning of the term "defective highways." *Whitney v. Town of Ticonderoga*, 27 N. H. 403, 127 N. Y. 40.

In an action for death caused by the condition of a road, it was held that a submission

to the jury as to whether the highway was "defective and unsafe" was not erroneous, the court saying that such expression is substantially equivalent to the expression "insufficient" or "out of repair," as used in the statute authorizing a recovery for damages caused by the insufficiency or want of repairs of any bridge or road. *Carpenter v. Town of Rolling*, 88 N. W. 958, 956, 107 Wis. 559.

#### DEFECTIVE MACHINERY.

It is held that, under a statute providing that exemption of risk shall not be an offense in a servant's action against an employer for injuries resulting from defective machinery, an injury caused by the fact that a machine was not securely fastened to the floor is not an injury arising from defective machinery. *Empire Laundry Machinery Co. v. Brady*, 60 Ill. App. 379.

#### DEFECTIVE RECOGNIZANCE.

"Defective," as applied to a recognizance, though different somewhat in significance from "insufficient," is frequently used indifferently with such latter word by the Legislature as meaning the same thing; and, as to a recognizance, there can scarcely be said to be any distinction in fact. *State v. Lavalley*, 9 Mo. 834, 836.

#### DEFECTIVE ROADBED OR WAY.

In an action against a railroad company for the death of one of its locomotive engineers, caused by an obstruction on the track, the court, in the first sentence of an instruction, told the jury that, if defendant employed the deceased as an engineer, it assumed a duty to him to construct and maintain its roadbed and roadway in a reasonably safe condition. In the latter part of the instruction the court stated that if the jury believed that the plaintiff's intestate was, without any fault or negligence on his part, killed in the manner charged in the complaint, and that the death was caused by the defective condition of defendant's roadbed or roadway, and such condition was known, or might have been, by the defendant, the jury should find for the plaintiff. Held that by the use of the words "defective condition of defendant's roadbed or roadway" was meant and intended a condition of the roadbed or roadway not reasonably safe. *Little Rock & Ft. S. Ry. Co. v. Voss* (Ark.) 18 S. W. 172, 178.

The term "defective way," in the employer's liability act, in reference to the liability of a railroad for an injury resulting from a defective way, does not include a movable object, such as a car on a side track placed temporarily in a dangerous proximity to a railroad track. *Kansas City, M. & B. R. Co. v. Burton*, 12 South. 88, 90, 97 Ala. 240.

#### DEFECTIVE SIDEWALK.

"Defective," as used in a municipal charter (Pub. & Loc. Laws, 1869, c. 298, § 9), rendering the owner of premises liable for damages sustained by reason of a defective sidewalk, means "defective because of imperfection or fault in the materials of which it is made, or from defect or fault in constructing it, or it may become defective and dangerous from use or in consequence of things placed upon it." *Morton v. Smith*, 4 N. W. 330, 333, 48 Wis. 265, 83 Am. Rep. 811.

#### DEFECTIVE TITLE.

The term "defective title," as used in describing title to land, means that the party claiming to own has not the whole title, but some other person has title to a part or portion of the land. *Copertini v. Oppermann*, 18 Pac. 256, 258, 76 Cal. 181.

A defective title is understood to be, and is in contemplation of law, the same as no title whatever, and a party exercising an office or franchise of a public nature is considered as a mere usurper unless he has a good and complete title in every respect. Thus the term, when used in speaking of a defective title of a person acting as president of a corporation in relation to his right to such office, means that he has no title thereto. *Place v. People*, 61 N. E. 354, 356, 192 Ill. 160.

#### Of affidavit.

Code, § 406, provides that it shall not be necessary to entitle an affidavit in an action, but an affidavit made without a title, or with a defective title, shall be as valid and effectual for every purpose as if it were duly entitled, if it intelligently refers to the action or proceeding to which it is made. To give effect to the intention of the Legislature, the words "defective title" must be understood in their broadest sense; that is, as equally applying whether the title be inaccurate as merely incomplete, or is positively erroneous. *Bowman v. Sheldon*, 7 N. Y. Super. Ct. (5 Sandf.) 657, 659, 10 N. Y. Leg. Obs. 889, 840.

#### DEFEND.

The term "defend," as used in the treaty between the United States and the kingdom of Italy, providing that consuls general may have recourse to the authorities of the respective countries within their respective districts, whether federal or local, judicial or executive, in order to defend the rights and interests of their countrymen, is to be given the broadest meaning, and includes the power to maintain affirmatively the rights of the consul's countrymen, so that a consul has authority to receive the distributive shares to which persons residing in his country are

entitled from the estate of a person dying in the United States. In *re Tartaglio's Estate*, 33 N. Y. Supp. 1121, 1122, 12 Misc. Rep. 245.

To defend is to contest and endeavor to defeat a claim or demand made against one in a court of justice. And its use in the statute providing that boards of directors of irrigation districts may sue, appear, and defend in person or by attorneys, and in the name of such district, implies that the district may be sued, as well as sue. *Boehmer v. Big Rock Irr. Dist.*, 48 Pac. 908, 911, 117 Cal. 19.

#### DEFENDANT.

See "Material Defendant."

Any defendant, see "Any."

Other defendants, see "Other."

"Defendant," as the term was used in the courts of common law, originally meant a person who was sued in a court of law, and who attempted to resist such suit. *Brower v. Nellis*, 33 N. E. 672, 673, 6 Ind. App. 323.

When a person was sued at law, the purpose of the action was to obtain a judgment affecting his rights of person or property. He who attempted to defend against such an action was a defendant. *Jewett Car Co. v. Kirkpatrick Const. Co.* (U. S.) 107 Fed. 622, 624.

Gen. St. p. 419, § 19, relating to the process of foreign attachment, and directing a continuance or adjournment if the defendant is not in the state, was intended to apply to and mean a defendant residing out of the state, and not to include an inhabitant of the state temporarily absent. *Potter v. Sanborn*, 49 Conn. 452.

The term "defendants," in a record entry showing "prayer of defendants attorney" for an appeal, may be taken in the possessive case singular, and held to apply only to a surviving defendant. Where one of two defendants is dead, the term can only apply to the survivor. *Grove v. Swartz*, 45 Md. 227, 228.

The title "defendant" is more generally applied to a party in a civil than in a criminal suit or proceeding. *Tyler v. State*, 21 Atl. 611, 63 Vt. 300.

A decree vesting title to a certain lot in the complainant, and declaring the defendants to be forever barred, without naming such defendants, should be held to comprise all those who are made parties as such to the suit. *Dousman v. Hooe*, 3 Wis. 466, 494.

In *Mansf. Dig.* §§ 3909, 5159, providing that a defendant constructively summoned, who did not appear, may at any time within two years move to have the action retried, the term "defendant" is used in a limited sense, as meaning one who is a party

to an action against him in the style of the suit, whether it looks to a personal judgment or not. *McLain v. Duncan*, 20 S. W. 597, 599, 57 Ark. 49.

In a suit to foreclose a chattel mortgage which purported on its face to have been executed by defendant mortgagor, but where there were several defendants, a paragraph of a complaint alleging that complainant had such mortgage recorded in C. county, where defendant lived, did not amount to an allegation that it was recorded where the mortgagor lived. *Stengel v. Boyce*, 42 N. E. 905, 906, 143 Ind. 642.

A statement in the record that a cognovit actionem signed in the partnership name by one of the partners was proved to be executed by the defendants will be construed to mean that all the partners who were served with process assented to and authorized the execution of the instrument. *Hull v. Garner*, 31 Miss. 145.

Where one of several defendants filed a plea in abatement, a judgment quashing a declaration, and using the term "defendants" in the final order that defendants have execution, must be construed as referring only to the defendant that filed the plea in abatement. *Barnes v. Michigan Air Line R. Co.*, 54 Mich. 243, 245, 20 N. W. 36.

#### As answering defendant.

A statement in the record that, on the trial, counsel appeared for the defendants, will be presumed to mean for all the defendants who have answered. *Adamson v. Sunby*, 53 N. W. 761, 762, 51 Minn. 460.

#### Claimant in liquor forfeiture proceeding.

St. 1864, c. 121, § 1, providing that in all criminal prosecutions in which the defendant relies for his justification on any license, appointment, or authority, he shall prove the same, and until such proof the presumption shall be that he is not so authorized, should be construed to include the claimant who becomes a party to a proceeding for the forfeiture of intoxicating liquors illegally kept and intended for sale, who is a party to answer the charges in the complaint, and defend himself and his property against such charges. He has the same rights as to the rules of evidence and mode of trial and of appeal as other defendants in criminal cases. *Commonwealth v. Certain Intoxicating Liquors*, 122 Mass. 8, 11.

#### As claimant or respondent.

The term "defendants" in the Supreme Court rules in admiralty is used indifferently to represent the respondents in a suit in personam, or claimants who defend a suit in rem. *Atlantic Mut. Ins. Co. v. Alexandre* (U. S.) 16 Fed. 279, 281.

**Corporation.**

A statute authorizing the attachment of the goods of defendant, etc., includes a corporation as well as natural persons, as a corporation may be made a defendant equally with natural persons. *South Carolina R. Co. v. McDonald*, 5 Ga. 531, 535.

**As defendant in court.**

Where the judgment is against the defendants, the word "defendants" will be construed and regarded to mean the defendants who appeared or were served. *Neal v. Singleton*, 26 Ark. 491, 494.

"Defendant," as used in a verdict rendered by a jury against the defendant, means the defendant in court, and does not include a defendant not served with process, and not having appeared. *Storey v. Kerr*, 89 N. W. 601, 603, 2 Neb. (Unof.) 568.

A motion to discontinue, purporting to be made by the defendants, prima facie means the defendants served with process. *Pollard v. Huston*, 75 Tenn. (7 Lea) 689, 690.

The word "defendants," as used in the statement of a justice as follows, "Judgment against the defendants for" \$109.35, means those persons only on whom process had been served, and who were before the court, and does not embrace a party defendant who was not served with process, and who did not appear before the court. *Winchester v. Beardin*, 29 Tenn. (10 Humph.) 247, 251, 51 Am. Dec. 702.

**As each defendant.**

Comp. Laws 1879, p. 755, § 198, declaring that the defendant in every indictment or information shall be entitled to a peremptory challenge, means each defendant, where two or more are jointly charged in one information, and put on trial together. *State v. Durein*, 29 Kan. 688, 690.

Act Cong. March 3, 1863, § 5, provides that if a suit is commenced against any person for any arrest or imprisonment for wrongs done during the Rebellion by virtue or under color of any authority derived from the government, and the defendant shall at the time of entering his appearance file a petition stating the facts, verified by affidavit, the cause may be removed to the next Circuit Court of the United States in the district. The word "defendant" is to be understood in its distributive or personal sense, and not in its collective or party meaning, so that each party has the right alone to remove his cause. *Tod v. Fairfield County Court of Common Pleas*, 15 Ohio St. 377, 383.

**Effect of filing counterclaim.**

A nonresident plaintiff suing in the state court, against whom a counterclaim is brought, is a defendant, within the provisions of the act authorizing the removal of causes

from state to federal courts, which limit the right of removal to the defendant who is a citizen of another state than that in which the suit is brought, for a counterclaim creates a controversy in which the original plaintiff occupies the attitude of a defendant. This is in reality a cross-action, which often involves an inquiry into transactions wholly distinct from those which furnish the basis of the original suit, and for such cross-action a judgment may be rendered against the original plaintiff to any amount. *Carson & Rand Lumber Co. v. Holtzclaw* (U. S.) 39 Fed. 578, 580; *Walcott v. Watson* (U. S.) 46 Fed. 529, 530.

Technically, no doubt, the defendants who file a cross-complaint are plaintiffs therein; but even then there is no impropriety in designating them as defendants, in order to distinguish them from the plaintiff in the original complaint. It is as defendants they file their cross-complaint, and, if they were not defendants, they could not file any such pleading. *Lentz v. Martin*, 75 Ind. 228, 234.

**Garnishee.**

A statute authorizing the granting of an injunction when during the litigation it appears that the defendant in the action is doing or threatening to do some act in violation of the plaintiff's rights should be construed to include a garnishee, for, the proceedings against a garnishee being to all intents an action, such garnishee is a defendant in the action. *Malley v. Altman*, 14 Wis. 22, 25; *Almy v. Platt*, 16 Wis. 169, 173.

**As judgment or execution debtor.**

The word "defendant," as used in the act in relation to attachments issued out of justices' courts, shall be construed to mean the judgment or execution debtor. *Mills' Ann. St. Colo.* 1891, § 2745.

The word "defendant" in Gen. St. c. 211, § 14, means defendant in execution. *Ex parte Thayer*, 11 R. I. 160, 161.

The word "defendant" in Gen. St. c. 146, § 38, providing that, after the rendition of judgment in a civil action, if the execution has not been satisfied, the court or justice, upon the petition of the defendant, may order a stay or supersedeas of it, if the petitioner gives to the adverse party security for the prosecution of the review, refers to the party against whom the judgment sought to be reversed is rendered, and not to the defendant in the original action. *Leavitt v. Lyons*, 118 Mass. 470.

**Municipal corporation or state.**

Act Jan. 29, 1827 (Rev. Laws 1833, p. 145), authorized process in certain cases to issue against defendants residing in foreign countries. Held, that the word "defendant," as used in such a statute, applied to persons only, and, in the absence of specific mention,

states, counties, and municipal corporations are not included therein. *Schuyler County v. Mercer County*, 9 Ill. (4 Gilman) 20, 24.

Under Pub. St. c. 206, § 12, providing that a writ of attachment may be issued on an affidavit alleging that plaintiff has a claim against "defendant," etc., and the statute of construction (Id. c. 24, § 8), providing that the singular number shall include the plural, and vice versa, the word "defendant" in an affidavit for attachment will be construed to include parties defendant. *McMahon v. Perkins*, 46 Atl. 405, 22 R. I. 116.

The word "defendant," used in a judgment, has been decided to be a collective word, which may embrace, and should be understood to embrace, all the defendants who, as the record showed, might and should be embraced in the judgment. *Clagget v. Blanchard*, 38 Ky. (8 Dana) 41, 43.

#### As party defendant.

By the term "defendant," as used in the title relating to execution, is meant the party against whom judgment was rendered. *Rev. St. Tex. 1895*, art. 2334.

#### As party prosecuted.

The party prosecuted in a criminal action is designated as the defendant. *Comp. Laws N. M. 1897*, § 1045; *Rev. Codes N. D. 1899*, § 7748; *Code Cr. Proc. N. Y. 1908*, §§ 7, 950; *St. Okl. 1908*, § 5154.

The word "accused" is intended to refer to any person who in a legal manner is held to answer for any offense at any stage of the proceeding, or against whom complaint in a lawful manner is made, charging the commission of an offense, including all proceedings from the order for arrest to the final execution of the law; and the word "defendant" is used in the same sense. *Pen. Code Tex. 1895*, art. 25.

#### As real party.

A defendant, within the meaning of Act Cong. Feb. 10, 1855, providing for two judicial districts in Ohio, and that suits should be brought in the districts where the defendant resides, but that if there should be more than one defendant, and they should reside in different districts, the plaintiff might sue in either, is one who is a real, and not merely a nominal, party to the suit, and who has either directly or indirectly an interest adverse to the claim of the plaintiff, and may be in some way affected by the judgment or decree to be entered. Consequently, where, in an action by stockholders of a bank charging malfeasance and fraud in the directors of the institution, and seeking to make them individually liable to the stockholders, stockholders not alleged to have had any participation in the acts, and against whom no decree was asked, could not be named as defendants, so as to give the district court of the district in

which they reside jurisdiction of the cause. *Sackett's Harbor Bank v. Barry* (U. S.) 21 Fed. Cas. 133, 134.

Code, § 60, which provides that every action, other than certain ones named, must be brought in the county in which the defendant or some of the defendants reside, or may be summoned, means not nominal defendants, merely, but parties who have a real and substantial interest adverse to the plaintiff, and against whom substantial relief is sought. It means an actual defendant—one having an actual interest in the result of the suit, adverse to the plaintiff—and does not include a surety who has been discharged by an act of the plaintiff from liability on the instrument sued on. *Dunn v. Haines*, 23 N. W. 501, 17 Neb. 560.

Code, tit. 4, § 53, after enumerating certain actions, provides that every other action must be brought in the county in which the defendant, or some one of the defendants, reside. Section 58 provides that, where the action is rightfully brought in any county according to the provisions of title 4, a summons shall be issued to any other county against any one or more of the defendants at the plaintiff's request. Held to mean not the nominal defendants, merely, but parties who have a real and substantial interest adverse to the plaintiff, and against whom substantial relief is sought. *Allen v. Miller*, 11 Ohio St. 374, 378.

#### Surety.

The term "defendant," as used in Code, §§ 3103, 3128, relating to the right of a defendant to redeem from foreclosure, means the principal debtor, or person in whom is the legal, or possibly an equitable, title in and to the premises sought to be redeemed, and does not include a surety on a promissory note secured by the mortgage. *Miller v. Ayres*, 13 N. W. 436, 438, 59 Iowa, 424.

#### Vendee of execution defendant in foreclosure.

Under Code, § 3128, relating to redemption of lands, and providing that the rights of a defendant in relation to redemption are transferable, the vendee of an execution defendant is within the meaning of the term "defendant." *Robertson v. Moline, Milburn & Stoddard Co.*, 55 N. W. 495, 496, 88 Iowa, 463.

Code, § 3102, relating to redemption of mortgaged premises, provides that the defendant may redeem real property within one year from the day of sale, and will in the meantime be entitled to the possession of the property. But in no action where the defendant has taken an appeal or stayed execution shall he be entitled to redeem. Held, that the term "defendant," in the first sentence, means the person holding the right to the possession as the owner of the land.

which would include the vendee of the execution defendant. The person referred to and described as the defendant in the last sentence is the party to the suit, and does not include the vendee of the execution defendant. *Thayer v. Coldren*, 10 N. W. 300, 301, 57 Iowa, 110.

### DEFENDANT COMES NOT.

See "Comes Not."

### DEFENDANT'S CASE.

An order for the examination of a plaintiff, limiting the proposed examination to such subjects as might be material to the defendant's case, means the contributory negligence alleged in the answer, and sought to be established by the proposed examination. *Kelly v. Chicago & N. W. Ry. Co.*, 19 N. W. 521, 523, 60 Wis. 480.

### DEFENDANT'S COSTS.

"Defendant's costs," as used in a judgment in favor of plaintiff, reciting that the defendant's costs were a certain amount, means the costs which the defendant was to pay; the judgment being rendered for one bill of costs only. The costs that were adjudged against the defendant were not the costs which he had himself expended, but costs of the plaintiff. *Gulick v. Van Arsdalen*, 3 N. J. Law (2 Penning) 746, 747.

### DEFENDANT'S RIGHTS.

The Code of Criminal Procedure, directing the reversal of a judgment of conviction if the jury was charged on the weight of the evidence, though such charge be not excepted to, if it was calculated to injure the rights of the defendant, means "a right to an acquittal unless his guilt be established by competent evidence beyond a reasonable doubt; second, to have the law applicable to the evidence given in charge to the jury; and, third, to have the judge refrain from charging on the weight of the evidence and discussing the same." *Maddox v. State*, 12 Tex. App. 429.

### DEFENSE.

See "Affirmative Defense"; "Consistent Defenses"; "Equitable Defenses"; "Lawful Defense"; "Meritorious Defense"; "Partial Defense"; "Personal Defense."

Issuable defense, see "Issuable."

In law, defense is that which is offered and alleged by the party proceeded against in an action or suit as a reason, in law or fact, why the plaintiff should not recover or establish what he seeks—what is put forward to defeat an action. And it has also been defined as the denial of the truth or the validity of the complaint—a general assertion that

the plaintiff has no ground of action. *Whitfield v. Aetna Life Ins. Co.* (U. S.) 125 Fed. 269, 270.

A defense, in legal language, is a full answer to the whole or to some part of plaintiff's demand. *Wehle v. Butler* (N. Y.) 43 How. Prac. 5, 15, 12 Abb. Prac. (N. S.) 189, 148.

Defenses are of two classes: First, those which deny some material allegations on the part of the plaintiff; and, second, those which confess and avoid those allegations. *Donovan v. Main*, 77 N. Y. Supp. 229, 233, 74 App. Div. 44.

In Const. art. 9, § 15, providing that knowledge by an employé of defects in machinery shall be no defense to an action for injury caused thereby, etc., the word "defense" is not used in its technical sense. The words "shall be no defense to an action" are to be understood as meaning "shall not defeat an action." The Constitution did not intend to deal with pleadings, but with a principle of law. *Youngblood v. South Carolina & G. R. Co.*, 38 S. E. 232, 60 S. C. 9, 85 Am. St. Rep. 824. The object of the provision was to take from a defendant that failed to furnish suitable machinery the right to defeat an action by the employé by showing that he did not act with due care in voluntarily operating the machinery after knowledge of its defective condition. *Bodie v. Charleston & W. C. Ry. Co.*, 44 S. E. 943, 948, 66 S. C. 302.

"Defense," as used in a statute providing that no appeal shall be granted to remove a judgment rendered upon the verdict of a jury unless the party demanding the appeal shall file with his bond an affidavit, made by himself, stating that he believes he has a just, legal defense, is not to be construed as meaning merely an opposal or denial of the truth or validity of a complaint, so as to deny an appeal to a plaintiff, but as meaning matter which is a just and legal protection or guard against the judgment which has been rendered. *Miller v. Martin*, 3 N. J. Law (3 Holst.) 201, 204.

"The word 'defense' applies to every matter tending to diminish or entirely defeat the plaintiff's cause of action." *Baier v. Humpall*, 20 N. W. 108, 16 Neb. 127.

The phrase "sufficient to constitute a cause of action" as used in Rev. St. 1881, § 846, is not equivalent to the phrase "does not state facts sufficient to bar the plaintiff's action"; and hence a demurrer using the latter clause to state the ground therefor is insufficient. *Angaletos v. Meridian Nat. Bank of Indianapolis*, 31 N. E. 368, 4 Ind. App. 578.

### As cause of defense.

In a demurrer alleging that an answer does not state sufficient to constitute a defense to the plaintiff's action, the word "defense" sufficiently presents the question

whether the answer states a cause of defense, within the statute providing that, when the facts stated are not sufficient to state a cause of defense, the plaintiff may demur. *Lewellen v. Crane*, 15 N. E. 515, 517, 113 Ind. 289.

#### Counterclaim distinguished.

A counterclaim is not a defense, as the word is used in reference to pleadings. Thus, in section 500 of the Code of Civil Procedure it is provided that an answer may contain a statement of new matter constituting a defense or counterclaim, thus making a clear distinction between the two; and the definition of "counterclaim" as given in section 501 shows that it is not included in the term "defense." Hence a counterclaim cannot be stricken off as sham under a provision allowing a sham answer or defense to be stricken off on motion. *Baum's Castorine Co. v. Thomas*, 37 N. Y. Supp. 913, 92 Hun, 1.

A counterclaim cannot be stricken out as an irrelevant defense. It is not a defense. It is an affirmation of a cause of action against the plaintiff in the nature of a cross-action, upon which the defendant may have an affirmative judgment against the plaintiff. *Fettretch v. McKay*, 47 N. Y. 423, 427, 11 Abb. Prac. (N. S.) 453, 454.

A clear distinction between a defense and a counterclaim is that, when a defense is intended as a counterclaim, it should be explicitly so stated in the answer; and when the defendant defines his answer as a defense, and it is uncertain whether a counterclaim is intended, the answer should be construed and considered as his defense. *Lafond v. Lassere*, 56 N. Y. Supp. 459, 26 Misc. Rep. 77.

A defense denies the right to recover, and shows that plaintiff never had a cause of action, or that it has been discharged as by payment; but a counterclaim does not deny the cause of action, or plaintiff's right to recover thereon. A counterclaim will not prevent plaintiff from obtaining full credit for the amount due him, yet, if established, it affects his right of judgment. *Yarger v. Chicago, M. & St. P. Ry. Co.*, 43 N. W. 469, 78 Iowa, 650.

#### Conclusion of law.

A defense is a statement of new matter, viz., matter outside of the general issue sufficient to divide the balance cause of action. Code Civ. Proc. § 500. A statement of a conclusion of law does not constitute a defense. *Hicks v. New Jersey Car Spring & Rubber Co.*, 49 N. Y. Supp. 401, 22 Misc. Rep. 585.

#### Demurrer.

A demurrer is a defense, within Code Civ. Proc. § 3253, providing that in a difficult and extraordinary case, where a defense has been interposed, the court may award a fur-

ther sum, etc. *Vietor v. Halstead*, 14 N. Y. Supp. 516, 517, 60 Hun, 578.

When a person was sued at law, the purpose of the action was to obtain a judgment affecting his rights of person or property. He who attempted to defend against such action was called a "defendant," and the means employed to defend against such action were called his "defense." Originally the word "defense," as used in the common-law court, meant simply the denial of the truth of the declaration. Later it came to mean whatever was offered by the defendant as sufficient to defeat the cause of action stated in the declaration, offered by way of denial, justification, or confession and avoidance. He could defend by demurrer or by pleading matter of fact. *Jewett Car Co. v. Kirkpatrick Const. Co.* (U. S.) 107 Fed. 622, 624.

"Defense," as the term was used in the courts of common law, meant the means used by a defendant to defeat the suit of his adversary. "Originally the word 'defense,' as used in common-law courts, meant simply a denial of the truth of the declaration or complaint, but now it means that which is offered by a defendant as sufficient to defeat the complaint, by denying, justifying, or confessing and avoiding the action. The person sued could defend by demurrer or by interposing the matter of fact." *Brower v. Nellis*, 33 N. E. 672, 673, 6 Ind. App. 323.

#### Denial.

Strictly speaking, the word "defense" signifies an opposing or denial of the truth or validity of the complaint. *Stewart v. Travis* (N. Y.) 10 How. Prac. 148, 151 (citing 3 Bl. 290).

A defense, in law, is the denial of the truth or validity of the complaint. In other words, it is the denial of the truth of the complaint, or an admission of the truth, and a dispute of the continued existence, of the claim, by a plea of payment or discharge, and by way of mitigating the amount of the recovery by alleging facts in recoupment. *Cohn v. Hussen* (N. Y.) 66 How. Prac. 150, 151.

Code Civ. Proc. § 500, provides that the answer of the defendant must contain (1) a general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief; (2) a statement of any new matter constituting a defense or counterclaim in ordinary and concise language, without repetition. Under this section, it is held that a denial is not a defense. A defense may consist only of new matter, viz., matter outside the issue raised by a general or special denial. A denial is not a defense, and is mere surplusage not to be regarded. A defense may only contain new matter, viz., matter outside of the issue raised by a general or special denial. *Green v. Brown*, 49 N. Y. Supp. 163.

164, 22 Misc. Rep. 279; *Staten Island Midland R. Co. v. Hinchcliffe*, 70 N. Y. Supp. 601, 604, 34 Misc. Rep. 624; *Flack v. O'Brien*, 43 N. Y. Supp. 854, 855, 19 Misc. Rep. 399; *Meurer v. Brinkman*, 53 N. Y. Supp. 770, 25 Misc. Rep. 12; *Johnson v. Andrews*, 68 N. Y. Supp. 764, 765, 34 Misc. Rep. 89; *Durst v. Brooklyn Heights R. Co.*, 67 N. Y. Supp. 297, 298, 33 Misc. Rep. 124; *Von Hagen v. Waterbury Mfg. Co.*, 49 N. Y. Supp. 465, 22 Misc. Rep. 580; *McManus v. Western Assur. Co.*, 48 N. Y. Supp. 820, 825, 22 Misc. Rep. 269; *Galbraith v. Daily*, 74 N. Y. Supp. 837, 839, 37 Misc. Rep. 156; *Laurie v. Duer*, 61 N. Y. Supp. 930, 30 Misc. Rep. 154; *Tum Suden v. Jurgens*, 66 N. Y. Supp. 452, 453, 32 Misc. Rep. 660; *Cruikshank v. Press Pub. Co.*, 65 N. Y. Supp. 678, 680, 684, 32 Misc. Rep. 152; *Pascekwitz v. Richards*, 75 N. Y. Supp. 291, 293, 37 Misc. Rep. 250; *Carter v. Eighth Ward Bank*, 67 N. Y. Supp. 300, 303, 33 Misc. Rep. 128; *Burkert v. Bennett*, 71 N. Y. Supp. 144, 145, 35 Misc. Rep. 318.

A defense, in pleading, can only consist of matter which cannot be proved under a denial, and which, taking every allegation of the complaint to be true, nevertheless defeats the action. A defense is confession and avoidance. It is on the basis that, confessing the complaint to be true, the matter pleaded as a defense nevertheless avoids or defeats it. *Sanford v. Rhoads*, 80 N. Y. Supp. 404, 405, 39 Misc. Rep. 548. New matter is matter which is not embraced within the issues raised or which can be raised by denial; that is, it is matter which cannot be proved under a denial. A denial is not what is termed a "defense" in pleading, and never was. It is a confusion of ideas to call a denial a defense, when using the terminology of pleading. A denial only raises an issue on the complaint, whereas a defense consists of new matter which is a defense to the action, though the complaint be true. The sufficiency of a defense is tested by whether the new matter pleaded under it constitutes a defense to the action, taking all of the allegations of the complaint to be true. If it does not stand this test, it is demurrable for insufficiency. If there be anything in a defense which is not new matter, it is of no weight there whatever." *Staten Island Midland R. Co. v. Hinchcliffe*, 68 N. Y. Supp. 556, 557, 34 Misc. Rep. 49.

A defense, in pleading, is not a denial. It can be good at all only on the theory that the complaint is true in all of its allegations. That is the test of the sufficiency of a defense. *Soper v. St. Regis Paper Co.*, 77 N. Y. Supp. 896, 898, 38 Misc. Rep. 294.

"Defense," as the term is used in law, is the means used by the parties resisting an action at law to ward off or resist the attack of the plaintiff. As the term was originally used in common-law courts, it meant simply a denial of the truth of the declaration or

complaint. 3 Bl. Comm. 296; *Chit. Pl.* 423. But now it means that which is offered by a defendant as sufficient to defeat the complaint, by denying, justifying, or confessing and avoiding the action. The person sued could defend by demurrer or by interposing matter of fact. *Steph. Pl.* 82, 85. *Brower v. Nellis*, 33 N. E. 672, 673, 6 Ind. App. 323.

Defense is the denial of the truth or validity of the complaint, and does not merely signify a justification. It is a general assertion that the plaintiff has no ground of action, and which assertion is afterwards extended and maintained in the body of the plea. The word "defense" is a term of art. It comes from the Norman French, and was used in common-law pleading in the sense merely of "denial." *Cullen v. Woolverton*, 47 Atl. 626, 628, 65 N. J. Law, 279.

#### Equitable defense.

The phrase "the same defense," as used in Rev. St. p. 105, declaring that the nature of the defense of the obligor or maker of bonds or notes shall not be changed by assignment, but that he may make the same defense against the bond or note in the hands of the assignee that he might have made against the assignor; the defense was clearly intended to embrace equitable as well as legal defenses. The Court of Appeals of Virginia, in *Norton v. Rose*, 2 Wash. 233, so construed the act of the Virginia Assembly, and a similar statute in Kentucky was similarly construed, and the act held to save all equitable defenses which the obligor had against the obligee from being impaired or affected by the assignments. *Barton's Adm'rs v. Rector*, 7 Mo. 524, 526.

#### Matter in abatement.

2 Gav. & H. St. p. 283, applying to actions for the recovery of real estate, and providing that the answer shall contain a denial of each material statement or allegation in the complaint, under which denial the defendant shall be permitted to give in evidence every defense of the action which he may have, legal or equitable, includes every matter in bar of the action, whether of denial or of confession and avoidance, but not matter of abatement. The pendency of a prior action between the same parties for the same cause is no defense to a subsequent action, but is merely a reason why defendant in the subsequent action should not be compelled to make his defense therein. *Wilson v. Poole*, 33 Ind. 443, 449.

#### Mitigating circumstances.

On a demurrer to the answer in an action for libel, the question whether the circumstances which the answer alleges in mitigation of damages can be properly admitted in evidence cannot be considered, since such matter, which is pleaded only in mitigation of damages, is not a subject of demurrer at



all. It is only when the new matter in the answer is alleged as a defense to the action as a legal bar, in whole or in part, to the plaintiff's recovery, that a demurrer is necessary or proper. That mitigating circumstances are not a defense, in the proper sense of the term, is evident from the fact that, if pleaded alone, the answer would be struck out as frivolous, and the plaintiff would be entitled to an immediate judgment. *Newman v. Otto*, 10 N. Y. Leg. Obs. 14.

#### Partial defense.

"Defense," as used in Code, §§ 149, 150, which require an answer to contain a statement of any new matter constituting a defense, applies to matters which go to the partial as well as to the total extinguishment of the plaintiff's claim. *Foland v. Johnson* (N. Y.) 16 Abb. Prac. 235, 239.

A defense to an action or a cause of action, in the popular sense of the Code, is a right possessed by the defendant, arising out of the facts alleged in his pleadings, which either partially or wholly defeats the plaintiff's claim. Thus a right given to a railroad company of exemption from taxation is clearly, if established, defensive to the claim of the people for taxes. *Utah & N. Ry. Co. v. Crawford*, 1 Idaho, 770, 773.

#### As a plea of new matter.

A defense may consist only of new matter, viz., matter outside the issue raised by a general or special denial. *Green v. Brown*, 49 N. Y. Supp. 163, 164, 22 Misc. Rep. 279; *Staten Island Midland R. Co. v. Hinchcliffe*, 70 N. Y. Supp. 601, 604, 34 Misc. Rep. 624; *Flack v. O'Brien*, 43 N. Y. Supp. 854, 855, 19 Misc. Rep. 399; *Meurer v. Brinkman*, 53 N. Y. Supp. 770, 25 Misc. Rep. 12; *Johnson v. Andrews*, 68 N. Y. Supp. 764, 765, 34 Misc. Rep. 89; *Durst v. Brooklyn Heights R. Co.*, 67 N. Y. Supp. 297, 298, 33 Misc. Rep. 124; *Von Hagen v. Waterbury Mfg. Co.*, 49 N. Y. Supp. 465, 22 Misc. Rep. 580; *McManus v. Western Assur. Co.*, 48 N. Y. Supp. 820, 825, 22 Misc. Rep. 269; *Galbraith v. Daily*, 74 N. Y. Supp. 837, 839, 37 Misc. Rep. 156; *Laurie v. Duer*, 61 N. Y. Supp. 930, 30 Misc. Rep. 154; *Tum Suden v. Jurgens*, 66 N. Y. Supp. 452, 453, 32 Misc. Rep. 660; *Cruikshank v. Press Pub. Co.*, 65 N. Y. Supp. 678, 680, 684, 32 Misc. Rep. 152; *Pascekwitz v. Richards*, 75 N. Y. Supp. 291, 293, 37 Misc. Rep. 250; *Carter v. Elighth Ward Bank*, 67 N. Y. Supp. 300, 303, 33 Misc. Rep. 128; *Burkert v. Bennett*, 71 N. Y. Supp. 144, 145, 35 Misc. Rep. 318; *Strauss v. Union Cent. Life Ins. Co.*, 67 N. Y. Supp. 931, 932, 33 Misc. Rep. 571.

"Defense," in its legal sense, signifies not a justification, protection, or guard, but merely an opposing or denial of the truth or validity of the complaint. Gould on Pleadings says the term "defense" signifies, in the lan-

guage of pleading, not a justification, but resistance or denial, as is very manifest from the established form in which defense is made. In the less technical sense, the word "defense" is used as well in legal as in popular language to signify, not the cause or form in pleading, but the subject of the plea. Thus, in an action on contract, the defendant pleads infancy; to an action of trespass, license. Infancy, in the one case, and license, in the other, is called the defense. As used in Code, § 149, subd. 2, it is not to be construed in its legal, technical sense, but is used in reference to the statement of new matter; and the new matter so pleaded need not be a complete bar to the action, in order to be properly termed a defense, but a partial payment or set-off is a defense pro tanto. *Houghton v. Townsend* (N. Y.) 8 How. Prac. 441, 443.

The word "defense" is a term of art. It comes from the Norman French, and was used in common-law pleading in the sense merely of "denial." *Rap. & L. Law Dict.*; 1 Ch. Pl. 462. Any new matter, therefore, which confesses and avoids the plaintiff's cause of action, either in whole or in part, and so far denies it, ought to be pleaded as a defense, under Code Civ. Proc. Or. § 71, confining the answer to denials and new matter, and constituting a defense or counterclaim to be pleaded as a defense. Good faith and honesty of purpose would constitute such a defense in an action for willful trespass and conversion of timber growing on plaintiff's land, in which damages were sought for the value of the timber after it had been manufactured by defendants into lumber. *United States v. Ordway* (U. S.) 30 Fed. 30, 32.

#### As question to be tried.

Some distinction was made in early cases between the term "defense" and the term "question to be tried." But under the Code, providing that two or more actions in favor of the same defendant for causes of action which may be joined may be consolidated by the court, to authorize the consolidation the defense or question to be tried must be substantially the same in all the suits. There is no distinction between the terms "defense" and "question to be tried." *Perkins v. Merchants' Lithographing Co.*, 47 N. Y. Supp. 712, 713, 21 Misc. Rep. 516.

#### Set-off.

Set-off is a mode of defense by which the existence of a demand sued upon is in a certain sense admitted, but at the same time the defendant sets up a demand against the plaintiff to counterbalance it in whole or in part. *Merchants' Bank v. Schulenberg*, 54 Mich. 49, 51, 19 N. W. 741.

"Set-off" is a mode of defense essentially not a part connected with the remedy, and

hence set-off is not governed by the law of the forum. *Gallipolis Bank v. Trimble*, 45 Ky. (6 B. Mon.) 599, 601.

Set-off is a defense which goes not to the justice of plaintiff's demand, but sets up a demand against the plaintiff to counterbalance it in whole or in part. Civ. Code Ga. 1895, § 3745.

A set-off is but a defense to the action, and its office is to make an appropriation of money which the plaintiff owes the defendant to the discharge, in whole or in part, of the demand asserted in the suit. It can go no further than to defeat the action. It differs from a counterclaim only in the disposition made of the excess—if there be an excess—of the counterclaim over the sum due the plaintiff, and in allowing the defendant to have judgment for such excess. They are essentially alike in respect to the rules of pleading which are applicable to them. *Boyet v. Vaughan*, 79 N. C. 528, 531, 532.

The word "defense," as used in the statute relating to foreclosure of mechanics' liens, providing that the defendants shall have any defense the builder might have to any action on the contract, does not include a set-off. In strictness, set-off is not a defense at all, since it neither destroys the plaintiff's right of action, nor denies that the amount claimed is due. On the contrary, it passes these defenses for the purpose of exhibiting a cause of action against the plaintiff. This is not a defense. It is an adjustment. *Naylor v. Smith*, 44 Atl. 649, 650, 63 N. J. Law, 596.

## DEFIANCE.

By "defiance" as applied to possession is meant, of course, a possession unequivocally adverse. *Williams v. McGee* (S. C.) 1 Mills, Const. 85, 92.

## DEFICIENCY.

See "Casual Deficiency."  
Any deficiency, see "Any."

A "deficiency" is defined to be the "lack of a part." In re Village of Plattsburgh, 50 N. Y. Supp. 356, 361, 27 App. Div. 353 (citing Worcester Dict.).

"Deficiency," as used in the last clause of a will saying, "whether deficiency or surplusage, let it apply in either case pro rata to all according to the sum bequeathed," applies only to the personalty which would come into the hands of the executors in performance of the ordinary duty of administering the estate. *Bragaw v. Bolles*, 25 Atl. 947, 950, 51 N. J. Eq. (6 Dick.) 84.

In a contract whereby the obligors bound themselves that if on the foreclosure of a mortgage a deficiency should occur they

would pay the same, the word "deficiency" had a technical meaning, and signified that part of the debt or sum of money which the mortgage was made to secure, and which was not realized and collected from the subject mortgaged, and which is chargeable, under the practice of our courts, in the form of a judgment against the debtor. *Goldsmith v. Brown* (N. Y.) 85 Barb. 484, 492.

### In cargo.

A bill of lading stipulating that any damage or deficiency in cargo will be deducted from the balance of freight by the consignee refers to the cargo actually received, and not the cargo described in the bill of lading. *Merrick v. Nineteen Thousand Five Hundred and Fourteen Bushels of Wheat* (U. S.) 3 Fed. 340, 341.

A bill of lading providing that any deficiency in quantity will be deducted from the balance of freight due the captain means deficiency from the quantity referred to in the bill of lading. *Mayer v. Peck*, 28 N. Y. 590, 596.

## DEFICIT.

In a stipulation between the parties to a suit against the sureties on the official bond of a treasurer of a corporation, that between certain dates the deficit amounted to a certain sum, "deficit" means the excess of collections over disbursements as shown by the books of the corporation. The term "deficit" does not necessarily or ordinarily imply misapplication. Worcester gives its meaning as "want, deficiency in an account or a number"; Johnson gives its meaning as "want, deficiency"; and Webster defines it as "want, deficiency; as a deficit in the tax or revenue." *Mutual Loan & Building Ass'n v. Price*, 19 Fla. 127, 135.

## DEFILE.

Code 1878, § 3862, defines forcible "defilement" as taking any woman unlawfully and against her will, and by force and menace or duress compelling her to be "defiled"; and "to defile" here means "to pollute"; "to corrupt the chastity of"; "to debauch" or "to violate." "Violate" and "force" are synonymous with "ravish." *State v. Montgomery*, 45 N. W. 292, 293, 79 Iowa, 737 (citing Webster Dict.).

One of the definitions of the word "defile" given by Webster is "to corrupt the chastity of; to debauch; to violate." Absolute purity or cleanliness is not the basis of defilement in any of these definitions. That which is already impure or unclean may be defiled by making more impure or unclean. A prosecution for defilement will lie though previous chastity cannot be shown. *State v. Fernald*, 55 N. W. 534, 535, 88 Iowa, 553.

## DEFINE.

See "To be Defined."

Under the constitutional provision that Congress shall "define" and punish piracy, a reference to the law of nations by Congress for a definition of the crime is an exercise of the power, as Congress may as well define by using a term of a known and determinate meaning as by an express enumeration of all the particulars included in that term. *United States v. Smith*, 18 U. S. (5 Wheat.) 153, 160.

"Define," as used in the title of an act "to define the county line of E. county," was used in its enlarged and not restricted sense, and the word would permit the abandonment of an uncertain boundary line, and change it altogether. Numerous acts are passed by every legislature "defining" the jurisdiction of courts, "defining" the power of authorities, or "defining" boundary lines, and in all these cases the powers may be either enlarged or restricted. *Walters v. Richardson*, 20 S. W. 279, 280, 93 Ky. 374.

"Define," as used in the title to an act to "define" the judicial districts of the state, is broad, comprehensive, and general enough to include the formation of a new judicial district; for the word "define" is not used exclusively in the sense of making clear what was before unintelligible, ambiguous, or uncertain, though it has such a meaning, and then relates to something that had a prior existence. In re Board of Com'rs of Johnson County, 32 Pac. 850, 851, 4 Wyo. 133.

### As contract or bound.

The word "defined," as used in stating the legal proposition that subterranean waters can only be the subject of riparian rights when flowing in "defined" or known channels, means a contracted and bounded channel, though the course of the stream may be undefined by human knowledge. *Miller v. Black Rock Springs Imp. Co.*, 40 S. E. 27, 30, 99 Va. 747, 86 Am. St. Rep. 924; *City of Los Angeles v. Pomeroy*, 57 Pac. 585, 598, 124 Cal. 597.

Underground currents of water, which flow in channels, the course of which can be distinctly traced, are "defined" and known, within the meaning of the law, and governed by the same rules of law as streams flowing beneath the surface. *Meando Ditch Co. v. Adams*, 68 Pac. 431, 434, 29 Colo. 317.

The word "defined," as used in the phrase "defined channel," as applied to a subterranean stream of water, means a contracted and bounded channel. It is not meant that there must be a channel or fissure in the rock through which the water flows freely and rapidly, in order that there may be a defined subterranean stream, but simply that the water, whether moving slowly or rapidly, or passing through sand or gravel or porous

rock, must have the characteristics of a stream, in that it has a course, and a channel with definite bounds. *Huber v. Merkel*, 117 Wis. 355, 94 N. W. 354, 355, 62 L. R. A. 589.

### As enlarge or extend.

The word "define" may be, and frequently is, used in the sense of merely to make clear and certain what was before uncertain, ambiguous, or indefinite; but in legislation it is frequently used in the creation, enlarging, and extending the powers and duties of boards and officers, in defining certain offenses and providing punishment, and thus enlarging and extending the scope of the law, and it has this meaning when applied to the title of an act to define boundaries of a city. *People v. Bradley*, 36 Mich. 447, 452.

### As fix or establish.

According to the best lexicographers, "to define" means to determine the end or limit, as to define the extent of the kingdom or country, and by defining is meant determining the limits. For instance, towns are authorized to determine the number and define the limits of school districts within the same. There can be no doubt but "to define the limits" here means to determine, to fix, or establish the limits. *Gould v. Hutchins*, 10 Me. (1 Fairf.) 145, 154.

To define is to fix, establish, or prescribe authoritatively; so that a law which leaves to the voters of a municipal corporation to fix, establish, or prescribe the powers of the municipality does not define such powers, as required by the Constitution. *Boyd Paving & Contracting Co. v. Ward* (U. S.) 85 Fed. 27, 35, 23 C. C. A. 667.

A "power to define" is different from a power to grant or apportion; and, however far the meaning of the word "define" might be extended when the context clearly calls for extension, it is certain that when used with reference to a jurisdiction substantially described its meaning must be confined to fixing limits for the exercise of such jurisdiction, and cannot be extended to an alteration of its character. *Styles v. Tyler*, 30 Atl. 165, 172, 64 Conn. 432.

### As specify or designate.

The act of 1876 provided for submitting the question to the people of the several election districts of the county whether or not spirituous liquors should be sold therein, and required the result of the election in such districts to be certified, and returned to the judges of the circuit court of the county, and, if it appeared that either one or more election districts of the county had cast a majority of votes against the sale of liquors, then the judges should make a proclamation of the result of such election, defining therein

the district or districts, or whole county, as the case might be. Held, that "defining" should be construed as synonymous with "specifying" or "designating," and thus simply requiring the judges to particularize in the proclamation the district or districts casting a majority of votes in favor of the law, and not as requiring the judges after the election to make any new definition of the limits or boundaries of the election districts voting for the adoption of the law. *Higgins v. State*, 1 Atl. 876, 64 Md. 419.

## DEFINITE.

The statute requiring the filing of a succinct and definite statement of a claim against an estate is sufficiently complied with if the statement apprises the administrator or executor of the nature of the claim and the amount demanded, and shows enough to bar another action for the same demand. *Hyatt v. Bonham*, 49 N. E. 361, 362, 19 Ind. App. 256; *Woods v. Matlock*, 48 N. E. 384, 385, 19 Ind. App. 364.

## DEFINITE CHARITY.

Charities are definite where they describe their object in general terms indicative of the particular kind of good to be effected thereby, though the particular objects may be indefinite. *Jones v. Habersham* (U. S.) 13 Fed. Cas. 957, 967.

## DEFINITE FAILURE OF ISSUE.

Failure of issue is definite or indefinite. When the precise time for the failure of issue is fixed by the will, as in the case of a devise to Peter, but if he dies without issue living at the time of his death then to another, this is a failure of issue definite. An indefinite failure of issue is the very converse or opposite of this. It signifies a certain failure of issue whenever it may happen, without fixing any time, or a certain or definite period within which it may happen. *Bouv. Law Dict.* A devise of an estate for life, with remainder over, if the devisee dies without living issue, does not convey by implication any estate in remainder to such devisee; simply the remainder over is upon a definite failure of issue. *Woodlief v. Duckwall*, 19 Ohio Cir. Ct. R. 564, 566, 10 O. C. D. 686, 687.

A definite failure of issue is when a precise time is fixed for the failure of issue, as in the case where there is a devise to one, but, if he dies without issue or lawful issue living at the time of his death, then over. *Cain v. Robertson*, 61 N. E. 26, 27, 27 Ind. App. 198; *Huxford v. Milligan*, 50 Ind. 542, 546; *Moody v. Walker*, 3 Ark. (3 Pike) 147, 198; *Hall v. Chaffee*, 14 N. H. 215, 220; *Anderson v. Jackson* (N. Y.) 16 Johns. 382, 399, 8 Am. Dec. 330; *Downing v. Wherrin*, 19 N. H. 984, 49 Am. Dec. 139; *Vaughan v.*

*Dickes*, 20 Pa. (8 Harris) 509, 513. See, also, *Deihl v. King* (Pa.) 6 Serg. & R. 29, 32, 9 Am. Dec. 407.

## DEFINITE LOCATION.

A definite location of a right of way may be made by the actual construction of the road, though a profile map of the road has never been filed. *Jamestown & N. R. Co. v. Jones*, 20 Sup. Ct. 568, 570, 177 U. S. 125, 44 L. Ed. 698.

## DEFINITE PERIOD.

The words "definite period" in a contract of a ball player, authorizing his punishment for certain misconduct by reducing his pay for a definite period, means a period fixed by days or weeks or months. *Russell v. National Exhibition Co.*, 69 N. Y. Supp. 732, 735, 60 App. Div. 40.

Act 1840, providing that a married woman may cause her husband's life to be insured for her use "for any definite period," and that the insurance shall be payable to her in case of her surviving him, means an insurance for a limited period. *Brummer v. Cohn*, 86 N. Y. 11, 16, 40 Am. Rep. 503.

## DEFINITE QUANTITY.

In a specification of a patent, declaring that it relates to the recovery of precious metals from their solution by the use of a definite quantity of finely divided precipitating reagent in a state of agitation, the term "definite quantity" should not be limited in its meaning only to the amount of zinc dust necessary to properly precipitate the minerals, but may mean the certain amount needed in either case to properly produce the result, as distinguished from an indefinite or unlimited amount as was used in the older process. *De Lamar v. De Lamar Min. Co.* (U. S.) 110 Fed. 588, 542.

## DEFINITELY FIX.

A line of railroad is not "definitely fixed," within the meaning of an act granting lands on either side of such line to aid in its construction, so as to determine the exterior limits of the grant, and prevent the lands from being granted to or earned by another company, until it has been definitely located on the ground, and such location approved by the action of the company, so that it cannot thereafter be changed at its option, and a map of such location filed with the government in the usual and proper manner. The line of railroad must have ceased to be the subject of change at the mere volition of the railroad. *Southern Pac. R. Co. v. United States* (U. S.) 109 Fed. 913, 922, 48 O. C. A. 712; *United States v. Southern Pac. R. Co.*, Id.; *Kansas Pac. R. Co. v. Dunmeyer*, 5 Sup.

Ct. 566, 573, 113 U. S. 629, 28 L. Ed. 1122; *Walden v. Knevals*, 5 Sup. Ct. 898, 899, 114 U. S. 378, 29 L. Ed. 167; *United States v. McLaughlin* (U. S.) 30 Fed. 147, 148; *Smith v. Northern Pac. R. Co.* (U. S.) 58 Fed. 513, 515, 7 C. C. A. 397; *Van Wyck v. Knevals*, 1 Sup. Ct. 836, 837, 106 U. S. 360, 27 L. Ed. 201.

To "definitely fix" a line of railroad route, it is necessary that there shall be a survey and marking upon the ground as a fact notorious and easily observed. *Southern Pac. R. Co. v. United States* (U. S.) 69 Fed. 47, 54, 16 C. C. A. 114.

*United States Land Grant Act* March 3, 1857, providing that in case it should appear that the United States have, when the line or route of said road is "definitely fixed," sold any section or any part thereof, granted as aforesaid, so that the right of redemption is attached to the same, etc., refers to the time when the road is definitely located by a proper survey. *St. Paul & S. C. R. Co. v. Ward*, 49 N. W. 401, 403, 47 Minn. 40.

#### DEFINITELY LOCATE.

To "definitely locate" a line of railroad route it is necessary that there shall be a survey and marking upon the ground as a fact notorious and easily observed. *Southern Pac. R. Co. v. United States* (U. S.) 69 Fed. 47, 54, 16 C. C. A. 114.

#### DEFINITION.

Legal definitions are for the most part inductive generalizations derived from juridical experience, and, in order to be complete and adequate, they must sum up the results of all that experience, as they are to be found in the special cases that belong to the class to be defined. *Mickle's Adm'r v. Miles* (Pa.) 1 Grant, Cas. 820, 823.

"Definition," says Webster, is an explanation of the signification of a word, or of what a word is understood to express. *Taylor v. Palmer*, 31 Cal. 666, 687.

"Definitions differ in their character according to the nature of the thing to be defined. Words denoting real substances existing in nature, or any of the ordinary acts of the mind, are all to be explained and defined by stating the facts and circumstances that usually accompany or follow such things or acts. The word is made intelligible only by a description; by the enumeration of the attributes or circumstances in which it agrees or differs with other things of qualities somewhat similar. Thus, a name conveying an idea generalized from many individuals is defined and explained by describing the qualities ordinarily found in such individuals. It is so in the definitions of natural objects, which are rather descriptions than defini-

tions. It is often so in the definition of moral actions. It is never so as to words or phrases denoting any artificial and purely technical conceptions; ideas framed by the mind itself and not otherwise found in nature. Such words or ideas are susceptible of a strict definition. In the logical phrase, they are capable of an essential definition comprehending the whole meaning essential to the thing being what it is; and this for the obvious reason that the meaning of the word is man's own meaning, being the creation of his own mind, and he can state precisely all that is essential to it. It is otherwise of the works of God, which man can describe only as far as known to him. Every such definition must be but a description of qualities, and that necessarily imperfect, since every work of the Creator possesses innumerable qualities which no human description or definition can grasp. Strict and essential definitions can generally be given of the terms of positive jurisprudence, and particularly so in the extremely technical and artificial system of the ancient English law. This is remarkably the case, for instance, in regard to our common-law terms of real estate, as 'fee,' 'lease,' 'warranty,' 'grant,' 'covenant,' 'reversion,' 'remainder,' etc., all of which are defined precisely and essentially, not explained by mere attributes. Bodies corporate belong to that system." *Warner v. Beers* (N. Y.) 23 Wend. 103, 141.

The definition of a crime is an enumeration of the particular acts which are included by or under the name of such crimes. *Marvin v. State*, 19 Ind. 181, 184.

#### DEFINITIVE.

That which finally and completely ends and settles a controversy. *Black, Law Dict.*

A "definitive or certain sum of money," within the meaning of a statute imposing a duty on bonds given as security for the payment of a definitive or certain sum of money, not exceeding, etc., means the principal of the bond, to be ascertained from the bond itself, and does not include interest thereon. *Barker v. Smark*, 7 Mees. & W. 590, 592.

#### DEFINITIVE DECREE OR SENTENCE

The term "definitive sentence or decree," as used in Act March 29, 1832 (P. L. 213), providing that any person aggrieved by a definitive sentence or decree of the orphans' court may appeal to the Supreme Court, is synonymous with "final decree," and means the final result. "In one sense every decision or order of the court during the progress of a case may be called final. That particular step may not be retraced. Yet in law they are intermediate, or interlocutory, not final or definitive. A writ of error nor an appeal will not lie at each stage of the pro-

ceeding." An order awarding an inquest of partition is not a definitive sentence or decree, it being not necessarily more than the first step toward a valuation or appraisal, having none of the characteristics of a decree or sale, disturbing no right, settling no title, and authorizing no sale. *Appeal of Gesell*, 84 Pa. 238, 239.

Act March 27, 1713, § 9, authorizing an appeal from a "definitive sentence" or judgment passed by the orphans' court, should be construed to include an order of the orphans' court directing a sale of real estate for the payment of debts, it being an order condemning the property without any further hearing to be had on the subject, except to carry it fairly into execution. *Appeal of Hess (Pa.)* 1 Watts, 255, 257.

## DEFORCE—DEFORCEMENT.

The word "deforce" implies that the plaintiff had been in possession; but this word signifieth, says Lord Coke, to withhold lands or tenements from the rightful owner. *Phelps v. Baldwin*, 17 Conn. 209, 212 (citing *Co. Litt.* 331b).

"Deforcement" is a term of most general signification, and includes the holding of any lands or tenements of which another has right. In a declaration of dower it is unnecessary to aver either the seisin or possession of the husband or the deforcement of the demandant, and possession of the land by defendant, these being matters of defense which may be the subject of special pleas. *Foxworth v. White's Ex'r* (S. C.) 5 Strobr. 113, 115.

A deforcement is a wrongful withholding of lands from the rightful owner; in case of dower, a denial of the widow's rights. *Woodruff v. Brown*, 17 N. J. Law (2 Har.) 246, 269.

A deforcement of a widow's dower is the withholding of the dower by the heir or alienee. *Hopper v. Hopper*, 21 N. J. Law 543 (1 Zab.) 547 (citing 3 Bl. Comm. 172).

## DEFRAUD.

The term "defraud" means to deprive of right, either by obtaining something by deception or artifice, or by taking something wrongfully, without the knowledge or consent of the owner. *People v. Wiman*, 42 N. E. 408, 409, 148 N. Y. 29.

"To defraud is to withhold from another that which is justly due to him, or to deprive him of a right by deception or artifice." *Burdick v. Post* (N. Y.) 12 Barb. 168, 186.

"Defraud" is defined by the *Encyclopedia Dictionary* as meaning "to deprive of a right, by withholding from another, by in-

direction or device, that which he has a right to claim or obtain." *Deseret Nat. Bank v. Kidman*, 71 Pac. 873, 877, 25 Utah, 379, 95 Am. St. Rep. 856.

Walker explains the term "defraud" by the approximate terms signifying "to rob, to deprive, to cheat." *State v. Rickey*, 9 N. J. Law (4 Halst.) 298, 302.

The words "cheating" and "defrauding," of themselves, do not import an offense, and do not define an offense, unless effected by false tokens or pretenses. Pursuant to this construction of the words, it is held that an indictment for conspiracy to cheat and defraud must set out the false tokens and pretenses to be used in effecting the contemplated fraud. *Alderman v. People*, 4 Mich. 414, 424, 9 Am. Dec. 321.

In Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], punishing persons who conspire to defraud the United States in any manner, the word "defraud" not only signifies pecuniary fraud, but has the broad meaning of depriving another of a right by deception and artifice, so as to include a conspiracy by which one falsely impersonates another at a civil service examination, and makes a declaration sheet for the latter. *United States v. Curley* (U. S.) 122 Fed. 738, 740.

Rev. St. § 5440 [U. S. Comp. St. 1901, p. 3676], declares that if two or more persons conspire to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, all shall be liable to a penalty prescribed. Held, that the crime provided by such act was *sui generis*, consisting of two elements: A conspiracy, and an act done to effect or accomplish it. The purpose of the conspiracy must be either to commit a crime defined by any law of the United States, or to defraud the United States, and the doing of some act to carry such purpose into effect. To "defraud the United States in any manner or for any purpose" is a very comprehensive expression, and includes every conspiracy to deprive the United States, by misrepresentation or concealment of material facts, of any kind of property, or whatever might be legally due to it on account of taxes, duties, imports, excises, etc. *United States v. Owen* (U. S.) 32 Fed. 534, 537.

A statute providing that any contractor or subcontractor who shall purchase his materials on credit and represent at the time of such purchase that the same are to be used in a designated building or other improvement, and shall thereafter use or cause to be used the said materials in the construction of any building or improvement other than that designated, with intent to defraud the person from whom the materials were purchased, without first giving notice to such person, shall be guilty, etc., means with in-

tent to deprive the materialman of the lien on which he relied at the time of making the sales. *Simmons v. Carrier*, 60 Mo. 581, 585.

The phrase "intent to defraud" finds an excellent interpretation in *Chaffe v. Gill*, 43 La. Ann. 1054, 10 South. 361, in which we held that, as the property of the debtor is the common pledge of his creditors, every act done by the debtor with the intent of depriving his creditor of the eventual right he has upon the property of such debtor is illegal. *Standard Cotton Seed Oil Co. v. Mathegal*, 20 South. 713, 720, 48 La. Ann. 1321.

#### **As actually defraud.**

A statute providing that when any insolvent debtor has fraudulently concealed or fraudulently incumbered or disposed of any of his property with intent to cheat and defraud his creditors, the judge may direct the distribution of the debtor's property among his creditors on their filing releases, or without their filing releases, in his discretion, means to actually defraud, as distinguished from fraud in law. To bring a case within the statute, the act complained of must have been committed with the actual, corrupt, and dishonest design or purpose of cheating and defrauding. *Shotwell v. Nicollet Nat. Bank*, 45 N. W. 842, 843, 43 Minn. 389.

If the words "fraud," "defraud," "fraudulent," and "fraudulently," in the chapter relating to insolvency proceedings, Pub. St. c. 2020, §§ 27, 34, 37, 40, and 49, relate to actual fraud alone, it would be difficult to explain why the Legislature in another section of the same chapter used the word "fraudulent" to include fraud in law. If that had been the legislators' purpose, some equivocal indications of this would be expected. *Thompson v. Esty*, 45 Atl. 566, 571, 69 N. H. 35.

The word "defraud," as used in Rev. St. § 5480, as amended March 2, 1889 [U. S. Comp. St. 1901, p. 3696], punishing the sending of letters through the mail with intent to defraud, is used in its broad sense, and includes any artifice, trick, or scheme by which a man is induced to part with his money, either voluntarily, in hope of seeming benefit, or involuntarily through fear. It includes the scheme to defraud persons of their money by means of letters sent through the mail threatening to accuse the person of crime and disgraceful matters, which threats were not to be carried out if the money was paid as the price of silence. *United States v. Horman* (U. S.) 118 Fed. 780, 781.

#### **Advantage and damage implied.**

The word "defraud" in Rev. St. § 5209 [U. S. Comp. St. 1901, p. 3497], making it criminal for any officer, clerk, or agent to make any false entry in any book, report, or statement to the association with intent to

defraud or injure the association, etc., necessarily implies that advantage comes to the party defrauding, and corresponding damage to the party who is defrauded; but the word "injure" has no such application. It is used in designating an injury which may come to the party whose property is taken, without any reference to whether the party who converts is benefited or not. *United States v. Lee* (U. S.) 12 Fed. 816, 819.

"Defraud," as used in a criminal statute making an intent to defraud an ingredient of a crime, does not mean merely an intent to deprive one of personal property, but has a broader meaning, and extends to acts prejudicing the rights of another in any way. *State v. Boasso*, 38 La. Ann. 202, 206.

#### **Artifice or deception implied.**

While it is true that "defraud" generally implies artifice or deception, one may be defrauded of his property when he has been wrongfully deprived thereof. To deprive of something dishonestly is to defraud. It is not uncommon to speak of one as "defrauded" of his rights who has been wrongfully deprived of them by other means than trickery. The reward justly due one for services may be withheld, and in that sense he is "defrauded." To "defraud" implies or includes all acts, omissions, or concealments which involve a breach of legal or equitable duty, trust, or confidence generally imposed, and which are injurious to another, or by which an undue advantage is taken of another, so that under the statute making it a criminal offense to use the mails in any scheme or artifice to defraud, a plan to extort money from another by threatening to publish charges against him, accusing him of having committed crimes, unless the sum demanded is paid, is a scheme to defraud. *Horman v. United States* (U. S.) 116 Fed. 350, 354, 53 C. C. A. 570.

#### **Criminal intent.**

The word "fraud" imports guilty knowledge, and there is no possibility that an act of fraud can be committed without a fraudulent intent, so that a definition of "defraud" as to deprive of right, either by taking something by deception or artifice, or by taking something wrongfully without the knowledge or consent of the owner, is erroneous as not requiring criminal intent. *People v. Wiman*, 32 N. Y. Supp. 1037, 1044, 85 Hun. 320.

#### **Hinder or delay synonymous.**

The term "hinder and delay" is regarded as synonymous with the expression to "defraud." *Armstrong v. Ames*, 43 S. W. 302, 305, 17 Tex. Civ. App. 46; *Burdick v. Post* (N. Y.) 12 Barb. 168, 186.

To "defraud" means to deprive one of some right, interest, or property by deceitful

devices; to withhold from wrongfully; to cheat; and implies or includes all the acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscionable advantage is taken of another. Citing *Burdick v. Post* (N. Y.) 12 Barb. 186; *Burnham v. Brennan*, 42 N. Y. Super. Ct. (10 Jones & S.) 63. So that an affidavit that the mortgage was not given to delay or "defraud" the creditors of the mortgagor sufficiently complies with the statute providing that the affidavit shall state that the mortgage was not given to "hinder or delay" the creditors. *Petrovitzky v. Brigham*, 47 Pac. 666, 667, 14 Utah, 472.

"Defraud," as used in the phrase, "disturb, hinder, delay, or defraud creditors," is the most generic term of the four, and really includes all the others, since to "disturb, hinder, or delay" a creditor in the collection of his debts are only different modes of "defrauding" him of his rights, and these words are used merely as more specific statements of various forms of fraud. *Weber v. Mick*, 23 N. E. 646, 649, 131 Ill. 520.

In the law regarding fraudulent conveyances, the words "hinder," "delay," and "defraud" are not synonymous. A conveyance may be made with intent to hinder or delay, without an intent to absolutely defraud. Either intent is sufficient. A conveyance made by an embarrassed debtor with a view, which was known to the purchaser, to secure the property from attachment, is void, though honestly made, the debtor intending that all creditors should be paid in full. The debtor's property is, in theory of law, subject to immediate process issued at the instance of his creditors, and the debtor will not be permitted to hinder or delay them by any device which leaves it, or the avails of it, subject to his control and disposition; and it makes no difference that the debtor intends to apply the avails of it to the payment of his debts. *Edgell v. Smith*, 40 S. E. 402, 404, 50 W. Va. 349. See, also, *Crow v. Beardsley*, 68 Mo. 435, 439.

## DEGRAS.

The word "degras," as used in Customs Act 1897, par. 279, relating to wool grease, including that known commercially as "degras," or brown-wool grease, has had to some extent a generic meaning, and is not always limited to wool grease or its products; but, in the trade of the United States, "degras" and "brown-wool grease," found in that paragraph, have now like signification, and each is the equivalent of what is known as "wool grease." Brown grease is obtained by acidulating with mineral acids the suds from wool grease. *United States v. Leonard* (U. S.) 108 Fed. 42, 43, 47 C. C. A. 181.

## DEGREE.

"Degree," as used in the rule that an indictment should state the defendant's degree, means his rank in life. *State v. Bishop*, 15 Me. 122, 124.

The degree of kindred is established by the number of generations, and each generation is called a "degree." Civ. Code Mont. 1895, § 1855.

## DEHERISON.

See "Disherison."

## DEL CREDERE.

"Del credere" is a term of mercantile law, used to denote the agreement sometimes made by an agent or factor. He receives an additional compensation or commission, and therefore undertakes to insure to his principal the solvency of the purchaser." *Loeb v. Hellman*, 83 N. Y. 601, 603.

A "del credere agent" is one who undertakes to procure a particular person to deal with his principal, and, in consideration of an additional commission allowed him, guaranties the payment of all bills of goods purchased of his principal by such customer, and as such agent he is primarily liable to satisfy his principal the price of the goods sold. *Lewis v. Brehme*, 33 Md. 412, 424, 3 Am. Rep. 190.

A "del credere agreement" is an agreement by which "a factor, for a premium greater than is usual, becomes bound, when he sells the goods, to pay the price at all events. In *Grove v. Du Bois*, 1 Term R. 115, Lord Mansfield observes: 'It is an absolute agreement to the principal from the broker, and makes him liable in the first instance.'"  
*Leverick v. Meigs* (N. Y.) 1 Cow. 645, 663.

A "del credere commission" is an additional compensation allowed to a commission merchant or factor in consideration of his guarantying the payment to his principal of the debts due from the buyer for goods sold by such factor or commission merchant. *Duguid v. Edwards* (N. Y.) 50 Barb. 288, 296.

When a factor undertakes to guaranty to his principal the payment of the debt due by the buyer of the goods, he is said to receive a "del credere commission." *Ruffner v. Hewitt*, 7 W. Va. 585, 604.

## DELAY.

See "Accidental Delays"; "Unnecessary Delay"; "Unreasonable Delay"; "Vexatious Delay"; "Without Delay."

"Delay," as used in a contract exempting a telegraph company from all liability for



any delay, error, or remissness in sending a message, implies that the message was or would be sent at some time, but not sent or delivered promptly, and the company is not exempt from liability for a total failure to send and deliver a message. *Baldwin v. United States Tel. Co. (N. Y.) 54 Barb. 505, 512, 6 Abb. Prac. (N. S.) 405, 423.*

The term "delay," as used in the statute making void all transfers of property made with intent to delay, hinder, or defraud creditors, is to be taken in its legal or technical sense, and not in its literal sense. For instance, where the sole purpose of a debtor is to secure his creditors, and there is no intent to either delay or defraud others, although the natural result of it may be to delay other creditors, but whenever the purpose of a conveyance is to bring about such delay, then the law itself is violated, and the contract by which his property is transferred becomes tainted with legal fraud. *Monroe Mercantile Co. v. Arnold, 84 S. E. 176, 180, 108 Ga. 449.*

The delay contemplated by a statute providing that a conveyance with intent to "hinder and delay" creditors shall be deemed fraudulent has in it an element of fraud, and, if the delay be found in any case to be free from such element, then it is not of that character which under the statute vitiates conveyances. No creditor without a lien has the right to have the debt due him paid out of any particular property of the debtor. All creditors have the same right to have their debts paid out of the property of the debtor, unless by a contract with the debtor, or by legal process, one or more acquire a right to be paid out of the proceeds of some particular property, or to have some particular thing, by way of sale, in satisfaction of his or their debt. Every payment of a debt by a person unable to pay all his debts, whether the payment be made in money or property, tends, in a popular sense, to hinder or "delay," or it may be even to defeat, other creditors in the collection of their debts, the extent of the effect depending on the amount of indebtedness and the value of the debtor's property; but it has never been held that a payment, either with money or property, by an insolvent debtor, in the absence of a law declaring preferences invalid, was, within the meaning of the law, to hinder, "delay," or defraud other creditors. *Ellis v. Valentine, 65 Tex. 532, 547.*

#### Discrimination.

Rev. St. art. 4574, subd. 2, declares that every railroad company failing or refusing to receive or transport the tonnage and cars of any connecting line without delay or discrimination, as prescribed by the regulations of the railroad commission, shall be deemed guilty of unjust discrimination; and article 4575 imposes a penalty on any company guilty of discrimination. Held, that the

terms "delay" and "discrimination" were to be used as convertible, and that "delay" was "discrimination" within the terms of the statute; and hence, delay in a shipment having been admitted, it was proper to direct a verdict for plaintiff. *Gulf, O. & S. F. Ry. Co. v. Lone Star Salt Co., 63 S. W. 1025, 26 Tex. Civ. App. 531.*

#### As hinder.

See "Hinder."

### DELECTUS PERSONÆ.

Every partnership is founded in a "delectus personæ," which implies confidence and knowledge of the character, skill, and ability of the other associates, and their personal co-operation, advice, and aid in the management of the business. *Goodburn v. Stevens (Md.) 5 Gill, 1, 21.*

### DELEGATE.

See "Assembly of Delegates."

A "delegate," in its strict, literal, technical meaning, is a person sent and empowered to act for another; one deputed to represent another. Yet the Legislature, by its use in Gen. Laws 1893, c. 4, §§ 31, 33, 34, providing for nominations "by any assembly, or convention of delegates," did not intend to prohibit political parties from holding mass meetings for the nominations of candidates for office. The word in that connection should be construed in its more popular sense as being a regularly selected member of a regular party convention. *Manston v. McIntosh, 60 N. W. 672, 58 Minn. 525, 28 L. R. A. 605.*

### DELEGATED POWER.

A "delegated power" is an authority which one person transfers to another, and which in some cases that other cannot further transfer. *Crooke v. Kings County, 97 N. Y. 421, 441.*

### DELEGATION.

Delegation "is where a debtor obtains a release from his creditor by the substitution and acceptance of another who obliges himself to the creditor." *Adams v. Power, 48 Miss. 450, 451.*

### DELEGATION OF POWER.

There is a distinction between a delegation of power for public and for private purposes. Where the power is delegated for a mere private purpose, all the persons, if more than one, upon whom the authority is conferred, must unite and concur in the exercise. In cases of the delegation of a public authority to three or more persons, the as-

thority conferred may be exercised and performed by a majority of the whole. If the act to be done by virtue of such public authority requires the exercise of discretion and judgment—in other words, if it is a judicial act—the persons to whom the authority is delegated must meet and confer together, and be present when the act is performed; or, at least, a majority must meet, confer, and be present after all have been notified to attend. Where the act to be done is merely ministerial, a majority must concur and unite in the performance of the act, or they may act separately. *Perry v. Tynen* (N. Y.) 22 Barb. 137, 140.

## DELETERIOUS.

In a statute for the preservation of fish and other game, a provision that no person shall throw or deposit any dye stuff, coal tar, refuse from gashouses, sawdust, lime, or other deleterious substance into any river, pond, or stream, the adjective "deleterious" has the effect, and such was the intention in using the same, to limit and qualify the meaning of the previous general words of the paragraph. The common and generally accepted meaning of the word is having the power of destroying or extinguishing life; that which is destructive; poisonous; pernicious; as a deleterious plant or quality. Webster. The object and purpose of this statute is declared in its title, "For the Preservation of Fish and Other Game"; and the word "deleterious" must have some meaning given to it, for it has been used by the Legislature in describing the quality of the material which is prohibited from being thrown or deposited in the streams or lakes of the state, and unless the act done, though included in the general words of the statute, has the effect in some degree of destroying fish or game, no penalty is incurred. *Cartwright v. Canandaigua Gaslight Co.* (N. Y.) 32 Hun, 403, 406.

## DELIBERATE — DELIBERATION — DELIBERATELY.

See "Sedate Deliberate Mind."

The expression "deliberation," distinctly formed in the mind, used in the charge of a prosecution for murder, implies the absence of overpowering passion. *State v. Ah Mook*, 12 Nev. 369, 381.

It is a perversion of terms to apply the term "deliberate" to any act which is done under sudden impulse. *Nye v. People*, 35 Mich. 16, 19.

The essential element of "deliberation" in connection with homicide is that the homicide must have been committed in the furtherance of a formed design to gratify a feeling of revenge, or accomplish some other un-

lawful purpose. *State v. Furgerson*, 162 Mo. 668, 677, 68 S. W. 101 (citing *State v. Wiener*, 66 Mo. 13; *State v. Fairlamb*, 121 Mo. 187, 25 S. W. 895).

In an indictment charging murder, both the words "deliberation" and "premeditation" involve a prior purpose to do the act charged. *Aubrey v. State*, 35 S. W. 792, 62 Ark. 368.

"Deliberate" means to weigh in the mind; to consider the risks for and against; to consider maturely. *Milton v. State*, 6 Neb. 136, 143.

"Deliberately" means with careful consideration and deliberation; with full intent; not hastily or carelessly—as a "deliberately" formed purpose. *Ferguson v. State*, 35 S. W. 369, 370, 36 Tex. Cr. R. 60.

The words "deliberate and premeditated," as applied to murder in the statutes, are used in their natural and ordinary sense, intending to exclude from the operation of the death penalty murder committed on the impulse of the moment, without actual deliberation and premeditation, unless committed in perpetrating arson, robbery, or burglary. They were meant to distinguish between an act done with a murderous intent, with a purpose of mind to kill, and an act done upon sudden impulse, without meditation or murderous intent. *State v. Greenleaf*, 54 Atl. 38, 42, 71 N. H. 606 (citing *State v. Carr*, 53 Vt. 37).

"Deliberate" means formed with deliberation, in contradistinction to a sudden rash act. *Hawes v. State*, 7 South. 302, 304, 88 Ala. 37; *Martin v. State*, 25 South. 255, 257, 119 Ala. 1; *Mitchell v. State*, 60 Ala. 26, 28.

Deliberation is that act of the mind which examines and considers whether a contemplated act should or should not be done. *United States v. Kie* (U. S.) 26 Fed. Cas. 781, 782.

"Deliberation," according to Webster, means the act of deliberating, or of weighing and examining the reasons for and against a choice or measure; mature reflection. *Summerman v. State*, 17 N. W. 115, 14 Neb. 563.

"With deliberation" means, not hastily or rashly, but coolly and with careful consideration. *State v. Fiske*, 63 Conn. 388, 390, 28 Atl. 572.

The provision that every murder committed by means of poison or lying in wait, or by any other kind of wilful, "deliberate, and premeditated" killing, shall be deemed murder in the first degree, means that it is not only necessary that the accused shall plan, contrive, and scheme as to the means and manner of the commission of the deed, but that he shall consider different means of accomplishing the act. He must weigh the modes of consummation which his premeditation suggests, and determine which is the

most feasible. The word "deliberate" is derived from two Latin words, which mean literally "concerning" and "to weigh." When used as an adjective in the English, it means that the manner of the performance was determined upon after examination and reflection; that the consequence, chance, and means were weighed and carefully considered and estimated. The term "premeditated" literally means to plan, contrive, or scheme beforehand. *Craft v. State*, 3 Kan. 450, 481.

Pen. Code, § 1, declares that every person who purposely, but without deliberation, kills another, shall be guilty of murder in the second degree. Held, that the word "deliberation" means to weigh in the mind; to consider the reasons for and against, and consider maturely; to reflect on. *State v. Rutten*, 43 Pac. 80, 32, 13 Wash. 203.

"Deliberation" is the act of considering and weighing the reasons for and against a measure or act. An act to be deliberate must be done after consideration, weighing, and balancing in the mind its nature and consequences, as distinguished from an act done under sudden impulse, without thought or reflection, and without the approval of the will. *Commonwealth v. Perrier (Pa.)* 3 Phila. 229, 232.

**As with cool, considerate purpose.**

"Deliberately," as used in connection with the crime of murder, means with cool, considerate purpose. *State v. Yarborough*, 18 Pac. 474, 478, 39 Kan. 581.

**As in a cool state of blood.**

"Deliberation," when used to describe an element of crime, means in a cool state of blood, as opposed to a heated state. *State v. McDaniel*, 7 S. W. 634, 636, 94 Mo. 301.

"Deliberately" means in a cool state of blood, not in a heat of passion caused by some just or lawful case of provocation to passion. *State v. Taylor*, 71 S. W. 1005, 1008, 171 Mo. 465; *State v. Harper*, 149 Mo. 514, 520, 521, 51 S. W. 89, 91; *State v. Talbott*, 73 Mo. 347, 350; *State v. Ellis*, 74 Mo. 207, 220; *State v. Lewis*, 14 Mo. App. 191, 195; *State v. Privitt*, 75 S. W. 457, 459, 175 Mo. 207; *State v. Donnelly*, 32 S. W. 1124, 1125, 130 Mo. 642; *State v. Dickson*, 78 Mo. 438, 441; *State v. Schaefer*, 22 S. W. 447, 450, 116 Mo. 96; *State v. Landgraf*, 8 S. W. 237, 240, 95 Mo. 97, 6 Am. St. Rep. 26; *State v. Tettaton*, 60 S. W. 743, 748, 750, 159 Mo. 354; *State v. Stephens*, 10 S. W. 172, 175, 96 Mo. 637; *State v. Seaton*, 17 S. W. 169, 171, 106 Mo. 198. This definition differs from the instruction in *State v. Fairlamb*, 25 S. W. 895, 896, 121 Mo. 137, in that it defines the condition of the mind when the crime was committed. That is to say, the act was done in a cool state of the blood; whereas in the *Fairlamb Case* it was said deliberation meant

a cool state of the blood, having no reference whatever to the state of the mind, but relating wholly to the physical condition of the blood. *State v. David*, 33 S. W. 28, 29, 131 Mo. 380. The term "deliberate" does not so much import an act done after time for reflection, as a voluntary act, an act upon motive, purpose, and design, in contradistinction to acts done in the heat of passion, where reason and choice for the moment have no power or sway. *Republic v. Yamane*, 12 Hawaii. 189, 203.

"Deliberation" means in a cool state of blood, and it is usually characterized by what are ordinarily termed "cold-blooded" murders, such as proceed from deep malignity of heart, and are prompted by motives of revenge or gain. *State v. Spotted Hawk*, 55 Pac. 1026, 1036, 22 Mont. 33; *State v. Curtis*, 70 Mo. 594, 599 (citing *State v. Wleners*, 66 Mo. 13); *State v. Avery*, 21 S. W. 193, 197, 113 Mo. 475.

"Deliberately" means done in cold blood, and not in a sudden passion caused by a lawful or reasonable provocation. *State v. Sneed*, 4 S. W. 411, 412, 91 Mo. 552.

"Deliberately" does not mean brooded over or reflected upon for a week or a day or an hour; it does not mean an intent to kill executed by a person, not under the influence of a violent passion suddenly aroused; but is that, and that only, which is produced by what the law recognizes as a just cause of provocation, or of a lawful provocation. *State v. O'Hara*, 4 S. W. 422, 423, 92 Mo. 59.

An instruction on the question of murder in the first degree, that "'deliberately' means thought of beforehand; that the killing was done in a cool state of the blood"—is inaccurate. *State v. Andrew*, 76 Mo. 101, 105.

An instruction that "'deliberation' means the act of deliberating or weighing, and considering the reasons for and against, a choice and measure. In the sense which the word is here used, an act is done 'deliberately' or 'with deliberation' when it is done in cool blood, and not under the influence of violent passion, suddenly aroused by some real or supposed grievance. A person who does an act, not in the heat of sudden passion, but after having coolly weighed or considered the mode and means of its accomplishment, does it 'deliberately'"—is not erroneous. *Debney v. State*, 64 N. W. 446, 449, 45 Neb. 856, 34 L. R. A. 851.

"Deliberately," as used in an instruction in a trial for murder, means in a cool state of the blood, and that the defendant, while in that state, formed a design to kill. *State v. Sharp*, 71 Mo. 218, 221.

**As with cruel purpose.**

"Deliberately," as used with relation to homicide, means with cruel purpose. An-

thony v. State, 19 Tenn. (Meigs) 265, 277, 33 Am. Dec. 143.

**As with full and conscious knowledge.**

"Deliberately and premeditatedly" imply a degree of reflection; that the party must have had time to frame his design, and where an act is said to be done "deliberately and premeditatedly," as in the case of a homicide, it means an intent to take a life, with a full and conscious knowledge of the purpose to do so. *Jones v. Commonwealth*, 75 Pa. (25 P. F. Smith) 403, 406.

**As intentional.**

"A 'deliberate' use of a deadly weapon is an intentional use; a use that is the result of a resolution, purpose, or design, formed in the mind and reflected on, and not done in self-defense. It is only necessary that it be the act of the mind when the mind has had time to act without heat or passion." *State v. Abrams*, 8 Pac. 327, 332, 11 Or. 169.

A statute providing that murder in the first degree shall be imposed only where the killing was "deliberate or premeditated," or done in the perpetration of a felony, refers to the specific intent with which the act was done, and denotes the action of the mind, and involves the idea of thought and reflection; and to constitute murder in the first degree, the jury must find a specific intent to take life. *Kent v. People*, 9 Pac. 852, 858, 8 Colo. 563.

The presence of a specific intent to take life is not, standing alone, conclusive that the homicidal act was done with deliberation and premeditation. *State v. Bonofiglio*, 52 Atl. 712, 713, 67 N. J. Law, 239, 91 Am. St. Rep. 423.

"Deliberate and premeditated," as used in a definition of first-degree murder, means "a distinctly formed intent to kill, not in self-defense, and without adequate provocation. It requires the malice premeditation or aforethought of the common-law definition of murder to be, not a general malice, but a special malice that aims at the life of a person." *Keenan v. Commonwealth*, 44 Pa. (8 Wright) 55, 57, 84 Am. Dec. 414.

"'Murder without deliberation' means without sufficient thought to enable the person killing to form a distinct intention to kill." *People v. Halliday*, 17 Pac. 118, 123, 5 Utah, 467.

**Mind capable of conceiving a purpose implied.**

"Deliberate," within the meaning of an instruction that to constitute murder in the first degree the killing must be willful, deliberate, and premeditated, indicates the purpose formed in a mind capable of conceiving a purpose. *Clifford v. State*, 37 Atl. 1101, 1102, 60 N. J. Law, 287.

"By the use of the word 'deliberate' in describing a crime, the idea is conveyed that the perpetrator weighs the motives for the act and its consequences, the nature of the crime, or the things connected with his intention, with a view to a decision thereon; that he carefully considers all these, and that the act is not suddenly committed. It implies that the perpetrator must be capable of the exercise of such mental powers as are called into use by deliberation and the consideration and weighing of motives and consequences." *State v. Wells*, 1 N. J. Law (Coxe) 424, 427.

**Premeditate synonymous.**

"Deliberate," as used in a statutory definition of murder in the first degree, requiring the killing to be deliberate and premeditated, is synonymous with the term "premeditated" as there used. *State v. Lopez*, 15 Nev. 407, 414; *State v. Reed*, 23 S. W. 886, 889, 117 Mo. 604; *State v. Dale*, 18 S. W. 976, 108 Mo. 205; *Bower v. State*, 5 Mo. 364, 379, 32 Am. Dec. 325; *People v. Ah Choy*, 1 Idaho, 317, 319; *State v. Hobbs*, 17 S. E. 380, 386, 87 W. Va. 812.

The terms "malice aforethought," "deliberate design," and "premeditated design" are synonymous. *Hawthorne v. State*, 58 Miss. 778, 783.

The word "deliberately," as used in a definition of the offense of murder as that the act must have been done willfully, deliberately, and premeditatedly, is more comprehensive than the word "premeditatedly." "Premeditatedly" involves the idea of conception of revolving in the mind and thinking over in a passive sense, while "deliberation" carries with it the idea of planning, devising, scheming, and determining upon in the active sense, and ultimately the idea of pre-determined execution. The deliberation does not involve the idea of length of time. Any amount of deliberation will suffice if the circumstances show that there was time for reflection. That the murder was done "willfully and premeditatedly" renders the indictment insufficient. *Cannon v. State*, 31 S. W. 150, 153, 60 Ark. 564.

The terms "malice aforethought," "deliberation," and "premeditation" are synonymous; hence the omission of the word "deliberately," or its equivalent, in an indictment for murder in the first degree, is not fatal where the words "willfully" and "premeditatedly" are used. *Cannon v. State*, 32 S. W. 128, 129, 60 Ark. 564.

"Deliberation," as used in an instruction in a trial for murder, means prolonged premeditation; in other words, in law, deliberation is premeditation, in a cool state of the blood, or, where there has been heat or passion, it is premeditation continued beyond the period within which there has been time for the blood to cool in the given case. Hence

"deliberation" means more than premeditation; it is not only to think of beforehand, which may be but for an instant, but where the inclination to do the act is considered, weighed, pondered on for such a length of time after the provocation is given that there is a sufficient time for the blood to cool. One in a heat of passion may premeditate without deliberating, since deliberation can only be exercised in a cool state of the blood, while premeditation may be exercised in a heat of passion. *State v. Kotovsky*, 74 Mo. 247, 249.

An instruction that if a person had time to think, and did think, and, after having thought, he struck the blow as the result of a determination produced by the operation of the mind, then that would be a sufficient deliberation and premeditation, was held to be a correct definition of the adjectives "deliberate" and "premeditate." *Cleveland v. State*, 5 South. 428, 431, 86 Ala. 1.

"Deliberate," as used in a definition of murder in the first degree as the deliberate and premeditated killing of a person, is not synonymous with "premeditated," though no particular period of time is required for the deliberation. *People v. Mongane*, 1 N. Y. Cr. R. 411, 413.

#### No specific length of time implied.

The question as to the meaning of the terms "deliberation and premeditation," which a statute requires to constitute the crime of murder, has frequently been considered. In *People v. Majone*, 91 N. Y. 211, 212, the same question was under consideration, and Earl, J., said: "Under the statute, there must also be a deliberate and premeditated design to kill. Such design must precede the killing by some appreciable space of time. But the time need not be long. It must be sufficient for some reflection and consideration upon the matter, for choice to kill or not to kill, and for the formation of a definite purpose to kill. And when the time is sufficient for this, it matters not how brief it is. The human mind acts with celerity which it is sometimes impossible to measure, and whether a deliberate and premeditated design to kill was formed must be determined from all the circumstances of the case." *People v. Constantino*, 47 N. E. 37, 41, 153 N. Y. 24 (citing *People v. Conroy*, 97 N. Y. 62, 76, *People v. Hawkins*, 109 N. Y. 408, 17 N. E. 371, and *People v. Johnson*, 139 N. Y. 353, 34 N. E. 920).

An act performed in deliberation is the opposite of one performed in uncontrollable passion, which prevents deliberation or cool reflection in forming a purpose. *Davison v. People*, 90 Ill. 229; *Spies v. People*, 122 Ill. 1, 174, 12 N. E. 865, 17 N. E. 898, 3 Am. St. Rep. 320. While the deliberate intent necessary to malice aforethought must have been in the mind at the time of the killing,

it need not have been entertained for any considerable time. *Marzen v. People*, 50 N. E. 249, 255, 173 Ill. 43.

In an instruction in a prosecution for murder it was said that: "If an intention to kill exists, it is willful. If this intention be accompanied by such circumstances as evidence a mind fully conscious of the purpose designed, it is deliberate." It was held that this was a clear and explicit statement that, in order to constitute the act one of premeditated and deliberate malice, the intent to perform it preceded the performance, and that the mind must have beforehand considered it and determined upon it. It is, no doubt, true that the term "deliberation" requires some time for reflection, and that it is not sufficient that the intent to kill be formed simultaneously with the striking of the blow. *Simmerman v. State*, 14 Neb. 568, 17 N. W. 115; *Milton v. State*, 6 Neb. 136. But in the latter case it was said where a person has actually formed the purpose maliciously to kill another, and had deliberated and premeditated thereon before committing the offense, the length of time that intervened between the time such purpose is formed and its execution is not material. *Carleton v. State*, 61 N. W. 699, 712, 43 Neb. 373.

To constitute "deliberate and premeditated malice," the intent to do the injury must have been deliberated upon, and the design to do it formed, before the act was done, though it is not required that either should have been for any considerable time before. This supposes the party by reflection understood what he was about to do, and intended to do it in order to do the harm. *State v. Turner* (Ohio) *Wright*, 20, 30.

A "deliberate killing" is a killing in which the "intent or purpose is formed upon deliberation or consideration, and the deliberation or consideration need not be for any particular period of time. A moment is as effectual as an hour or a day." *People v. Pool*, 27 Cal. 572, 585.

"Deliberately" does not necessarily mean brooded over, or considered, or reflected on for a day or a week or an hour, but means an intention to kill, executed by a party not under the influence of a violent passion, suddenly aroused, amounting to a temporary dethronement of the reason, but in the furtherance of a formed design to gratify a feeling of revenge, or to accomplish some other unlawful purpose. *State v. Furgerson*, 63 S. W. 101, 104, 162 Mo. 668; *State v. Spotted Hawk*, 55 Pac. 1028, 1036, 22 Mont. 33.

An instruction, in a prosecution for murder, which stated that the jury should find the accused guilty of murder in the first degree, must find that deliberation and premeditation existed before the killing, but it did not matter for how short a time, so they

existed before the fatal blow was struck, is incomplete without explaining further what was meant by the terms "deliberation" and "premeditation." *State v. Foster*, 41 S. E. 284, 286, 180 N. C. 666, 89 Am. St. Rep. 876.

"Deliberately" does not mean brooded over, considered, or reflected upon for a week or a day or an hour, but it means an intent to kill, executed by one in a cool state of the blood, in furtherance of a formed design to gratify a feeling of revenge, or to accomplish some other object, and not under the influence of violent passion suddenly aroused by a real or supposed grievance suffered at the time. *State v. Fitzgerald*, 82 S. W. 1118, 1116, 130 Mo. 407; *State v. McKenzie*, 45 S. W. 1117, 144 Mo. 40; *State v. Gatlin*, 70 S. W. 885, 888, 170 Mo. 354; *State v. Ashcraft*, 70 S. W. 898, 900, 170 Mo. 409; *State v. McMullin*, 71 S. W. 221, 224, 170 Mo. 608; *State v. Fairlamb*, 25 S. W. 895, 897, 121 Mo. 187. The passion here referred to is that only which is produced by what the law recognizes as a just cause of provocation. *State v. Howell*, 28 S. W. 263, 267, 117 Mo. 307.

By "deliberately and with premeditation," in instructions defining murder, is not meant that any particular length of time need intervene between the formation of the purpose to kill and its execution. It is not necessary that the deliberation and premeditation should continue for a day, an hour, or a minute, but it is enough that the design to kill is fully and clearly received in the mind, and purposely and deliberately executed. *State v. Zdanowicz*, 55 Atl. 743, 746, 69 N. J. Law, 619.

"Deliberately" does not mean brooded over or contemplated upon for a week, a day, or an hour. No specified time need be shown for such deliberation; a moment will do as well as an hour. *State v. Seaton*, 17 S. W. 169, 171, 106 Mo. 198.

"Deliberate and premeditated malice" means a fixed design to unlawfully take human life, accompanied with some degree of reflection thereon, and the act of killing, which follows. The premeditation and reflection thereon may take place but a moment before the doing of the act, but both states of mind must have actually existed to make the offense murder in the first degree. *State v. Gin Pon*, 47 Pac. 961, 963, 16 Wash. 425.

By the term "deliberate and premeditated" is not meant that the killing must have been conceived or intended for any particular length of time; it is sufficient if it was done with reflection and conceived beforehand. *State v. Shuff* (Idaho) 72 Pac. 664, 668.

"Deliberate and premeditated," as used in Code, § 3725, defining murder, means only

this: that the slayer must intend before the blow is delivered, though it be only for an instant of time before, that he will strike at the time he does strike, and that death will be the result of the blow. *Daughdrill v. State*, 21 South. 878, 886, 113 Ala. 7.

The word "deliberate," as used in a discussion of murder relative to the deliberate intent to kill, etc., does not, in its legal acceptance, so much import an act done after time for reflection, as it imports a voluntary act, an act done on motive of purpose and design, in contradistinction to acts done in the heat of passion, a paroxysm of resentment, in which reason and choice for the moment have no agency. The books constantly speak in this connection of a "deliberate" act, however sudden, whereas, if deliberation implied time and reflection, a "deliberate" act could never be sudden. *Commonwealth v. York*, 50 Mass. (9 Metc.) 98, 107, 43 Am. Dec. 878.

#### Will power implied.

The terms "deliberately" and "willfully" necessarily imply a certain degree of will power. *State v. Maier*, 15 S. E. 991, 996, 86 W. Va. 757.

#### DELIBERATE CONVICTION.

"Deliberate conviction," as used by a juror with reference to a case on which he was called, was equivalent to the expression "fixed opinion," which, according to the modern authorities, is the test of qualification. *Allison v. Commonwealth*, 99 Pa. 17, 81.

#### DELIBERATING UPON THE ACCUSATION.

The phrase, "deliberating upon the accusation against the defendant," in Code Cr. Proc. art. 523, providing that an indictment may be set aside if any person unauthorized by law was present when the grand jury was deliberating upon the accusation against the defendant, is of the same meaning as the phrase "discussing the propriety of finding a bill of indictment" in article 394, providing that the state's attorney may come before the grand jury at any time except when they are discussing the propriety of finding a bill of indictment, etc. *Stuart v. State*, 34 S. W. 118, 35 Tex. Cr. R. 440. Thus the presence of an unauthorized person during the taking of the testimony is insufficient to authorize the setting aside of the indictment. *Sims v. State* (Tex.) 45 S. W. 705, 706.

#### DELIBERATIVE BODY.

The term "deliberative body" is properly applied to a town meeting which "acts as such in determining all matters that may lawfully be determined by it as any other deliberative body, except in the election of certain officers of the town, and except as to

matters, which by express law, the question to be determined by the electors of the town is required to be determined by a vote or ballot." *State v. Racine County*, 36 N. W. 399, 403, 70 Wis. 543.

## DELINEATION.

Act Sept. 26, 1888, c. 1039, 25 Stat. 496 [U. S. Comp. St. 1901, p. 2661], declares that all matter, otherwise mailable by law, upon the envelope or outside wrapper of which, or any postal card upon which, any "delineations" of an indecent or threatening character, calculated by the terms or style of display to reflect injuriously upon the character of another, may be written or printed, is nonmailable, etc. It was held that the term "delineations" signified representations expressed otherwise than by language, as by the use of figures, drawings, colors, etc., for the fact that a dunning letter is contained in the envelope may be expressed by a figure or other sign impressed upon it of a character recognized as conveying such expression by those who may see it. Such figure or sign is a "delineation" within the meaning of the statute. *United States v. Dodge* (U. S.) 70 Fed. 235, 236.

## DELINQUENCY.

"Delinquency," when applied to a merchant, cannot mean anything less than that he has proved to be dishonest and attempted to evade the payment of his debts. *Boyce v. Ewart* (S. C.) *Rice, Law*, 126, 140.

"Delinquency" is only another name for gross neglect to perform a lawful obligation, or willful default, either of which is a proper subject for penalties. To say that a taxpayer is delinquent merely because, without demand, he does not pay over more than \$6,000 of his money when he believes he does not owe more than \$3,000, and it afterwards turns out by judicial decree that he was right, is a misapplication of the term "delinquent." *Ferguson v. City of Pittsburgh*, 28 Atl. 118, 121, 159 Pa. 435.

A "delinquent" is defined in Webster's Dictionary to be "one falling in duty; offending by neglect of duty." The second definition is "one who fails to perform his duty; an offender or transgressor; one who commits a fault or crime." The innuendo to be gathered from the words in a book or pamphlet published by a retail grocers' association organized for the purpose of collecting bad debts, and called "Delinquent Book," means that the pages following contain the names of persons whom said association has found to be dishonest and unworthy of credit. *Cleveland Retail Grocers' Ass'n v. Exton*, 18 Ohio Cir. Ct. R. 321, 324, 10 O. C. D. 145, 148.

## DELINQUENT CHILD.

As used in the chapter relating to the juvenile court, the words "delinquent child" shall include any child under the age of 16 years who violates any law of this state or any city or village ordinance, or who is incorrigible, or who knowingly associates with thieves or vicious or immoral persons, or who is growing up in idleness or crime, or who knowingly frequents a house of ill fame, or who knowingly patronizes any policy shop or place where any gaming device is or shall be operated. *Bates' Ann. St. Ohio* 1904, § 548-58.

## DELINQUENT DEBTOR.

Section 3, subd. 5, of the act relating to assignments for the benefit of creditors, provides that the debtor should make an inventory of his property within a certain time after making the assignment, and, in case he shall fail to do so within such time, that the assignee shall then make a schedule, and that if he should fail to do so he shall be removed by the judge; and then further provides that "the books and papers of such delinquent debtor shall at all times be subject to the inspection and examination of any creditor. The county judge is authorized by order to require such debtor or assignor to allow such inspection or examination." Held that, by providing that the books and papers should "at all times be subject to inspection," an intention was expressed that the words "debtor" and "delinquent debtor" should be taken as synonymous with "assignor," and that such inspection might be made by a creditor prior to the refusal of the debtor to make the inventory, as well as after such refusal. *In re H. Herrmann Lumber Co.*, 48 N. Y. Supp. 509, 510, 21 App. Div. 514.

## DELINQUENT TAX.

"Delinquency of taxes" necessarily includes present obligation to pay, for such delinquency is the neglect of that obligation. *Chauncey v. Wass*, 30 N. W. 826, 830, 35 Minn. 1.

"To constitute a legal 'delinquent tax' on land, three things are necessary: (1) That the land is subject to taxation; (2) that a tax authorized by law has been levied on it in the manner provided by law; (3) that the tax remains unpaid after the time appointed by law for its payment. To make a tax delinquent each of these things must be shown; each is as essential as either of the others." *Chauncey v. Wass*, 30 N. W. 826, 830, 35 Minn. 1.

A tax is not an ordinary debt. It flows from the exercise of sovereign power, and is imposed without the consent of the debtor. The right to tax, and the terms of its exercise, are inseparable. Accordingly, a tax

cannot be called a "delinquent tax" until it has been assessed and placed upon the tax duplicate, in accordance with statutory provisions; and the statutes which provide for the assessing of penalties on taxes, which have been duly charged on the tax duplicate, and have not been paid by a certain date, do not confer authority for the assessment of penalties on taxes for past years, levied on property which has escaped assessment in such years. *Gallup v. Schmidt*, 56 N. E. 443, 450, 154 Ind. 196.

#### DELINQUENT TAXPAYER.

Taxation Act 1889, § 54, declares that the publication of notice of delinquent taxes shall be equivalent to personal notice on persons not personally served, and section 53 declares that the subpoena shall be personally served on the delinquent taxpayer if he can be found within the state, and, if he cannot be so found, the return of the officer shall so state. Held, that the term "delinquent taxpayer," as used in section 53, was intended to apply to and embrace persons against whom the tax was assessed and whose names appeared on the assessment roll, and did not include persons holding the title by virtue of a conveyance made after the assessment. *Fowler v. Campbell*, 59 N. W. 185, 186, 100 Mich. 398.

#### DELIRIUM.

Delirium is a fluctuating state of mind created by temporary excitement, in the absence of which, to be ascertained by the appearance of the patient, the patient is most commonly really sane. *Brodgen v. Brown*, 2 Add. 441, 443.

Delirium "is a temporary derangement of the mind, and is always preceded or attended by a feverish and highly diseased state of the body. It may vary in intensity from slight wanderings of the mind to more violent mental derangement, and it may be accompanied in a greater or less degree with stupor or insensibility." *Clark's Heirs v. Ellis*, 9 Or. 128, 132.

Delirium is that state of the mind in which it acts without being directed by the power of volition, which is wholly or partially suspended. This happens most perfectly in dreams. But what is commonly called "delirium" is always preceded or attended by a feverish and highly diseased state of the body. The patients in delirium are wholly unconscious of surrounding objects, or conceive them to be different from what they really are. Their thoughts seem to drift about, wildering and tossing amidst distracted dreams; and their observations, when they make them, as often happens, are wild and incoherent; or from excessive pain they sink into a low muttering or silent and

deathlike stupor. The law contemplates this species of mental derangement as an intellectual eclipse; as a darkness occasioned by a cloud of disease passing from the mind, which must soon terminate in health or in death. *Owings' Case (Md.)* 1 Bland, 370, 386, 17 Am. Dec. 311.

"Delirium" is defined as mental aberration or wandering of the mind. "Illness" is defined as a disorder of health; sickness. Under these definitions, where the deceased was suffering from violent pains in the head, which had continued for some time, and seemed to be wandering and distraught, there was at least ground for the conclusion that he was suffering from "delirium resulting from illness," within the meaning of a benefit certificate providing that the insurer should pay benefits of members who commit suicide in delirium resulting from illness. *Supreme Lodge Knights of Honor v. Lapp's Adm'x*, 74 S. W. 656, 657, 25 Ky. Law Rep. 74.

#### DELIRIUM TREMENS.

Authorities all agree that delirium tremens is a disease of a very distinct and strongly marked character, and as little liable to be mistaken as any known in medicine. The symptoms are: (1) Delirium taking the form of apprehensiveness on the part of the patient. He is fearful of something; fears pursuit by officers or foes. Sometimes demons and snakes are about him. In the earlier stages, in attempting to escape from his imaginary pursuers, he will attack others as well as injure himself. But he is much more apprehensive of receiving injury than desirous of inflicting it, except to escape. He is generally timid and irresolute, and easily pacified and controlled. (2) Sleeplessness. Delirium tremens cannot exist without this. (3) Tremulousness, especially of the hands, but showing itself in the limbs and the tongue. (4) After a time sleep occurs, and reason itself returns. *United States v. McGlue (U. S.)* 26 Fed. Cas. 1093, 1096.

"Delirium tremens" has an ordinary and accepted meaning, and is in common use by English-speaking people. Webster's definition is as follows: "A violent delirium induced by the excessive and prolonged use of intoxicating liquors." The Century Dictionary gives the following definition: "A disorder of the brain arising from an inordinate and protracted use of ardent spirits, and therefore almost peculiar to drunkards. Delirium is a constant symptom, but the tremor is not always conspicuously present. It is properly a disease of the nervous system." *Ætna Life Ins. Co. v. Deming*, 24 N. E. 86, 87, 123 Ind. 384.

A life policy which provided that the same should be void in case the insured should come to his "death by delirium tre-



mens" meant death by voluntary and habitual drunkenness. *St. Louis Mut. Life Ins. Co. v. Graves*, 69 Ky. (6 Bush) 268, 271.

"Delirium tremens" is a kind of insanity produced by alcoholism, caused by the breaking down of the person's system by long continued or habitual drunkenness, and brought on by abstinence from drink. It is called "settled insanity" to distinguish it from "temporary insanity," or drunkenness directly resulting from drink. *Evers v. State*, 20 S. W. 744, 748, 81 Tex. Cr. R. 818, 18 L. R. A. 421, 87 Am. St. Rep. 811.

#### As insanity.

See "Insane—Insanity."

#### As affecting responsibility for crime.

"Delirium tremens, though the result or consequence of continued intoxication, is insanity or a diseased state of the mind which affects responsibility for crime in the same way as insanity produced by any other cause." *Maconnehey v. State*, 5 Ohio St. 77, 78.

"Delirium tremens is a species of insanity, rendering the party incapable of committing a crime. Though usually occurring in habitual drinkers after a few days' total abstinence from spirituous liquors, it may result directly and immediately from drunkenness." *Erwin v. State*, 10 Tex. App. 700, 702.

Delirium tremens is the result of intemperance, and therefore in some sense is voluntarily brought on, yet it is distinguishable, and by the law is distinguished from that madness which sometimes accompanies drunkenness. If a person suffering from delirium tremens is so far insane as to render him irresponsible, the law does not punish him for any crime he may commit. But if a person commit a crime while intoxicated, the law punishes him however mad he may have been. *Carter v. State*, 12 Tex. 500, 508, 62 Am. Dec. 539.

## DELIVER—DELIVERY.

See "Absolute Delivery"; "Actual Delivery"; "Awaiting Delivery"; "Claim and Delivery"; "Conditional Delivery"; "Constructive Delivery"; "Immediate Delivery"; "Proper Delivery"; "Substituted Delivery"; "Symbolical Delivery."

Before delivery, see "Before."

A delivery is a transfer of the possession of property from the vendor to the vendee, and when so transferred from the seller to the buyer, or vendor to the vendee, the title vests and he becomes the owner. *Turner v. Moore*, 8 Atl. 467, 470, 58 Vt. 455.

"A delivery of a deed is in fact its tradition from the maker to the person to whom

it is made, or to some person for his use, and, if the person receiving it for another is authorized to do so, it is not only immediately the maker's deed, but it cannot be rejected by the grantee." *Kirk v. Turner*, 16 N. C. 14, 20.

The tradition or delivery is the transferring of the thing sold into the power and possession of the buyer. *Civ. Code La. 1900*, art. 2477.

"Delivery" signifies, as a popular word, mere tradition, but in legal phraseology means the final, absolute transfer to the grantee of a complete legal instrument, sealed by the grantor, covenantor, or obligor. *Black v. Shreve*, 18 N. J. Eq. (2 Beasli) 455, 461.

"Unfortunately the word 'delivery' is used in reports and lawbooks in two widely different senses. It is most frequently used in reference to the change of possession of a chattel, but sometimes it is used in reference to the change of property in a chattel which may in certain cases take place without any change of possession. In other words, this word 'delivery' is generally used to denote transfer of possession, but sometimes to denote transfer of title." *Blloyd v. Pollocks*, 27 W. Va. 76, 128, 129.

The use of the words "sell, exchange, and deliver" in an indictment for forgery, in place of the words used in the statute, "pass, utter, and publish," sufficiently describe the offense, for "selling, exchanging, and delivering" a bank bill or piece of money is, in common parlance, passing the bill or money. *State v. Mills*, 47 S. W. 963, 941, 146 Mo. 196 (citing *State v. Watson*, 65 Mo. 115).

"Deliver," as used in a lease of a widow's one-third of her husband's farm, in which the tenant agreed to deliver to the lessor a certain portion of all the produce raised thereon, means something more than to deposit the whole crop in a specified place. The lessor's portion must be secured. *Manwell v. Manwell's Estate*, 14 Vt. 14, 23.

A delivery of chattels necessarily presupposes three features, viz., chattels that are to be delivered, a party who is to make the delivery, and a party who is to accept or receive the delivery. Thus a judgment that plaintiff recover a specified sum, and that the sheriff take possession of chattels covered by the mortgage sued on, and sell the same and apply the proceeds in discharge of a money judgment, is not a judgment for the delivery of property, but a money judgment; so that an undertaking to pay the judgment, if confirmed upon appeal, is sufficient. *National Bank of Wahpeton v. Hanberg*, 87 N. W. 1006, 1007, 10 N. D. 383.

Merely placing goods in such a position that the carrier could easily have taken them, but without calling his attention to

them, is not sufficient to constitute a delivery. *O'Bannon v. Southern Exp. Co.*, 51 Ala. 481, 484.

What constitutes delivery in case of a sale depends on the nature and situation of the property. Asportation from the premises is never necessary. It is always sufficient if the agreement be definite and unconditional, and everything has been done in pursuance of it on the part of the vendor which might be necessary to identify the property and separate it from others, so that it may be known specifically what has been sold. *Little Rock & Ft. S. Ry. Co. v. Page*, 85 Ark. 304, 315.

#### As either actual or constructive.

The word "delivery," as applied to a deed, may be either actual or constructive, and any words showing an intention on the part of the grantor that the deed shall be considered as completely executed and the title conveyed is sufficient. *Tucker v. Allen*, 16 Kan. 312, 319.

A delivery is effected either by a manual transfer of the deed from the grantor to the grantee, or to some third party for his use, or by the doing of some act or saying something, or by both, whereby the grantor manifests an unequivocal intention to surrender the instrument so as to deprive himself of all authority over it, or have the right to recall it, and to consummate the conveyance. *Payne v. Hallgarth*, 54 Pac. 162, 164, 33 Or. 430.

The word "delivery," in the law of sales, may signify a delivery, either actual or constructive; but both forms of delivery contemplate the absolute giving up of the control and custody of the property on the part of the vendor, and the assumption of the same by the vendee. Whether such delivery has taken place depends on the facts of each particular case. *Brown v. Dickerson* (Del.), 42 Atl. 421, 422, 2 Marv. 119.

In *Caldwell v. Wilson* (S. C.) 2 Speers, 75, it was held that "delivery," in case of gift, is a transfer of possession, either by actual tradition from hand to hand, or by an expression of the donor's willingness that the donee should take when the chattel was present, and in a situation to be taken by either party. In *Beaver v. Beaver*, 117 N. Y. 422, 428, 22 N. E. 940, 941, 6 L. R. A. 403, 15 Am. St. Rep. 531, Andrews, J., says the delivery may be symbolical or actual; that is, by actually delivering the custody of the chattel to the donee, or giving to him the symbol which represents possession. *Liebe v. Battmann*, 54 Pac. 179, 180, 33 Or. 241, 72 Am. St. Rep. 705.

There are in law two kinds of delivery: That which is called "manual" or "actual" delivery, as when one of you sells a horse to another, and you hand him over—that is a

case of manual delivery. When one of you rents a house to another and hands him the key, he thereby delivers the house, and that is a "symbolical" delivery; so that if one person has a quantity of corn or wheat in a warehouse, and should sell it to another and hand over the warehouse receipts, it would be a complete delivery of the grain. *Edwards v. Hoeffinghoff* (U. S.) 88 Fed. 635, 641.

Delivery of a deed may be either actual, by doing something and saying nothing, or else verbal, by saying something and doing nothing, or it may be both. *Arrison v. Harmstead*, 2 Pa. (2 Barr) 191, 193; *Dwinell v. Bliss*, 5 Atl. 317, 318, 58 Vt. 353; *Bank of Healdsburg v. Bailhache*, 4 Pac. 106, 108, 65 Cal. 327; *McGrath v. Hyde* (Cal.) 21 Pac. 943, 949.

Delivery may be either actual or verbal, and if delivered by words no particular form of words is essential for such purpose; it is sufficient that there be an intention or assent of the mind to treat it as the deed of the grantor, to clothe it with the attributes of a legal instrument. *Byers v. McClanahan* (Md.) 6 Gill & J. 250, 256.

#### Actual manual delivery not essential.

What will amount to a delivery must depend upon the nature of the thing and the circumstances of the case. Actual manual delivery is not in all cases necessary. Where the thing is incapable of actual delivery, or where the situation of the parties and the circumstances of the case will not admit of it, it may be symbolical or constructive. There may be circumstances under which a gift may be complete and valid as between donor and donee without delivery; and the possession of the former will not be inconsistent with the right of the latter. So where a father procured a brand to be recorded in the name of his child, and branded certain cattle with the brand so recorded, with the avowed object of making a gift of the cattle to the child, it was held that there was a sufficient delivery to consummate the gift. *Hillebrant v. Brewer*, 6 Tex. 45, 49, 50, 55 Am. Dec. 757.

Actual manual delivery and change of possession are not required in order to constitute an effectual delivery, but whether there has been a delivery or not must be decided by determining what was the intention of the grantor, and by regarding the particular circumstances of the case. *Black v. Sharkey*, 37 Pac. 939, 104 Cal. 279.

To constitute a delivery of personal property, it is not always necessary that there should be an actual removal of the goods and a change of possession from hand to hand, but where, from the nature of the article, it could not be removed without great expense and inconvenience, an intention to

transfer the right of possession is a sufficient delivery. *Allen v. Smith*, 10 Mass. 308, 311.

Manual delivery of a deed is not always necessary to effectuate it. The delivery of a deed depends on the intent of the parties, and, though not in formal words, may be shown by circumstances. If the parties meet to make it, and read, sign, and acknowledge it without reservation, this amounts to a delivery. *Adams v. Baker*, 40 S. E. 356, 357, 50 W. Va. 249.

"Delivery" may be defined to be a word, act, or both combined, by which a grantor expresses a present intention to divest himself of title to property described in an appropriate deed. Manual delivery is not necessary, but in its absence the grantor must have, by some word expressed or act done, clearly indicated his intention at the time of its signing by him, or subsequently while the deed is in his possession, that the deed shall be considered as executed. *Fitzpatrick v. Brigman*, 30 South. 500, 501, 130 Ala. 450.

A manual delivery of a deed is not required, nor is the acceptance of the bodily possession of the paper itself. The delivery may be shown by acts without words, or words without acts, or both. Possession by the grantee is persuasive evidence of previous delivery. Delivery may be completed after the death of the grantor, and acceptance may be after the death of the grantee. In 18 states, including Kentucky, it has been held that manual delivery of the deed is not required. It is sufficient if from the facts, conduct, and expressed intention of the party it may be fairly gathered that the grantor intended to divest himself of the title by the instrument, and that the grantee intended to be thereby invested with the title so granted. *Shoptaw v. Ridgway's Adm'r* (Ky.) 60 S. W. 723, 724.

It is not necessary that there should be an actual handing over of the instrument to constitute a delivery, and it may be delivered by words without acts, or by acts without words, or by both acts and words. *Shep. Touch.* 58. A deed may be effectual to pass real estate though it be left in the custody of the grantor. Thus, if both parties be present, and the contract is to all appearances consummated without any conditions or qualifications annexed, it is still a complete and valid deed, notwithstanding it be left in the custody of the grantor. *Souver Bye v. Arden* (N. Y.) 1 Johns. Ch. 240; *Jones v. Jones*, 6 Conn. 111, 16 Am. Dec. 35; *Doe v. Knight*, 5 Barn. & C. 671; 4 Kent, Comm. 448. It is, however, necessary that there should be something evincing the intention. It must necessarily appear, if not from acts and express words, yet from circumstances at least, that there was the intention to part with the deed, and, of course, to pass the title. *Crawford v. Bertholf*, 1 N. J. Eq. (Saxt.) 458, 467.

### Acceptance implied.

To constitute the delivery of a deed there must not only be a delivery by the grantor, but an acceptance by the grantee. *Bank of Healdsburg v. Bailhache*, 4 Pac. 106, 65 Cal. 327. Acceptance by a grantee is an essential part of the delivery of a deed. *Powell v. Banks*, 48 S. W. 664, 667, 146 Mo. 620.

The term "delivery," when used in reference to a conveyance, implies acceptance. There may be delivery in escrow, and there may be transfer of manual possession for examination or other purposes, but without acceptance there is merely a tender. Delivery implies both tender and acceptance. *Tate v. Clement*, 35 Atl. 214, 176 Pa. 550.

A deed cannot be delivered without being accepted, and the word "delivery" includes acceptance, though there might be a mere manual delivery of a deed by some fraud which would not include an acceptance. Ordinarily, the averment that a deed was delivered implies that it was accepted. *Davenport v. Whisler*, 46 Iowa, 287.

A delivery of a deed is in fact its tradition from the maker to the person to whom it is made, or to some person for his use, for his acceptance is presumed until the contrary is shown. It being for his interest, the presumption is not that he will accept, but that he does. *Chapin v. Nott*, 67 N. E. 833, 834, 203 Ill. 341 (citing *Robbins v. Rascoe*, 120 N. C. 79, 26 S. E. 807, 38 L. R. A. 238, 58 Am. St. Rep. 774).

Where a bond was written and executed by one of the obligors in California, and the money then paid thereon by the obligee, and the bond was then sent to the other obligor in Nevada, who executed it and sent it to the obligee, the bond was delivered and took effect when it left the hands of the last obligor. Usually a bond must be accepted by the obligee before the delivery is completed, but where the obligee has paid the consideration for a bond already drawn, and it is thereafter executed and sent to him, there is a clear agreement to accept that bond when executed, and the delivery and acceptance both date from the moment that the bond is delivered by the obligor to some person or public conveyance to be taken to the obligee. *Alcalda v. Morales*, 3 Nev. 132, 136.

"Delivered," as used in the statute of frauds, providing that it shall embrace, among other contracts, those in relation to the sale of personal property when no part of the property is "delivered" and no part of the price paid, cannot be construed as synonymous with the terms "accept" and "receive," nor is it equivalent to the word "accepted." Goods may be delivered and not accepted, but, on the contrary, rejected as not corresponding to sample, or as otherwise con-

trary to the conditions of the contract. "Delivered" is equivalent to "received." Delivery alone, without acceptance, is sufficient to dispense with the necessity of writing. The delivery of the possession of goods is an open, feasible, and tangible act. It is a physical act manifesting the intention of the party. A sale, therefore, with delivery of possession, is a totally different thing from a sale by mere words. Delivery and possession accomplish every purpose of the statute, and the mere act of acceptance could add little or nothing to that purpose. Hence, as delivery of goods to a common carrier for conveyance to the buyer is such a delivery to the buyer through his agent, the carrier, as suffices to put an end to the vendor's lien, and constitutes an actual receipt by the purchaser, where there has been such a delivery the goods have been "delivered" to the purchaser within the statute of frauds, and the contract is binding on him. *Bullock v. Tschergi* (U. S.) 13 Fed. 345, 346.

The word "deliver" has many meanings, and what particular meaning among its many definitions is to be assigned to the word depends on the connection in which it is used. As used in an instruction, in an action against a city for injuries resulting from the negligent piling of lumber in a street, that if at the time defendant had a contract with any person to furnish it with lumber and deliver same, and such person did actually "deliver" and pile the lumber in the street, then the act was not the act of the city, and the latter is not liable for negligence of such person in placing the same in the street, unless it had notice thereof, etc., means the same as the word "placing" in the latter part of the instruction, and cannot be construed to involve acceptance, and therefore notice, by the city. *City of Evansville v. Senhenn*, 51 N. E. 88, 90, 151 Ind. 42, 41 L. R. A. 728, 68 Am. St. Rep. 218.

Delivery of a deed includes a surrender and an acceptance, both of which are necessary to its completion. This must be the result of contract, the meeting of two minds, the accord of two wills. The grantor must be willing and agree to deliver, and the grantee must be willing and consent to receive, and this accord of wills must be evinced in some way to show the unequivocal intention of both parties that the instrument shall take effect according to its purport and tenor. *Best v. Brown* (N. Y.) 25 Hun, 223, 224 (citing *Fisher v. Hall*, 41 N. Y. 416; *Brackett v. Barney*, 28 N. Y. 333). Delivery of a deed includes the surrender and acceptance. Both are necessary to the completion of the delivery. The grantor must be willing and agree to deliver, and the grantee must be willing and consent to receive, and this meeting of minds must be evidenced in some way to show the unequivocal intention of both parties that the instrument shall take effect according to its purport and tenor.

*Rousseau v. Blean*, 14 N. Y. Supp. 712, 716, 60 Hun, 259.

"Delivered," as used in How. Ann. St. § 2278, requiring a liquor bond to be filed with or delivered to the county treasurer, was not used in the legal sense of a delivery necessary to the execution of a contract, the duty of the treasurer in regard to it being merely clerical, as an act, not to give effect to the bond, but to make and perpetuate a record of it, he having no discretion in regard to the receipt and filing of it. *Brockway v. Petted*, 45 N. W. 61, 79 Mich. 620, 7 L. R. A. 740.

#### Acceptance by other than grantee.

Where a father, on purchasing and paying for two lots, had them conveyed to his two minor sons, the acceptance of the deed by the father for the sons was a sufficient delivery. *Rhea v. Bagley*, 38 S. W. 1039, 63 Ark. 374, 36 L. R. A. 86.

#### Change of possession implied.

The term "delivery," as used in the negotiable instruments law, means transfer of possession, actual or constructive, from one person to another. *Rev. Laws Mass.* 1902, p. 653, c. 73, § 207; *Rev. Codes N. D.* 1899, *Negotiable Instruments Law*, § 191, p. 1060; *Code Supp. Va.* 1898, § 2841a; *Ann. Codes & St. Or.* 1901, § 4592; *Bates' Ann. St. Ohio* 1904, § 3178.

A delivery of an article consists in handing the article to the person to whom the delivery is made. *Bellows v. Folsom*, 27 N. Y. Super. Ct. (4 Rob.) 43, 48.

Delivery may be either actual or constructive. It must divest the donor of possession and dominion over the thing given. It must be *secundum subjectam materiam*, and be the true and effectual way of obtaining the command and dominion of the subject. It depends to some extent on the character of the thing given and the relative situation of the parties. There must be a positive change of possession, and the donor must have put it out of his power to recall the gift or repossess himself of its subject-matter. *Crouse v. Judson*, 84 N. Y. Supp. 755, 757, 41 Misc. Rep. 338.

"Delivered" is sometimes used to mean a transfer of title, but sometimes a transfer of possession, and, in a deed declaring that the parties "have sold, conveyed, and delivered," does not necessarily imply that the actual possession of the property was delivered to the grantee. *Martin Browne Co. v. Morris*, 42 S. W. 423, 428, 1 Ind. T. 495.

"Deliver," as used in a return of the service of process reciting that the process was served by delivering to the defendant a true and certified copy of the same, means to transfer, as to deliver a letter from one person to the other, and imports an actual de-

livery or a delivery in fact, which is the transfer of the physical possession in esse. *Betts v. Boyd*, 45 N. W. 889, 890, 81 Neb. 815.

"Deliver," as used in Rev. St. § 3892 [U. S. Comp. St. 1901, p. 2657], inflicting a punishment on any person for the taking of mail out of the post office or branch post office, or from a letter or mail carrier, or which has been in any post office or branch post office, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it is directed, etc., means an actual manual delivery to the party addressed, or his authorized agent. The word "deliver" has perhaps as many different shades of meaning ascertained by judicial interpretation as any other term known to the law. As between carrier and consignee, delivery implies the mutual acts of the two. *United States v. McCready* (U. S.) 11 Fed. 225, 234, 237.

The term "delivery" is used in the law of sales in very different senses, being used in turn to denote transfer of title and transfer of possession. Where the parties have agreed, and the specific articles are appropriated and accepted, then, independent of the statute of frauds, it is often said there is sufficient delivery to pass the title, although there be no transfer of possession. *Morse v. Sherman*, 106 Mass. 430, 433.

To constitute a delivery, there must be a change of possession from the shipper to the carrier, and the former must relinquish all custody and control of the property for the time being, leaving exclusive possession to the carrier, in order to constitute a sale. *Roy v. Griffin*, 66 Pac. 120, 121, 26 Wash. 106.

Where a husband has formally executed a deed conveying property to his wife—that is, has signed such a deed with attested witnesses—as between them and their heirs, if nothing appears to the contrary, this will be sufficient evidence of a delivery, notwithstanding he may retain possession, as his possession of the deed and property is consistent with her right to it. *Brown v. Brown*, 61 Tex. 56, 60.

To constitute a good delivery of a gift *inter vivos*, there must be an actual change of possession, to the extent that the owner loses the dominion and control over it. *Shugart v. Shugart* (Tenn.) 76 S. W. 821, 822.

A "delivery," as the word is used in a bill of lading, is such a delivery as is required, in the case of a sale, in those systems of law and in those cases where a delivery is required to consummate a contract and operate a transfer of property. And in those cases it must include a transfer of legal possession, so as to exonerate the vendor or the person making the delivery from all the responsibilities attached to the possession, and to place the risk on the other party. There may be a constructive or symbolical delivery, in its legal

effects equivalent to an actual delivery, as the delivery of a raft of lumber lying in a lake or river by the vendor pointing it out to the sight of the vendee, or the delivery of goods in a warehouse by the delivery of the key, with a sufficient description of the goods. In these cases, though there is no passing the goods from hand to hand—"traditio"—there is a legal transfer of the possession, and the risk of the goods is shifted to the purchaser, or to the person to whom the delivery is made under any other contract, as much as though they had been actually been put into his hands. A "delivery," in the strict and proper sense of the word, seems to me always to imply this transfer of possession, actual or legal, and with it the rights and responsibilities attached to the possession. One consequence involved in this doctrine is that to complete the legal delivery there must be an acceptance, actual or implied. This, as I think, is the sense in which the word is used in bills of lading, and in the delivery of the goods. *Salmon Falls Mfg. Co. v. The Tangier* (U. S.) 21 Fed. Cas. 236, 237.

#### Change of title implied.

The ordinary test of delivery of a deed is, did the grantor by his acts or words, or both, intend to divest himself of the title to the estate described in the deed? If so, it is delivered. But if not, there is no delivery, and no title passes. In order to constitute a delivery, the grantor must absolutely part with the possession and control of the instrument. *Johnson v. Johnson*, 54 Atl. 578, 24 R. I. 571.

A bond given to secure the performance of an agreement "to deliver" certain personal property imports a delivery which is to pass the title, there being nothing in the character of the article or the attending circumstances to qualify the language used. *Shelton v. French*, 33 Conn. 489, 496.

The term "delivered," as used in Rev. St. 1878, § 1691, providing that any person who shall have paid or delivered any greater sum or value as interest than is allowed by law may recover treble the sum paid or value delivered, means such a delivery as passes the title to the party receiving the same. A delivery of the possession of land under an agreement to pass title would not constitute such a delivery. *Howe v. Carpenter*, 6 N. W. 357, 359, 49 Wis. 697.

The word "delivery" is used in law sometimes with reference to the passing of the property or the title, and sometimes to the change of possession. As used in a contract of sale of certain machinery for which the defendants gave old machinery and their notes, and payments and the notes were delivered to plaintiff's agent, who told defendants to leave the machinery on his farm till called for, there was a delivery of them as used in its first sense; that is, passing title.

*Robinson v. Berkey*, 82 N. W. 972, 973, 111 Iowa, 550.

"Delivery," in its legal sense, may denote a transfer of title to the thing sold, or it may mean a transfer of possession. In some cases between the parties, as well as between them and other persons affected by a complete contract and bargain and sale of goods, it may be necessary to consider whether the reciprocal obligation imposed by the terms of the sale on the seller and buyer have been enforced. In such cases delivery, whether actual or constructive, may be evidence of performance. *De Bary v. Souer* (U. S.) 101 Fed. 425, 428, 41 C. C. A. 417.

#### Consent of grantor essential.

To constitute a delivery, the deed should appear to have come into the possession of the grantee as a conveyance by the consent of the grantor. If a deed be placed in the hands of a grantee, not for the purpose of having it take effect as a deed, but for some other purpose, that is no delivery of it as a deed, and no title will be conveyed by it. *Rhodes v. School Dist. No. 14 in Gardiner*, 30 Me. (17 Shep.) 110, 112.

#### As deliver free from incumbrance.

A contract to build and deliver a vessel requires that it be built and actually delivered free from any valid lien or incumbrance growing out of acts of the builder. *The Revenue Cutter No. 2* (U. S.) 20 Fed. Cas. 568.

#### As deliver in exchange.

The word "deliver," as applied to coin or bank notes, means to deliver in exchange for something else, and is equally expressed by the words "sell," "exchange," or "pass." *State v. Watson*, 65 Mo. 115, 119.

#### Delivery by indorsement.

The delivery of the bill of lading of a car of wheat by indorsement in blank to the purchaser of the wheat is a sufficient delivery thereof to take the transaction out of the statute of frauds. *Wadhams & Co. v. Bal-four*, 51 Pac. 642, 645, 32 Or. 313.

#### Delivery by mail or to carrier.

A delivery of goods to a common carrier, consigned to a particular person without specific directions, different from ordinary usage, is constructively a delivery to the consignee. Where the vendee is the consignee, the delivery of goods to a common carrier, without qualifications, consigned to that vendee, is in law a constructive delivery to the consignee from the time of shipment and the commencement of the carriage. *Lake Shore & M. S. Ry. Co. v. National Live Stock Bank*, 53 N. E. 326, 328, 178 Ill. 506 (citing *Benj. Sales* [2d Am. Ed.] p. 649, par. 693; *Merchants' Dispatch Co. v. Smith*, 76 Ill. 542).

"Deliver," as used in Code Civ. Proc. § 1008, making it the duty of a justice of the peace, on demand, to deliver a certified transcript of his proceedings to the appellant, is not used in the sense of sending it by mail or messenger, but contemplates a delivery at the office of the justice on demand by the appellant. *Van Sant v. Francisco*, 73 N. W. 1086, 1087, 55 Neb. 650.

#### Delivery of receipt.

The indorsement and delivery by the bailor of a receipt for goods stored in a private warehouse, in which the bailee undertook to deliver the goods to the bailor upon the payment of charges, but not to hold or deliver to his order, is not such a delivery of the goods stored as is required by the statute of frauds, and does not pass the title in the goods to the indorsee, as against a creditor of the bailor, who attached the goods before notice of such indorsement had been given to the bailee. *Hallgarten v. Oldham*, 135 Mass. 1, 8-10, 46 Am. Rep. 433.

#### Delivery of sample.

Where goods are sold by sample, handing over the sample to the buyer does not amount to a delivery and acceptance of a part of the thing sold, so as to take the case out of the seventeenth section of the statute of frauds, but it is otherwise where the buyer draws samples from the bulk after he has purchased the goods. *Gardner v. Grout*, 2 C. B. (N. S.) 340, 343.

#### Delivery to third person.

*Bouvier* defines "delivery" as "the transfer of a deed from the grantor to the grantee, or some person acting in his behalf, in such a manner as to deprive the grantor of the right to recall it at his option." No particular form of delivery is required. A deed may be manually given by the grantor to the grantee, yet this is not necessary. The real test of delivery is, did the grantor, by his acts or words, or both, intend to divest himself of title? If so, the deed is delivered. And it is now well settled that a deed may be delivered to a third person for the grantee, and if subsequently assented to by the grantee, it will be as good a delivery as if handed to him in person; and any words or acts which show an intention to receive the title will be sufficient to prove that acceptance. The delivery of a deed by the grantor to a deputy clerk with directions to put it on record, to which the grantee assented by taking possession of the land conveyed, and listing it for taxation, was a delivery to the grantee. *Martin v. Bates*, 50 S. W. 38, 39, 20 Ky. Law Rep. 1798, 1800.

A deed need not be delivered to the grantee in person, but one delivered by the grantor to a third person to be delivered to the grantee, and by such third person delivered to the grantee, is effectually delivered.

Schreckhise v. Wiseman (Va.) 45 S. E. 745, 746.

A delivery to any third person, intended to make the conveyance operative, is a legal delivery. Where a deed is deposited with a third person, and the future delivery is to depend upon the payment of money or the performance of some other condition, it will be deemed an escrow. Where it is merely to await the lapse of time or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently. Still it will not take effect as a deed until the second delivery, but when thus delivered it will take effect by relation from the first delivery. Taft v. Taft, 26 N. W. 426, 428, 59 Mich. 185, 60 Am. Rep. 291.

Where the terms of a deed provided that it was to be delivered and recorded to the grantee on the death of both grantors, the immediate delivery of the deed to a third person, with instructions to hold the same and deliver it to the grantee upon the death of both grantors, was not a delivery violative of the terms of the deed, the delivery there spoken of meaning the actual delivery to the grantee for recording, and not referring to a delivery to a third party to see that such provision was carried out. When the grantor deposited the deed with a third person, and placed it beyond his control or recall, the deed was delivered. Meech v. Wilder, 89 N. W. 556, 557, 180 Mich. 29.

The placing of a note or other instrument in the hands of another, though the payee of the note, does not conclusively establish a delivery of the note or instrument, within the legal meaning of that word. Leaving a note with the payee's employé, as part of an offer to buy land from the payee, is not a delivery thereof. Gross v. Arnold, 52 N. E. 867, 868, 177 Ill. 575.

Where a deed at the time of its execution was delivered to the father of a child non compos mentis, for the benefit of such child, and with an intent to pass title, an acceptance of the conveyance will be presumed, and the delivery is complete. Eastham v. Powell, 11 S. W. 823, 824, 51 Ark. 530.

#### As equivalent to deliverable.

The term "delivered," as used in an offer to sell certain malt delivered on boat at a certain place, is not equivalent to the word "deliverable" on boat, as used in the acceptance of such offer. The words do not mean the same thing. They require or may require something to be done quite different, as one or the other should be exacted. If the defendant was only required to deliver on board, the operation was very simple. It only obliged the defendant to deposit the malt in the boat, necessitating but the single process of handling and weighing. But if the

plaintiff was uncertain as to whether he would have it delivered on the boat, that it might perchance be a good speculation to effect a sale to a third party, who might choose some other method of removal, this might and would require the defendant to separate and weigh the malt, and hold it ready for delivery in any manner, and perhaps at any time, the plaintiff might direct; and if the plaintiff, at some future, convenient season, should conclude to have it delivered on a boat provided by him, it would require the whole mass to be again weighed and delivered. Hence there was a variance between the terms of the offer and acceptance. Myers v. Smith (N. Y.) 48 Barb. 614, 634.

#### Executory agreement to deliver.

A mere executory agreement to deliver possession is not a delivery, either actual or symbolical, so that an assignment of a share of a crop by a landlord does not constitute a delivery of the crop, and hence amount to a chattel mortgage. Woodward v. Crump, 32 S. W. 195, 95 Tenn. (11 Pickle) 369.

#### Form or ceremony.

No particular form or ceremony is necessary to constitute delivery. It will be sufficient if a party testifies his intention in any manner—whether by action or by words—to deliver or put into possession of the other party, as if a party throw a deed upon a table with intent that it may be taken up by the other, who accordingly takes it, or if a stranger delivers with assent of the party to the deed. Tarlton v. Griggs, 42 S. E. 591, 592, 131 N. C. 216.

No particular act or formal ceremony is necessary to make a delivery in law. Any act done, coupled with intent to change the ownership, which has the effect of changing the dominion over the thing sold to the buyer, is a delivery. Dodge v. Jones, 14 Pac. 707, 708, 7 Mont. 121.

"No particular form is necessary to constitute the delivery of a deed. It may be by acts without words, or by words without acts, or by both. Anything which clearly manifests the intention of the grantor and the person to whom it is delivered that the deed shall presently become operative and effectual, that the grantor loses all control over it, and that by it the grantee is to become possessed of the estate, constitutes a sufficient delivery." Benneson v. Aiken, 102 Ill. 284, 287, 40 Am. Rep. 592.

"Delivery," in the legal sense, consists in the transfer of the possession and dominion. No formality, either of words or action, is prescribed by law as essential to the delivery, nor is it material how or when the deed came into the hands of the grantee. Whenever the grantor assents to the possession of the deed by the grantee as an instrument of title, then, and not until then, the delivery is

complete. *White v. White*, 55 Pac. 645, 647, 34 Or. 141.

The delivery of a deed is defined to be that part of the operation of executing the deed by which the grantor signifies his intention when and how it is to take effect. It is required by the law in order to demonstrate beyond doubt that the party making the deed meant it to be his act. No precise formulary is required. It is not necessary that there should be an actual handing over of the instrument to constitute a delivery. A deed may be delivered by doing something and saying nothing, or by saying something and doing nothing, or it may be by both. *Fain v. Smith*, 12 Pac. 365, 367, 14 Or. 82, 58 Am. Rep. 281.

Delivery may be consummated by an act without words, and so it may by words only, without any act of delivery. All the books are to this effect. *Shep. Touch.* 57, lays down the doctrine thus: "So, if I take the deed in my hand, and use these or the like words: 'Here, take it;' or, 'This will serve;' or, 'I deliver this as my deed;' or, 'I deliver it to you'—these are good deliveries." To the same effect is *Cruise's Dig. tit. "Deed," c. 2, § 51*: "A deed may be delivered by words without any act of delivery as if the writing sealed lies on the table, and the feoffor says to the feoffee, 'Go and take up the said writing. It is sufficient for you;' or, 'It will serve the turn,' or the like words—it is a sufficient delivery." So, in *Cro. Eliz. 7, Shelton's Case*: "A deed was sealed in presence of several and of the grantee himself, and read, but not delivered, nor did the grantee take it, but it was left behind them in the same place. The court said that the parties came for the purpose; it was left behind them and not countermanded, and is a good delivery in law." *Folly v. Vantuyt*, 9 N. J. Law (4 Halst.) 153, 162.

The delivery of a deed, in its legal sense, consists in the transfer of the possession and dominion. It is complete at the moment when the deed is in the hands or power of the grantee with the consent of the grantor, and with his intent that it should operate and inure as a muniment of title to the grantee. The grantee's presence at the time of delivery is not necessary, it being sufficient that the deed goes out of the hands or control of the grantor with his intent that it should go to those of the grantee, or that it ultimately does so. *O'Neal v. Brown*, 67 Ga. 707, 712 (citing 2 Greenl. *Cruise, Real Prop.* p. 42).

There is no precise or set form in which the delivery of a deed must be made. It may be delivered by words without acts, or by acts without words, or by both acts and words. After the writing has been executed, an intent, coupled with acts and words evincing such intent, to complete it, and to part absolutely with it and the right over it, is sufficient to give it legal existence as a

deed. The books are full of cases to such effect. *Woodward v. Woodward*, 8 N. J. Eq. (4 Halst. Ch.) 779, 784.

#### As give.

"Deliver," as used in *Sess. Laws* 1882, c. 107, pt. 6, § 4, providing that every licensed person who shall sell or deliver intoxicating liquor to any minor shall be fined, etc., is of the same import as the word "give." *State v. McMahon*, 5 Atl. 598, 598, 53 Conn. 407, 55 Am. Rep. 140.

#### As give birth to.

In a clause in a will providing that if a daughter "die without leaving any heir of her body, by her begotten and delivered," the word "delivered" indicates a parental and filial relation, so as to show that the word "heir" was limited to the children, and would not include the grandchildren. *Granger v. Granger*, 44 N. E. 189, 190, 147 Ind. 95, 86 L. R. A. 186, 190.

The word "delivered," when used in speaking of a woman being delivered of a child, means the birth of a live child only. *State v. Joiner*, 11 N. C. 350, 353.

#### As give up for safe-keeping.

In construing a statute relative to the issue of bonds by a township in aid of a railroad company, which provided that the bonds should be executed by the supervisor and clerk, and delivered by the person having charge of them to the State Treasurer, who should receipt therefor, and hold the same as trustee for the township and the company, to be disposed of by the said treasurer in the discharge of his trust as theretofore provided. It was said that the delivery which was to be made by the supervisor and clerk was clearly not the technical delivery needed to complete the bonds as negotiable instruments, because the power to hand over to the payee was not conceded to them in any event. The delivery which they were directed to make to the treasurer in his capacity of statutory trustee was only such as amounted to a giving up or the committing of them to the treasurer for safe-keeping. The word was used in its ordinary and popular sense, and not in the technical one. *Young v. Clarendon Tp.*, 10 Sup. Ct. 107, 110, 132 U. S. 840, 33 L. Ed. 356.

#### Intent.

The delivery of a deed is composed of two constituent parts—an intention to deliver, and an act evincing a purpose to part with the control of the instrument. *Johnson v. Johnson*, 22 S. E. 419, 423, 44 S. C. 364 (quoting from *Carrigan v. Byrd*, 23 S. C. 89).

Act and intention are the two elements or conditions essential to a delivery. This intent is to be gathered from the conduct of the parties—particularly the grantor—and all the surrounding circumstances. And



if, from all the circumstances in the case, it appears that the grantor by these acts intended to give effect and operation to the deed, and to relinquish all power and control over it, we think it clear the law would give the deed effect accordingly. In other words, such acts would, in law, amount to a delivery. *Slattery v. Keefe*, 66 N. E. 365, 366, 201 Ill. 483 (citing *Weber v. Christen*, 121 Ill. 91, 11 N. E. 893, 2 Am. St. Rep. 68).

Delivery of a deed depends on the intent of the parties, and, though not in formal words, may be shown by circumstances. Where the parties meet to make it, and read, sign, and acknowledge it without reservation, this amounts to delivery. *Delaplain v. Grubb*, 80 S. E. 201, 44 W. Va. 612, 67 Am. St. Rep. 788.

Delivery is a question of intention. The term signifies any manifestation whereby the grantor makes known his intention that the deed is complete and is to take effect. It is not necessary that there shall be any manual transfer of the instrument. *McGrath v. Hyde* (Cal.) 21 Pac. 948, 949; *Hastings v. Vaughn*, 5 Cal. 815, 816; *Whitney v. American Ins. Co.*, 59 Pac. 897, 898, 127 Cal. 464; *Hudson v. Redford* (Ky.) 67 S. W. 35, 36; *Brown v. Brown*, 61 Tex. 56, 60; *Dwinell v. Bliss*, 5 Atl. 317, 318, 58 Vt. 353; *Gross v. Arnold*, 52 N. E. 867, 868, 177 Ill. 575; *Bryan v. Wash*, 7 Ill. (2 Gilman) 557, 565.

What constitutes a sufficient delivery of a deed is largely matter of intention, and the usual test is, did the grantor, by his acts or words, or both, manifest an intention to make the instrument his deed, and thereby divest himself of title? It is not necessary that there should be a formal delivery, nor that the instrument should be delivered to the grantee in person. *Kelsa v. Graves*, 68 Pac. 607, 608, 64 Kan. 777.

To constitute a delivery of a deed, the obligor must part with dominion over the deed, with the intent that it must pass to the grantee. The intention of the grantor to part with dominion over the deed must appear from the facts of the case. When the grantor in a voluntary deed places it in the hands of a third person to be delivered at an indefinite time to the grantee, and, before the delivery thereof, such person returns the deed to the grantor, who destroys it, the presumption of law is against the delivery of such deed. *Davis v. Ellis*, 19 S. E. 399, 400, 39 W. Va. 226.

A delivery of a deed, either as an escrow or absolutely, is an act including intent. It may be by words without act, by an unequivocal act only, or by both combined. It is always a question of fact, resting in pais, to be found by a jury. *Lindsay v. Lindsay*, 11 Vt. 621, 626.

"Not every act of placing the deed in the hands of the grantor named therein is a de-

livery, either absolute or conditional—as, if the grantor placed the deed in the hands of such grantee to inspect, or to hand to another person to inspect, this is no delivery, and operates in no manner as a conveyance. To constitute a delivery, there must be intention to part with control over the deed as its owner." *Berry v. Anderson*, 22 Ind. 36, 39.

Delivery is an incident essential to the execution of a mortgage or other conveyance of real estate. No formality, no particular words, no certain acts, are essential to the valid delivery of a deed. The fact rests in intention, and it is to be collected from all the acts and declarations of the parties having relation to it. It may be actual by the transfer of a conveyance, signed and attested or acknowledged, from the manual possession of the mortgagor to the manual possession of the mortgagee, though not a word has been spoken; or it may be by saying something and doing nothing, as where the mortgage, signed and attested or acknowledged, is lying on the table, and the mortgagor should say, "There is your mortgage," or in any other words equally signifying the mortgagor's intention to part with dominion over it and to pass it to the mortgagee. *Arrington v. Arrington*, 26 South. 152, 154, 122 Ala. 510.

An intent to deliver a note is not equivalent to a delivery. *Montgomery v. Montgomery* (Tex.) 54 S. W. 414.

In *Dayton v. Newman*, 19 Pa. (7 Harris) 194, Justice Wood says delivery may be made by words alone, or by acts alone, or by both together, but there must be sufficient to show an intention to pass the title. A delivery of a deed is not shown where the grantor, after its execution, placed it in a satchel in his room, and gave no directions for its delivery, but said that he did not want the papers therein meddled with, and it was not taken therefrom until after his death. *Cameron v. Gray*, 52 Atl. 132, 134, 202 Pa. 566.

The recording of a deed raises a presumption of delivery, to be explained or rebutted by the intention of the party recording the deed. Any act presumptively a delivery will not be a delivery if the intent to make it such is wanting, or expressly negated by the acts or words of the grantor. *Stevens v. Castel*, 63 Mich. 111, 117, 29 N. W. 828.

Where parties consigned and executed a bond for the purpose of enabling another to get money, when they delivered it to him, and left it with him after having executed it, it was, so far as any act of theirs necessary to be done to fix their liability upon the bond, complete. *Haywood v. Townsend*, 88 N. Y. Supp. 517, 519, 4 App. Div. 246.

#### As load and store on board.

Where a charter party provided that the charterer was to bring the cargo alongside

the vessel and load it, and furnish all the appliances necessary therefor, except the steam for raising it into the vessel, and that demurrage should be charged for delay in delivery of the cargo to the vessel after the specified time, the delivery referred to is the complete and final delivery, not merely alongside, but to the vessel, which did not occur until the cargo was loaded and stowed. *Baldwin v. Sullivan Timber Co.*, 86 N. E. 1060, 1061, 142 N. Y. 290.

#### More than one act implied.

Acts 1891, c. 290, § 1, making it a misdemeanor for any person to sell or deliver any tickets issued by a railroad, unless he be a duly authorized agent, meant to engage in the business of selling or buying and selling such tickets, and did not imply a single sale, but a multiplicity of such sales, in the sense of a business. *State v. Ray*, 14 S. E. 83, 84, 109 N. C. 736, 14 L. R. A. 529.

#### Notice.

When property sold in good faith is at the time in the custody of a third person, notice to him of the sale is sufficient to constitute a delivery as to subsequent purchasers or attaching creditors. *Lufkins v. Collins*, 7 Pac. 95, 96, 2 Idaho (Hash.) 150.

#### Parting with dominion or control over implied.

Delivery is the absolute transfer of a deed properly executed to the grantee in such manner that it cannot be recalled by the grantor. *Byers v. McClanahan (Md.)* 6 Gill & J. 250, 256.

Delivery of a deed is such an act of the grantor touching its execution as deprives him of the power of controlling its operation, and confers on the grantee the right to enforce it, even against the will and pleasure of the grantor. It need not be delivered to the grantee. It may be delivered to a stranger for his use, even though the grantee did not know of its existence until the grantor's death. Nor need it remain in the possession of a stranger or grantee. It will be valid if it remains in the hands of the grantor, providing it be signed, sealed, and declared by the grantor, in the presence of the attesting witnesses, to be delivered as his deed, and providing there be nothing to qualify the delivery. But the test is: Can the grantee at any time and in any way get possession of it? Can he enforce it against the will of the grantor? Did the grantor intend that at all events and immediately it should operate? And could the grantee have filed a bill to take the instrument into safe custody? *Roosevelt v. Carow (N. Y.)* 6 Barb. 190, 195.

Delivery is a word, act, or both combined, by which a grantor expresses a present intention to divest himself of title to property described in an appropriate deed. It is

a transfer of the deed from the grantor to the grantee, or some person acting in his behalf, in such manner as to deprive the grantor of the right to recall it at his option. *Dyer v. Skadan*, 87 N. W. 277, 278, 128 Mich. 348, 92 Am. St. Rep. 461.

To constitute a good delivery, the grantor must divest himself of all power and dominion over the deed. *Dagley v. Black*, 64 N. E. 275, 276, 197 Ill. 53; *Prutsman v. Baker*, 30 Wis. 644, 646, 11 Am. Rep. 592. Until then the instrument passes nothing. It is merely ambulatory and gives no title. So long as it is in the hands of a depository, subject to be recalled by the grantor at any time, the grantee has no right to it, and can acquire none; but, if the grantor dies without parting with his control over the deed, it has not been delivered during his life, and after his decease no one can have the power to deliver it. *Cook v. Brown*, 84 N. H. 460. Thus the leaving by assured with the agent of an insurance company of one of the duplicate copies of the assignment of a life policy is not a delivery to a third person for the benefit of the assignee, but merely compliance with the condition of the policy requiring, in case of assignment, the copy thereof to be furnished to the company to make it valid. *Weaver v. Weaver*, 55 N. E. 338, 339, 182 Ill. 287, 74 Am. St. Rep. 173. To do this, he must part with the possession of the deed, and all right and authority to control it, either finally and forever, as where it is given over to the grantee himself, or to some person for him, which is called an absolute delivery, or otherwise he must part with all present or temporary right of possession and control until the happening of some future event or the performance of some future condition, upon the happening or not happening or performance or nonperformance of which his right of possession may return, and his dominion and power over the deed be restored, in which case the delivery is said to be contingent or conditional. An essential characteristic and indispensable feature of every delivery, whether absolute or conditional, is that there must be a parting with the possession and of the power and control over the deed by the grantor, for the benefit of the grantee, at the time of delivery. *Prutsman v. Baker*, 30 Wis. 644, 646, 11 Am. Rep. 592.

A deed may be deposited with the grantee or handed to him for any other purpose than as the deed of the grantor, or as an effective instrument between the parties, without becoming at all operative as a deed. *Ford v. James (N. Y.)* 2 Abb. Dec. 159, 163; *Denis v. Velati*, 31 Pac. 1, 2, 96 Cal. 223. So there was no delivery where an owner of hogs, who agreed to sell them at a certain price per hundredweight, and to deliver them at the stockyards, delivered them as agreed, but there was no one there to receive and weigh them. *Shelton v. Thompson*, 70 S. W. 256, 257, 96 Mo. App. 327.

To constitute a delivery sufficient to make a valid gift, there must be a parting with the dominion over the subject-matter of the gift, with a present design that the title shall pass out of the donor and to the donee; and this so fully and completely, to all intents and purposes, that, if the donor again resumes control over it without the consent of the donee, he will act as a trespasser. *Waite v. Grubbe*, 73 Pac. 206, 207, 48 Or. 406.

To constitute a delivery, even of a deed—a single instrument, having no connection with any other—the grantor must part not only with the possession but with the control of the deed, and deprive himself of the right to recall it. If a deed be left by a grantor to be registered, the mere registry is not equivalent to delivery. *Commercial Bank v. Reckless*, 5 N. J. Eq. (1 Halst. Ch.) 430, 452.

Delivery takes place when the deed, either actually or constructively by record, is placed beyond the control of the grantor. In determining this question of fact, the purpose of the grantor and the grantee in making the deed is an important factor. *Gardiner v. Gardiner* (Mich.) 95 N. W. 973, 975.

#### As production for inspection.

"Delivery," as used in Rev. St. § 646, authorizing an appeal to the Supreme Court from an interlocutory order of any circuit court or judge for the payment of money, to compel the execution of any instrument of writing, or the delivery or assignment of any instrument of writing, evidences of debt, documents, or things in action, does not "refer to the mere production of documents for inspection. The meaning of the words is to be determined from those with which they are associated, or, as the maxim is, 'Noscitur a sociis'; and the words with which the word 'delivery' is associated very plainly show that it was not used as meaning the production of instruments of evidence for the purposes of a trial. The statutory provision refers to an order compelling the person against whom it is directed to do an act divesting himself of possession and title, for no other meaning can be justly assigned to the words 'execution, assignment, or delivery,' and these are the words which control the provision." *Western Union Tel. Co. v. Locke*, 7 N. E. 579, 582, 107 Ind. 9.

#### Recording.

A delivery may be inferred from the fact that the grantor has had the deed recorded. *Fisher v. Hall*, 41 N. Y. 416, 423.

The deposit of a paper with the proper officer in order that he may place it on the public records is held to operate as a constructive delivery. *McCartney v. McCartney* (Tex.) 53 S. W. 388, 390.

The delivery of a deed to the register of deeds by the grantor for the use of the grantee, to be recorded, and the grantee's subsequent assent to the same, is equivalent to an actual delivery to the grantee. *Cooper v. Jackson*, 4 Wis. 537, 550.

The delivery of a deed by the grantor to a deputy clerk, with directions to put it on record, to which the grantee assented by taking possession of the land conveyed, and listing it for taxation, was a delivery to the grantee. *Martin v. Bates* (Ky.) 50 S. W. 38, 39.

The recording of a deed is a good delivery, and, where a conveyance is for the benefit of the grantees, their acceptance will be presumed unless disclaimer is affirmatively shown. *Whitaker v. Whitaker*, 74 S. W. 1029, 1031, 175 Mo. 1.

Leaving a deed for record at the proper office is prima facie delivery. *Mallet v. Page*, 8 Ind. 364, 367 (citing *Gilbert v. North America Fire Ins. Co.* [N. Y.] 23 Wend. 43, 35 Am. Dec. 543; *Hammell v. Hammell*, 19 Ohio, 17; *Murray v. Earl of Stair*, 2 Barn. & C. 82; *Somers v. Pumphrey*, 24 Ind. 231, 239.

While the delivery of a deed is necessary to make it effectual in passing title, it is established that when a deed to a minor child is absolute in form and beneficial in effect, and the father and grantor voluntarily causes the same to be recorded, acceptance by the grantee will be presumed, and such facts constitute prima facie a delivery, and afford a reasonable presumption that the grantor intended to part with the title; and clear proof should be made, where a person who, under such circumstances, has executed, acknowledged, and caused a deed to be recorded, before the court would be warranted in declaring that he did not intend to part with his title. *Lay v. Lay* (Ky.) 66 S. W. 371, 372 (citing *Tobin v. Bass*, 85 Mo. 654, 55 Am. Rep. 392; *Cecil v. Beaver*, 28 Iowa, 242, 4 Am. Rep. 174; *Masterson v. Cheek*, 23 Ill. [18 Peck] 72; *Robinson v. Gould*, 26 Iowa, 89; *Mitchell's Lessee v. Ryan*, 3 Ohio St. 377).

#### As remove.

As used in a policy of insurance, where the property insured consisted of a large amount of lumber piled on docks, some of which had been sold, piled by itself, and marked for the purchaser, and its speedy removal was contemplated, and the provision of the policy was for a year, and covered property owned by insured, and property held by it in trust, or sold and not delivered, and piled on the docks, the word delivered cannot be construed in a technical, legal sense, but must be understood to mean removal from the docks where it was situated. *Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co.*, 52 N. W. 1070, 1072, 92 Mich. 482, 20 L. R. A. 277.

**Sale implied.**

The word "deliver," as used in a memorandum stating that the undersigned agrees to deliver at a named place a fixed number of bushels for a stated price, imports a sale and delivery of the rye. *Bowers v. Whitney*, 92 N. W. 540, 541, 88 Minn. 168.

**Sealing and acknowledging.**

There is no precise form which it is necessary strictly to pursue to constitute delivery. Sealing and acknowledging before a mayor, if the statute is good, amounts to a delivery. *Shep. Touch*, 58. Under an act of Assembly, *Allinson* 33, § 8, the acknowledgment of a deed makes it good, to all intents and purposes. *Chews v. Sparks*, 1 N. J. Law (Coxe) 56, 66, 1 Am. Dec. 188.

**As set apart.**

"Delivery," as used in a lease of a farm, in which the tenant agreed to deliver to the lessor one-half of all the crops, means to set apart the lessor's portion of the crops, and the tenant has not performed his part of the contract until such delivery. *Hurd v. Darling*, 14 Vt. 214, 220.

**Temporary surrender for examination.**

The written instruction, "Papers to be delivered only upon payment of draft," sent to a collector with a draft and a sealed package of papers, is not violated by the collector's allowing the drawee to open the package and examine the papers before payment of the draft, as such a temporary surrender for examination is not a delivery. The word "delivery" could have no double meaning in the letter of instructions, and the delivery which the collector was prohibited from making except upon payment of the draft could be no other than the delivery which it was required to make upon such payment. *People's Nat. Bank v. Freeman's Nat. Bank*, 47 N. E. 588, 589, 169 Mass. 129, 61 Am. St. Rep. 279 (citing *Maynard v. Maynard*, 10 Mass. 456, 6 Am. Dec. 146; *Mills v. Gore*, 37 Mass. [20 Pick.] 28; *Shurtleff v. Francis*, 118 Mass. 154; *Hawkes v. Pike*, 105 Mass. 560, 7 Am. Rep. 554; *Stevens v. Stevens*, 150 Mass. 557, 23 N. E. 378; *Markey v. Mutual Ben. Life Ins. Co.*, 108 Mass. 78; *McCreary v. Boston & M. R. Co.*, 153 Mass. 300, 307, 26 N. E. 864, 11 L. R. A. 359; *Parrott v. Avery*, 159 Mass. 594, 35 N. E. 94, 22 L. R. A. 153, 38 Am. St. Rep. 465; *City of Springfield v. Harris*, 107 Mass. 532, 538, 540).

**Turning over keys.**

The delivery necessary to constitute a valid gift mortis causa may be either actual, by manual production of the subject of the gift, or constructive, by the means of obtaining possession. Constructive delivery is always sufficient when actual, manual delivery is either impracticable or inconvenient. The contents of a warehouse, trunk, box, or

other depository may be sufficiently delivered by delivery of the key of the receptacle. *Thomas' Adm'r v. Lewis*, 15 S. E. 389, 398, 89 Va. 1, 18 L. R. A. 170, 87 Am. St. Rep. 848; *Jones v. Selby*, Pr. Ch. 300; *Ward v. Turner*, 2 Ves. Sr. 431, 1 White & T. Lead. Cas. Eq. 1205; *Jones v. Brown*, 84 N. H. 445; *Cooper v. Burr*, 45 Barb. 10; *Penfield v. Thayer*, 2 E. D. Smith, 305; *Westerlo v. Dewitt*, 36 N. Y. 341, 93 Am. Dec. 517; *Ellis v. Secor*, 31 Mich. 185, 18 Am. Rep. 178; *Hillebrant v. Brewer*, 6 Tex. 45, 55 Am. Dec. 757; *Elam v. Keen*, 4 Leigh, 333, 28 Am. Dec. 322; *Stephenson's Adm'r v. King*, 81 Ky. 425, 50 Am. Rep. 173; *Lee's Ex'r v. Boak*, 11 Grat. 182.

The rule that the delivery of property is essential to the validity of a gift is not to be taken in such a narrow sense as to import that the title or property is to go literally into the hands of the recipient, and be carried away. There are many articles which might be made the subject of a donation mortis causa in which a manual delivery of that kind might be inconvenient or impracticable. We have no doubt that a trunk, with its contents, might be effectually given by a delivery of the key, not as a symbolical delivery of the property, but because it is the means of obtaining possession. *Coleman v. Parker*, 114 Mass. 30, 33 (citing *Ward v. Turner*, 2 Ves. Sr. 431, 443).

Where a grandfather made a deed of gift to his grandson, and put it among other things in a private box in the bank, and two months before his death delivered the key of the box to the grandson, who retained possession of it, but nothing was said to the grandson, or to any one in his behalf, about a delivery of the deed, no sufficient delivery was shown. *Walls v. Ritter*, 54 N. E. 565, 566, 180 Ill. 616.

The delivery to the purchaser of the keys to the partnership premises, together with a notification by both partners to the receiver that the dispute between them has been settled, and a direction to him to turn over the property to the purchaser, followed in due time by an order of court discharging the receiver, is a delivery, within the meaning of Civ. Code, § 1781, which provides that a buyer must pay the price of the thing sold on its delivery. *Schurts v. Romer*, 23 Pac. 118, 119, 82 Cal. 474.

**Unloading of cargo.**

Delivery by a common carrier implies mutual acts of the carrier and the consignees, and, where a wharf was the place of delivery, a mere physical landing of the goods on the wharf was no delivery. *Ostrander v. Brown* (N. Y.) 15 Johns. 89, 42, 8 Am. Dec. 211.

The mere unloading of goods by a vessel does not of itself constitute delivery, if the goods are still subject to the risks of

transportation. *The St. Georg* (U. S.) 95 Fed. 172, 177.

Rev. St. § 2966 [U. S. Comp. St. 1901, p. 1949], providing that where, by the bill of lading, it appears that goods are to be delivered immediately after the entry of the vessel, the collector is authorized to take possession of the goods and deposit them in a warehouse, does not mean delivered to the consignee, but means delivered in the sense of unloading or discharging from the ship. *The Egypt* (U. S.) 25 Fed. 320, 323.

#### Of freight.

If the captain or other officer of a steamboat or other vessel shall, in suitable weather, deposit any freight, in proper manner and in good condition, on the wharf of any city or incorporated town, and shall give verbal or written notice to the consignee thereof one hour before sundown on which the same is deposited on the wharf, such depositing and notice shall constitute a delivery. Rev. St. Mo. 1899, § 5144.

#### Of treaty.

The exchange of ratifications after the signing of a treaty by plenipotentiaries or commissioners constitutes the delivery of a treaty. *Ex parte Ortiz* (U. S.) 100 Fed. 955, 962.

#### Of will.

The words "executed and delivered," in a finding that an executor executed and delivered his will on the day of its date, are appropriate to the allegation of the exercise of a power by appointment *inter vivos*, and are quite variant from that which would recite the exercise of a power by last will, which would have alleged the instrument to have been published and declared. *Wooster v. Cooper*, 45 Atl. 381, 387, 59 N. J. Eq. 204.

#### Of writ.

"Delivery," as the term is used in reference to the delivery of an execution to a sheriff, means the delivery for the purpose of being executed. A delivery of an execution to a sheriff, with instructions to do nothing with it, is no delivery. It is a nullity, and will bind nothing. *Cook v. Wood*, 16 N. J. Law (1 Har.) 254, 262.

Gen. St. c. 12, § 21, provides that any sheriff, etc., who shall willfully neglect and refuse to serve or return any writ delivered to him, etc., shall pay a fine, etc. Held, that the word "delivered," as used in the section, should be construed to include the laying of a process on a table before the sheriff, with instructions to serve it. By this the writ was offered to him, and made subject to his control, and was a delivery, within the meaning of the statute. *Patten v. Bowles*, 51 Vt. 388, 391.

#### DELIVERANCE.

"Deliverance," as used in 1 Rev. Laws 93 relating to actions of replevin, providing that if the defendant in replevin proceedings shall claim the property whereof deliverance is sought, and the sheriff, having due notice, proceeds to make deliverance and dispossess such defendant thereof before the claimed property is tried according to law, such sheriff shall be answerable in trespass, and also forfeit the sum of \$100, means—construing it with the other terms of the statute—that the property shall not be taken from the possession of the defendant; that is, to liberate, to set free, or deliver from the defendant. *Lisher v. Pierson* (N. Y.) 2 Wend. 345, 348, 20 Am. Dec. 612.

#### DELIVERY BOND.

A delivery bond given to stay execution cannot be regarded as a contract. It is a mere process provided by statute as a means of having execution of the judgment, and at the same time of giving indulgence to the defendant; and, as such, it is under the power of the court, and liable to be quashed as process of the court. *Smith v. Brown*, 23 Miss. 810, 813.

#### DELIVERY IN PART.

The statute of frauds, declaring that, to make a sale valid, where the amount of the sale exceeds \$50, the contract should be reduced to writing, or money should be paid on account, or that there should be a delivery in whole or in part, means a delivery of a sufficient part of the goods sold to indicate a change of title. A mere taking of a sample on a sale of articles in bags is not a delivery in part, within the meaning of the statute. To constitute a symbolical delivery, the act must show that the vendor relinquishes his control over the property, and places it within the power of the vendee. *Carver v. Lane* (N. Y.) 4 E. D. Smith, 168, 170.

#### DELIVERY OF CHILD.

The best writers on medical jurisprudence, as well as the decisions of our courts, concur in this: That, after the child has passed from the body of the mother, a delivery of the child has taken place, so that where a child had been expelled from the womb of its mother, but before the connection between them had been severed, the mother made accusations as to its paternity, she was not within Rev. St. c. 131, § 8, providing that, if at the time of travail she shall accuse the same man with being the father of the child of which she is about to be delivered, she shall be a witness at the trial of the cause. *Blake v. Junkins*, 35 Ma. 433, 435.

**DELIVERY OF POSSESSION.**

Where in a contract for the sale of land there is a special covenant that on payment of the price the vendor will "deliver possession," such phrase should be construed to mean the delivery of a sufficient deed, and not actual delivery of seisin or possession. *Egbert v. Chew*, 14 N. J. Law (2 J. S. Green) 446, 455.

**DELIVERY TO MARKET.**

In an agreement to furnish money enough "to pay off the men within twenty-four hours of the delivery of the said lumber to market," the words "delivery to market" meant arrival at the place of destination. *Farrington v. Meek*, 80 Mo. 578, 584, 77 Am. Dec. 627.

**DELSARTE.**

Delsarte was the name of a French artist, who became celebrated for his theory of the method of exercise for developing bodily grace and strength and the power of dramatic expression. The general system or theory has become so well known that the word "Delsartian," as denoting the system, has since become a recognized generic or descriptive word of the English language. *Medlar & Holmes Shoe Co. v. Delsarte Mfg. Co.* (N. J.) 46 Atl. 1089.

**DELUSION.**

See, also, "Insane Delusion."

"Delusion" and "insanity" are but terms which are popularly used to indicate a diseased mind. *Burkhart v. Gladish*, 24 N. E. 118, 119, 123 Ind. 337.

**Belief in the impossible.**

"Delusion is a belief in something impossible in the nature of things or circumstances of the case. There must be a belief in the mind of the existence of a fact which no sane person would believe under the circumstances of the case, although there might be a shadow of evidence that the fact exists. But this is not the true test to be applied in determining the question whether the act involved is the result of a delusion or not. A single circumstance may be in a particular instance some evidence of the fact believed; but when it is not supported by some further evidence, and is left to stand wholly uncorroborated, it would be the most irrational and improbable thing for a sane mind to believe that the fact existed. The legal proposition to be applied in cases of this character is a general one, and is in substance as before stated, viz.: A belief of the mind which induces the act; a mere delusion which no sane person would believe in. Delusions of the mind, which render void the act caused

by such delusions, must be a belief of fact which no sane person would believe." *Riggs v. American Home Missionary Soc.* (N. Y.) 85 Hun, 656, 658.

**Failure of memory.**

A delusion is primarily the creation of a perverted or diseased imagination. The failure on the part of the person to remember the death of her brother and sister does not amount to that persistent or incorrigible belief in facts having no real existence which is the essential element of the delusion, but is rather a failure of her memory for the time being. *Davis v. Denny*, 50 Atl. 1037, 1038, 94 Md. 390.

**Impression distinguished.**

The term "delusion" refers to the state of the mind, while "impression" signifies the results of that state. *Boyd v. Eby* (Pa.) 8 Watts. 68, 70, 73.

**Mistake of fact.**

The term "delusion," as applied to insanity, is not a mere mistake of fact, or the being misled by false testimonial statements to believe that a fact exists which does not exist. *Buchanan v. Pierie*, 54 Atl. 583, 585, 205 Pa. 123 (citing *Robinson v. Adams*, 62 Me. 369, 16 Am. Rep. 473).

A delusion, which might incapacitate a person from making a will, is the conception of the existence of something extravagant, which has no existence whatever, but of which the person entertaining it is incapable of becoming permanently disabused by argument, reason, or proof. *Stanton v. Wetherwax* (N. Y.) 16 Barb. 259. A mere mistake of fact, which is the result of false evidence, is not such a delusion. In *re Henry's Will*, 41 N. Y. Supp. 1096, 1100, 18 Misc. Rep. 149.

**Monomania.**

Delusion is a form of insanity in which the subject may be sane on all topics but one, but is insane on some particular topic. This mental condition denotes an impairment or disease of the mental faculties which may more or less affect the mind generally. *Merritt v. State*, 45 S. W. 21, 22, 39 Tex. Cr. R. 70.

The most common is that of monomania, when the mind broods over one idea and cannot be reasoned out of it. This may operate as an excuse for a criminal act in one of two modes. Either the delusion is such that the person under its influence has a real and firm belief of some fact, not true in itself, but which, if true, would excuse his act; as where the belief is that the party killed had an immediate design upon his life, and under that belief the insane man kills in supposed self-defense. A common instance is where he fully believes that the act he is doing is done by the immediate command of

God, and he acts under the delusive, but sincere, belief that the act he is doing is by the command of a superior power, which supercedes all human laws and the laws of nature. Or this state of delusion indicates to an experienced person that the mind is in a diseased state. The known tendency of that state of mind is to break out into violence against friend or foe indiscriminately, so that the act, connecting itself with previous symptoms, will enable an experienced person to say that it was the result of uncontrollable impulse, and not that of a person acted upon by motives and governed by the will. *Commonwealth v. Rogers*, 48 Mass. (7 Metc.) 500, 502, 41 Am. Dec. 458.

#### As test of insanity.

"Delusion" is a most difficult word to define, and is very unsatisfactorily done, even by the most acute and metaphysical minds that have investigated it. Shelford, in his treatise on the Laws of Lunacy, says: "The true criterion, the true test, of the absence or presence of insanity, where there is no frenzy or raving madness, seems to be the absence or presence of delusion." "Delusion" and "insanity" seem to be almost convertible terms, so that a patient under a delusion on any subject or subjects is for that reason essentially mad or insane on such subject or subjects to the extent of the delusion. *Gass' Heirs v. Gass' Ex'rs*, 22 Tenn. (3 Humph.) 278, 283.

Delusion, in a technical sense, is a legal test of the presence of active insanity, and if a will is the offspring of this delusion it should be set aside. It is difficult to conceive how insanity could be judicially established unless delusion of some sort was proven. A delusion offers a practical test of active insanity. *Boardman v. Woodman*, 47 N. H. 120, 137.

"The true criterion, the true test, of the absence or presence of insanity I take to be the absence or presence of what, used in a certain sense of it, is comprehended in a single term, namely, 'delusion.' \* \* \* In short, I look upon 'delusion' \* \* \* and 'insanity' to be almost, if not altogether, convertible terms; so that a patient, under a delusion, so understood, on any subject or subjects, in any degree, is for that reason essentially mad or insane on such subject or subjects, in that degree." *Dew v. Clarke*, 3 Add. 79 (cited in *State v. Jones*, 50 N. H. 369, 395, 9 Am. Rep. 242); *State v. Wilner*, 40 Wis. 304, 306; *In re Shaw's Will* (N. Y.) 2 Redf. Sur. 107, 126. CONTRA, see *Denson v. Beazley*, 34 Tex. 191, 199.

A delusion is not necessarily a belief in something impossible in the nature of things or the circumstances of the case; but if a belief is entertained against all evidence and probability, and after argument to the contrary, it affords grounds for infer-

ring that the person entertaining it labors under an insane delusion. *Medill v. Snyder*, 58 Pac. 962, 61 Kan. 15, 78 Am. St. Rep. 307.

#### Unchangeable belief.

Wherever a person once conceives something extravagant to exist, which has still no existence whatever but in his own heated imagination, and wherever at the same time, having once so conceived, he is incapable of being, or at least of being permanently, reasoned out of that conception, he is said to be under a delusion in the peculiar and half technical sense of the term; and the absence or presence of delusion, so understood, forms the true and only test or criterion of absent or present insanity. In short, delusion, in this sense, and insanity, are almost, if not altogether, convertible terms. *Dew v. Clark*, 3 Add. 79; *In re Shaw's Will* (N. Y.) 2 Redf. Sur. 107, 126; *In re Smith's Will*, 24 N. Y. Supp. 928, 929; *American Seamen's Friend Soc. v. Hopper*, 33 N. Y. 619, 624; *Stanton v. Wetherwax* (N. Y.) 16 Barb. 259, 262; *In re Mason*, 14 N. Y. Supp. 434, 437, 60 Hun. 46; *Bull v. Wheeler* (N. Y.) 6 Dem. Sur. 123, 126; *In re Lapham*, 19 Misc. Rep. 71, 77, 44 N. Y. Supp. 90; *Phillips v. Charter* (N. Y.) 1 Dem. Sur. 533, 541; *In re Jenkins' Will*, 80 N. Y. Supp. 664, 665, 39 Misc. Rep. 618; *State v. Jones*, 50 N. H. 369, 395, 9 Am. Rep. 242; *State v. Pike*, 49 N. H. 399, 432, 6 Am. Rep. 533; *Middleditch v. Williams*, 17 Atl. 826, 829, 45 N. J. Eq. (18 Stew.) 726, 4 L. R. A. 738; *Smith v. Smith*, 25 Atl. 11, 12, 48 N. J. Eq. (3 Dick.) 566; *Rush v. Megee*, 36 Ind. 69, 80; *In re McGovran's Estate*, 39 Atl. 816, 817, 185 Pa. 203; *In re Tittel's Estate* (Cal.) Myr. Prob. Rep. 12, 14; *Lucas v. Parsons*, 24 Ga. 640, 651, 661, 71 Am. Dec. 147; *Clements v. McGinn* (Cal.) 33 Pac. 920, 921 (as cited in *Re Kendricks' Estate*, 62 Pac. 605, 610, 130 Cal. 360); *Denson v. Beazley*, 34 Tex. 191, 213; *State v. Pratt* (Del.) *Houst. Cr. Cas.* 249, 266; *Sharp v. Merriam*, 66 N. W. 372, 373, 108 Mich. 454.

"All delusions are not insane delusions. The difference between the two species is that one is the product of the reason, and the other a fragment of the imagination." Thus, on an issue as to the insanity of testator, the question is not whether a certain view of his was sound, but whether he imagined or conceived something to exist which did not in fact exist, and which no rational person, in the absence of evidence, would have believed to have existed. *In re Bennett's Estate*, 51 Atl. 336, 201 Pa. 485.

Redfield speaks of a delusion as a creation purely of the imagination, such as no man can believe. *Redf. Wills*, 67. *In Tayl. Med. Jur.* c. 62, it is described as a belief in the existence of something that does not exist. The proof of the existence and influence of the delusion in any particular case may be found in the surrender of the will

to imaginary directions, regarded by the victim as the directions of God, or of spirits speaking to him from another world, or to the control of an impulse due to an imaginary state of facts. The mental processes of such a person may be orderly and logical, but they rest on false assumptions. *Trich's Ex'r v. Trich*, 30 Atl. 1053, 1056, 165 Pa. 586.

In ordinary language a person is said to be under a delusion who entertains a false belief or opinion which he has been led to form by reason of some deception or fraud; but it is not every false or unfounded opinion which is in legal phraseology a delusion, nor is every delusion an insane delusion. If the belief or opinion has no basis in reason or probability, and is without any evidence in its support, but exists without any process of reasoning, or is a spontaneous offspring of a perverted imagination, and is adhered to against all evidence and argument, the delusion may be truly called "insane"; but if there is any evidence, however slight or inconclusive, which may have a tendency to create the belief, it cannot be said to be a delusion. In *re Scott's Estate*, 60 Pac. 527, 528, 128 Cal. 57.

A "delusion" is the spontaneous conception and acceptance of that as a fact which has no real existence except in his imagination, and his persistent adherence to it against all evidence. *Smith v. Smith*, 25 Atl. 11, 12, 48 N. J. Eq. 566. Thus a belief by a person that he could physically see inside of other persons' bodies is a delusion. *Kern v. Kern*, 26 Atl. 837, 842, 51 N. J. Eq. (6 Dick.) 574.

#### Unreasonable prejudice.

Insane delusion consists in the belief of facts which no rational person would have believed. In order that a testator may comprehend the relations which he holds to those having claims upon him, no insane delusion should influence his will. Unreasonable prejudice against relatives is not ordinarily a ground for invalidating a will, but it may be set aside where the testator's aversion is the result of an insane delusion, and his conduct cannot be explained on any other ground. *Nicewander v. Nicewander*, 151 Ill. 156, 157, 87 N. E. 698, 700.

## DEMAND.

See "Lawfully Demanded"; "Matter in Demand"; "On Demand"; "Sum Demanded"; "Waiving Demand and Notice."

A demand is a requisition or request to do a particular thing specified under a claim of right on the part of the person requesting. *Brackenridge v. State*, 11 S. W. 680, 681, 27 Tex. App. 513, 4 L. R. A. 360 (citing *Bouv. Law Dict.*).

A demand, within the meaning of the rule that a demand must precede the bringing of replevin, where the taking of the chattel was originally lawful, does not require that the word "demand" be used in making such a demand; but it is sufficient if any words are used which are understood by both parties to be a demand. *Truax v. Parvis* (Del.) 32 Atl. 227, 228, 7 Houst. 330.

A demand, within the meaning of the requirement of a demand for the payment of taxes, means any intimation to the taxpayer that payment is desired. *Miller v. Davis*, 34 Atl. 265, 88 Me. 454.

In an action to recover money deposited by plaintiff with the defendant as a stakeholder on a wager depending on the result of an election, the court charged the jury as to what would constitute a demand by plaintiff on defendant for the money as follows: "I instruct you that no formal words are necessary to constitute a demand. Any words expressive of a prohibition to pay absolutely or conditionally are sufficient to revoke the authority of the stakeholder to pay it over." Held, that the instruction was proper. *Willis v. Hooper*, 9 Or. 418, 424 (citing *Ivey v. Phifer*, 11 Ala. 535).

1 Rev. St. 1899, § 3431, provides that a stakeholder shall be liable to the party placing a bet in his hands, both before and after the determination thereof, and delivery to the winner shall be no defense; provided, that no stakeholder shall be liable afterwards unless a demand has been made of him previous to the time agreed on for the determination of the bet. Held, that a written notice, served on a stakeholder, reciting: "I hereby notify you not to pay my part of the bet made on the election of the Governor, \* \* \* held by you as stakeholder, made on October 19, 1900, with one R."—dated and signed by the other party to the wager, was a sufficient demand, within the statute, to charge the stakeholder. *Vandolah v. McKee*, 73 S. W. 233, 234, 99 Mo. App. 342.

Where a grantee of the mortgagor called on the mortgagee and asked the amount of his claim on the mortgaged estate, and was answered that he owned the whole, that he had bought it and paid for it, and, on such grantee showing his deed and again asking the amount of the claim, he was referred to the records, and, on being asked what sort of money would answer, the mortgagee replied, "Nothing but specie," and that, if money was tendered, he would do as he thought proper about taking it, and that his papers were at another town and he could not ascertain what was due on the mortgage, there was a sufficient demand and refusal to entitle such grantee to maintain an action to redeem the land from such mortgage. *Willard v. Fiske*, 19 Mass. (2 Pick.) 540, 544.



**As actual demand.**

The rule that, in order to bind an indorser, a demand must be made on the maker, means a demand actual and virtual, made at the place where the note is payable. *Shaw v. Reed*, 29 Mass. (12 Pick.) 132.

**Debt due indicated.**

In notes payable on demand, the word "demand" is not treated as a part of the contract, but is used to show that the debt is due. *McMullen v. Rafferty*, 89 N. Y. 456, 459. But, if payable at any period of time after demand, the weight of authority would seem to favor the doctrine that an actual demand must be made to fix the period of maturity; but where several notes were given, some of which were payable on demand, others one day after date, and others one day after demand, the word "demand," in those made payable one day after demand, will be construed in the sense of indicating that the debt is due. *Smith v. Ijams*, 24 N. Y. Supp. 202, 206, 70 Hun, 155.

**Examination of bank's books.**

Where a bill or note is made payable at a particular bank, and the bank itself is the holder, an examination of the books of the bank on the day when the bill or note becomes due is a sufficient demand, and in an action upon the instrument no other demand need be averred or proved. *Bank of United States v. Smith*, 24 U. S. (11 Wheat.) 171, 177, 6 L. Ed. 443.

**Notice of filing of petition.**

While a notice that a treasurer would file a petition on a certain day to collect certain taxes is not technically a demand for the payment of such taxes, but a notice of the commencement of an action, yet, where no form has been prescribed for such demand, such notice will be held sufficient. *Bell v. Stevens*, 90 N. W. 87, 88, 116 Iowa, 451.

**Notification by mail.**

"Demand," as used in the statement of the rule that, in order to charge an indorser of a note, a demand must be made on the maker at maturity, means a demand made by the holder or his agent, accompanied by a presentment of the note; and hence a notification to the maker through the post office is not a sufficient demand, when the maker's residence is supposed to be ascertained. *Stuckert v. Anderson* (Pa.) 1 Whart. 116, 118.

**As personal demand.**

Where one promised to deliver specific articles when called for, the demand need not be personal, since, if a personal demand were required, it would always be in the power of the party to elude a demand, and

thus avoid his responsibility; but a demand at a party's dwelling house in his absence is sufficient. *Mason v. Briggs*, 16 Mass. 453, 454.

**Presentation of account for fees.**

The presentation by a county judge of an account in writing for fees against the county to the commissioners' court, accompanied by a certificate that the account was correct, was a demand, within the meaning of Pen. Code, art. 240, subjecting to a fine any officer who should willfully demand higher fees than those allowed by law. *Brackenridge v. State*, 11 S. W. 630, 631, 27 Tex. App. 513, 4 L. R. A. 360.

**DEMAND (Legal Obligation).**

See "Contingent Demand"; "Disputed Demand"; "Lawful Claim or Demand"; "Legal Demand"; "Money Demand"; "Reciprocal Demand"; "Unliquidated Demand."

All demands, see "All."

Liquidated demand, see "Liquidated."

Stale demand, see "Stale."

A demand is a claim; a legal obligation; a thing or amount claimed to be due. *Rosser v. Bunn*, 66 Ala. 89, 93.

According to Lord Coke the word "demand" is the largest word in the law, except "claim," and a release of demands discharges all sorts of rights and titles, conditions before or after breach, executions, appeals, rents of all kinds, covenants, annuities, contracts, recognizances, statutes, commons, etc. *Vedder v. Vedder* (N. Y.) 1 Denio, 257, 261.

A demand is a claim; a legal obligation. "Demand" is a word of art, of an extent greater in its signification than any other word, except "claim." A release of all demands is in general a release of all covenants, real or personal, conditions, whether broken or not, annuities, obligations, contracts, and the like. *State v. Baxter*, 38 Ark. 462, 467.

"Demand," as used in Code, § 3591, providing that in appeal cases "no new demand or counterclaim can be introduced into a case after it comes into the circuit court, except by mutual consent," means a claim or legal obligation, and relates to the subject of the suit and the remedy sought. *Hollen v. Davis*, 13 N. W. 413, 414, 59 Iowa, 444, 44 Am. Rep. 688.

An assignment of all the assignor's "goods, chattels, wares, merchandise, rights, credits, notes, accounts, and demands" does not pass the assignor's interest in a sum of money borrowed by him and in course of transmission from the lender at the time of making the assignment. *Sheldon v. Dodge* (N. Y.) 4 Denio, 217.

The term "demands," within the meaning of a deed conveying all debts, dues, and demands, real, personal, and mixed, which are due and owing or of right belonging to the grantor by virtue of inheritance, legacies, bonds, notes, book debts, or otherwise, passes real estate. Though the broad construction of the word "demands" might be confined to releases which discharge, and not conveyances which charge, yet still, as it is coupled with the word "real," and with words of inheritance, it shows a strong intention to dispose of the realty. *McWilliams v. Martin* (Pa.) 12 Serg. & R. 269, 271, 14 Am. Dec. 688.

A conditional sale is one in which the seller retains the title as security, so that, upon failure of the purchaser to pay the purchase money, he may replevy the property, and thereby defeat the sale arising out of plaintiff's demand. Under Acts 1858, § 2918, providing for a set-off by defendant of any matter "arising out of plaintiff's demand," or "out of the original consideration of any written instrument," it is held that these phrases do not mean all rights that may be asserted, of whatsoever nature, by either party, to the property, or concerning the property, which was the subject of the dealing of the parties. In the first expression quoted, the word "demand" means the assertion of a right to recover a sum of money from the defendant, and subsequently the same ideas are conveyed by the word "consideration" in the second expression. *Blair v. A. Johnson & Sons* (Tenn.) 76 S. W. 912, 914.

#### Assessment on stockholder.

Whenever the words "claim," "demand," and "liability" have been the subject of judicial construction, it has always been agreed that they have a broader significance than the word "debt"; and hence an assessment on a stockholder, made after an assignment for creditors, is provable as a claim or demand against the assigned estate. *Hill v. Graham*, 53 Pac. 1060, 1063, 11 Colo. App. 536.

#### Claim distinguished.

A demand is a peremptory claim to a thing or right. It differs from a claim, in that it presupposes that there is no defense or doubt about the question of right. Demand will not admit of delay, but is an insistence on immediate observance, while claim, on the other hand, implies that the right is or may be doubtful, and that negotiation shall be had to determine the same. *Prigg v. Pennsylvania*, 41 U. S. (16 Pet.) 539, 573, 575, 10 L. Ed. 1060.

#### As claim arising on contract.

Under statutes requiring 'demands against a city or town to be presented within a certain time, it has been held that the word "demand" includes claims arising in

tort, as well as on contract. *Pulitzer v. City of New York*, 62 N. Y. Supp. 587, 48 App. Div. 6. Contra, see *Vogel v. City of Antigo*, 51 N. W. 1008, 81 Wis. 642; *Mason v. City of Ashland*, 74 N. W. 357, 358, 98 Wis. 540. The term as so used is sufficiently broad to include claims for torts as well as on contract, yet the purpose of the act being that the claim should be audited, which would not apply to claims for torts, the act does not require presentation of a claim for damages for the maintenance of a nuisance. *Adams v. City of Modesto*, 63 Pac. 1083, 131 Cal. 501.

Under a statute making stockholders of a corporation liable in certain instances for the debts and demands of the corporation, it is held that the word "debt" is to be regarded as limited to claims arising out of contracts, but that the word "demand" by itself will include a claim for damages arising out of a wrong of the corporation. *Heacock & Heacock v. Sherman* (N. Y.) 14 Wend. 53, 59; *Kelly v. Clark*, 53 Pac. 959, 972, 21 Mont. 291, 42 L. R. A. 621, 69 Am. St. Rep. 668.

Gen. St. c. 118, § 25, providing that all demands against a debtor for or on account of goods or chattels wrongfully obtained, taken, or withheld from him may be proved and allowed as debts, will be construed to include that part of the damages claimed by a plaintiff for breaking and entering his close by the defendant which is for the value of goods wrongfully taken at the time of such breach or entry. *Bickford v. Barnard*, 90 Mass. (8 Allen) 314, 315.

"Demand," as used in Ten Pound Act, § 9, providing that defendant may plead or set off his account or judgment against the plaintiff, includes all matters arising on contract. *McCumber v. Goodrich* (N. Y.) 1 Johns. 56, 58.

An instrument executed by plaintiff to defendant, who had made a tortious entry on the lands of the former and caused a nuisance thereon, which shows a receipt from defendant in full of all demands, will include all causes of action arising from damages caused by such a nuisance. *Vedder v. Vedder* (N. Y.) 1 Denio, 257, 261.

As used in Rev. St. c. 13, §§ 40, 42, providing that an appeal may be taken from the disallowance of any demand against a county by the board of supervisors, the word "demand" means only those demands which arise in some matter of debt and credit between the party, either on the score of contract or some fiduciary relation, and does not embrace a claim for taxes paid through the wrongful or illegal conduct of the assessor. *Stringham v. Winnebago County Sup'rs*, 24 Wis. 594, 602.

"Demand," as used in Act N. Y. Feb. 17, 1848, declaring that, if any person have a

judgment against a corporation, he may sue any stockholder in any court, etc., provided that no stockholder shall be obliged to pay more in the whole than the amount of the stock he may hold in said company at the time the debt accrued, while undoubtedly broad enough, if it stood alone, to embrace claims arising from torts, yet, the term, being used in connection with the provision making the stockholders jointly and severally liable for the payment of all debts contracted by the corporation or their agents, and the liability being new and unknown to the common law, must be taken in a more restricted sense, and as so used is applicable to claims arising *ex contractu* only. *Chase v. Curtis*, 5 Sup. Ct. 554, 559, 118 U. S. 452, 28 L. Ed. 1038.

#### Debt distinguished.

In ordinary legal usage, the words "debt" and "demand" are of a kindred meaning, but "demand" is a term of much more comprehensive signification than "debt." The term "debt" imports a sum of money owing upon a contract, express or implied, while the term "demand" embraces rightful claims, whether founded upon a contract, a tort, or a superior right of property. In *re Denny* (N. Y.) 2 Hill, 220, 222. The statute which enumerates the classes of demands for which attachments may issue in the first place authorizes the issue of the writ "to enforce the collection of a debt"; next, for any "moneyed demand the amount of which can be certainly ascertained." Code 1886, § 2929; Code, § 3687. In such connection the meaning of the words "debt" and "demand" is plain. They are used to describe certain classes of rights of action. Neither of them covers anything more than what is due to the plaintiff in attachment—the amount which he is entitled to recover. We think it is plain that the phrase "amount of the demand," as used in the statute fixing the sheriff's commissions when the attachment suit is settled, means the amount which the plaintiff was entitled to be paid by the defendant. *United States Rolling Stock Co. v. Clark*, 10 South. 917, 95 Ala. 322.

#### Interest included.

Where the trust in a deed of assignment was to pay to the creditors the amount of their respective demands in full, the word "demands" included everything which the creditor would have been entitled to recover by suit, and hence it meant interest, as well as principal. *Scott v. Morris* (Pa.) 9 Serg. & R. 123, 124; In *re Fay*, 27 N. Y. Supp. 910, 912, 6 Misc. Rep. 462; *Appeal of Murphy* (Pa.) 6 Watts & S. 223, 226.

"Debts, dues, and demands" as the terms are used in a discharge of all debts, dues, and demands, include a special prom-

ise to pay the interest upon an assigned note. *Howell v. Seaman* (Conn.) 1 Root, 383.

#### As legal demand.

1 Gav. & H. Rev. St. c. 71, § 23, relating to taxation, and providing that personal estate includes, among other things, the value of all demands against any person or body corporate, must be construed to mean only such legal demands as the law will recognize and enforce. *Lamb v. Rawles*, 33 Ind. 386, 388.

#### License tax.

"Taxes, debts, dues, and demands due the state," as used in Act March 30, 1871, providing that coupons on state bonds should be receivable for all taxes, debts, dues, and demands due the state, includes the "charges or assessments made by law as a condition precedent to obtaining license for pursuing a business or profession." *Royall v. Virginia*, 6 Sup. Ct. 510, 513, 116 U. S. 572, 29 L. Ed. 735.

#### DEMAND AGAINST ESTATE.

Gen. St. 1865, c. 127, § 1, providing that appeals may be allowed from the decisions of the courts having probate jurisdiction on all "demands" against an estate exceeding \$10, cannot be construed to include the claim of an executor of an estate for costs, attorney's fees, and commission which accrued in a proceeding instituted by a plaintiff against the executor to recover her absolute property in the estate of the deceased. *Baker v. Schoeneman*, 41 Mo. 391, 394.

"Demand," within the meaning of Rev. St. 1894, § 507, relative to the admission of testimony in actions founded upon a contract or demand against the estate of one deceased, has been held to be one of broad meaning, and it may well be held to apply to an action by or against devisees in relation to a will of the ancestor. Suits to contest a will come clearly within the spirit and meaning of this section, if not within its express letter. *McDonald v. McDonald*, 41 N. E. 336, 337, 346, 142 Ind. 55.

The terms "claim or demand," as used in section 5957, Rev. St., providing that parties to an action against an executor or administrator upon a claim or demand against the estate of a deceased person are incompetent to testify as to any matter or fact occurring before the death of such person, embrace all rights of action for the establishment of a trust in land as well as claims or demands for debts or damages against the estate of the deceased person. *Rice v. Rigley*, 61 Pac. 290, 296, 7 Idaho, 115.

Rev. St. 1879, c. 1, art. 9, providing that all demands against deceased persons shall be divided into classes and paid in a certain order, should be construed to include taxes

on the personal estate of a decedent, whether they accrued before or after his death. *State ex rel. Ziegenhein v. Tittman*, 15 S. W. 936, 937, 103 Mo. 553.

Acts 1891, c. 123, amending Gen. St. 1878, c. 77, § 2, authorizing the maintenance of an action for the negligent killing of plaintiff's intestate, provides that any demands for the support of the deceased and funeral expenses shall be first allowed and deducted from the recovery. Held, that the words "demands for the support of the deceased" must be construed as referring only to the expenses of his last sickness—that is, during the time, if any, that elapsed between the injury and his death. *Sykora v. J. I. Case Threshing Mach. Co.*, 60 N. W. 1008, 1009, 59 Minn. 130.

The word "demands," as used in a statute authorizing the county court to hear and determine all suits and other proceedings against executors or administrators upon demands against the estate of the testator or intestate, includes claims based on alleged trespasses by the deceased. *Mayberry v. McClurg*, 51 Mo. 256, 261.

#### DEMAND AND RECONVENTION.

The term, "demand and reconvention," in the law of Louisiana is equivalent to the term "counterclaim," as used in our law, and to reconvene is equivalent to interposing a counterclaim in the answer. Such pleading is denominated a "plea of reconvention." *McLeod v. Bertschy*, 33 Wis. 176, 177, 14 Am. Rep. 755.

#### DEMAND FOR RENT.

A demand for rent is nothing more or less than a notice that payment is required to be made. *Pendill v. Union Min. Co.*, 31 N. W. 100, 102, 64 Mich. 172.

#### DEMAND IN WRITING.

A paper addressed to a railroad company, and reciting that payment of certain interest coupons of its mortgage bonds had been demanded and refused, and that the holder would look to the company for payment thereof, is substantially a "demand made in writing," within the meaning of a provision in the mortgage, requiring a demand to be made in writing, etc. *Pennsylvania Co. for Insurance on Lives and Granting Annuities v. Philadelphia & R. R. Co.* (U. S.) 69 Fed. 482, 483.

#### DEMAND SOUNDING IN DAMAGES.

See "Sounding in Damages."

#### DEMANDS DUE.

"Demands due," in the commercial and popular acceptance of the words, are debts

presently payable. *Ming v. Wollfolk*, 3 Mont. 880, 885.

#### DEMENTIA.

Dementia is that form of insanity characterized by mental weakness and decrepitude and total inability to reason. In the case of old men it is called "senile dementia," and it indicates the breaking down of the mental powers in advance of bodily decay. The mind dwells only in the past, and the thoughts succeed one another without any obvious association. The Century Dictionary defines it to be an "extremely low condition of the mental function; profound general mental incapacity." *Pyott v. Pyott*, 90 Ill. App. 210, 221.

"Dementia is that form of insanity where the mental derangement is accompanied with a general enfeeblement of the faculties. It is characterized by forgetfulness, inability to follow any train of thought, and indifference to passing events. In dementia, says Ray, a celebrated writer on medical jurisprudence, the mind is susceptible of only feeble and transitory impressions, and manifests but little reflection even on these. They come and go without leaving any trace of their presence behind them. The attention is incapable of more than a momentary effort, one idea succeeding another with but little connection or coherence. The mind has lost the power of comparison, and abstract ideas are utterly beyond its grasp. The memory is peculiarly weak, events the most recent and most nearly connected with the individual being rapidly forgotten. The language of the demented is not only incoherent, but they are much inclined to repeat isolated words and phrases without the slightest meaning." *Hall v. Unger* (U. S.) 11 Fed. Cas. 261, 263.

"We have not been able to discover that any line is drawn by medical experts between weakness of mind and dementia, and we trace no indication of such line drawn with any reference to the capacity to transact business. It seems not an uncommon opinion of medical men and others that, if insanity is clearly proved to exist in any degree, the party can no longer be safely regarded as capable of transacting any business. We are unable to adopt this opinion, because we think there is abundant evidence that the species of insanity called 'monomania' may be limited to certain subjects, and the mind and memory be greatly impaired, and yet the person be capable of disposing of his property; and, where an affidavit states that testator was in a state of 'dementia' during the later years of his life, the term would be understood to mean an impaired state of the mental powers and feebleness of the mind caused by disease, and not accompanied by delusion or uncontrollable impulse." *Dennett v. Dennett*, 44 N. H. 531, 537, 84 Am. Dec. 97.

Dementia is "a form of insanity where the person afflicted is rendered incapable of reasoning in consequence of functional disorder of the brain, not congenital or born with the person." *People v. Lake* (N. Y.) 2 Parker, Or. R. 215, 218.

Dementia is a state of enfeeblement of the mind or impairment of the mind, and is usually the result of other forms of insanity. In *re Shaw's Will* (N. Y.) 2 Redf. Sur. 107, 132.

#### DEMENTIA AFFECTATA.

The term "dementia affectata" was used by Sir Matthew Hale in his Pleas of the Crown to designate drunkenness, which he considered to be a species of madness. "This doth deprive man of the use of reason, and puts many men into a perfect but temporary phrensy; but, by the laws of England, such a person shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses." *Cronwell v. State* (Tenn.) Mart. & Y. 147, 156.

#### DEMESNE.

See "Ancient Demesne."

#### DEMIJOHN.

A demijohn is a glass vessel with a large body and a small neck, inclosed in wickerwork. It is not synonymous with "bottle," within Rev. St. § 2504, Schedule D, declaring that all spirituous liquors imported in bottles shall be packed in packages containing not less than one dozen bottles in each package, and all such bottles shall pay an additional duty of three cents for each bottle. *United States v. Ninety Demijohns of Rum* (U. S.) 8 Fed. 485, 487.

#### DEMISE.

The word "demise," says Coke, "is applied to an estate, either in fee simple, fee tail, or for a term of life, and so commonly is taken in many writs." *Krider v. Lafferty* (Pa.) 1 Whart. 302, 314, 315.

"Demise" technically means a lease for a term of years. *Voorhees v. Presbyterian Church of Amsterdam* (N. Y.) 5 How. Prac. 58, 71 (citing Bouv. Law Dict.).

A demise is a conveyance or transfer of an estate either in fee, for life, or for years. *Gilmore v. Hamilton*, 83 Ind. 196, 198 (citing Webst. Dict.).

Where the word "demise" is employed in a deed, it is not used to designate the quantity of estate intended to be conveyed, but merely for the purpose of passing title to an

estate described by other words introduced for that purpose. *Krider v. Lafferty* (Pa.) 1 Whart. 308, 314, 315, 316.

The words "demise and grant" in a deed will make a good deed of bargain and sale if made for a pecuniary consideration or one of pecuniary value, and though ever so small, even a barleycorn. *Krider v. Lafferty* (Pa.) 1 Whart. 302, 314, 315 (citing Shep. Touch. 222).

"Demise," as used in Act March 27, 1801 (providing for the incorporation of religious societies) § 4, authorizing their trustees to purchase and hold real and personal estate, and to demise, lease, and improve the same for the use of the congregation, means a lease for a term of years in consideration of rent, which is a contract for the possession and profits of lands and tenements on the one side, and a recompense of rent or income on the other, or a conveyance of lands to one for life or years or at will in consideration of a rent or other recompense. *Voorhees v. Presbyterian Church of Amsterdam* (N. Y.) 5 How. Prac. 58, 62.

#### Covenant for quiet enjoyment.

The word "demise" in a lease imports a covenant for quiet enjoyment. *Maeder v. City of Carondelet*, 26 Mo. 112, 115; *Mershon v. Williams*, 44 Atl. 211, 214, 63 N. J. Law. 398; *Williams v. Burrell*, 1 C. B. 402, 429; *Burwell v. Jackson*, 9 N. Y. (5 Seld.) 535, 541 (quoting *Grannis v. Clark* [N. Y.] 8 Cow. 36); *Gallup v. Albany Ry.* (N. Y.) 7 Lana. 471, 479; *Tone v. Brace* (N. Y.) 1 Clark, Ch. 503, 506; *Wells v. Mason*, 5 Ill. (4 Scam.) 84, 90; *Crouch v. Fowle*, 9 N. H. 219, 222, 32 Am. Dec. 350; *Wilkinson v. Clanson*, 12 N. W. 147, 148, 29 Minn. 911; *Coogan v. Parker*, 2 S. C. (2 Rich.) 255, 267, 16 Am. Rep. 659; *Ware v. Lithgow*, 71 Me. 62, 64.

The word "demise," in the operative words of a conveyance in a tax deed made by the officers of a municipality, does not import a covenant for quiet enjoyment. *Meday v. Borough of Rutherford*, 48 Atl. 529, 530, 63 N. J. Law (36 Vroom) 645.

"Demise," as used in a lease, cannot be construed as importing a covenant for quiet enjoyment, there being other provisions in the lease which show a different intent of the parties. *O'Connor v. Dally*, 109 Mass. 235, 236. Though the word "demise" in a lease implies a covenant for quiet enjoyment, it will have a different meaning, and the implication will not be raised, where it is expressly stipulated in the lease that nothing therein contained shall be construed to imply a covenant for quiet enjoyment. *Maeder v. City of Carondelet*, 26 Mo. 112, 115.

From the word "demise" in a lease under seal the law implies a covenant; in a lease not under seal, a contract for title to the us-

tate merely; but it does not imply a contract for any particular state of the property at the time of the demise, or that the property shall continue fit for the purpose for which it was demised. *Foster v. Peyser*, 68 Mass. (9 Cush.) 242, 246, 57 Am. Dec. 48.

#### **Covenant of power to give lease.**

In a lease, the term "demise" imports a covenant on the part of the lessor of good right and title to make the lease. *Crouch v. Fowle*, 9 N. H. 219, 222, 82 Am. Dec. 850; *Ware v. Lithgow*, 71 Me. 62, 64.

In the charter of a railroad company it was empowered to have, purchase, etc., lands, tenements, goods, etc., of whatsoever kind, sufficient for the construction of banking houses and the erection of the railroad, and the same to sell, grant, demise, alien, or dispose of. It was held that the word "demise," thus used in the enumeration of the powers of the company, meant technically to lease for a term of years, and thus gave the company power to lease its road. *Georgia R. & Banking Co. v. Maddox*, 42 S. E. 815, 819, 116 Ga. 64.

The word "demise," when used in a lease for years, implies a covenant of power in the lessor to give the lease. *Grannis v. Clark* (N. Y.) 8 Cow. 36, 39.

#### **Lease and letting distinguished.**

See "Lease."

#### **Of vessel.**

Affreightment distinguished, see "Charter Party."

A charter party, by the terms of which the general owner did not part with the possession, command, and navigation of the vessel, and the language used shows no intent to transfer such possession, command, and control, does not constitute a demise of the vessel. *The Nicaragua* (U. S.) 71 Fed. 723, 725.

When a ship is let to another for a period of time, and the owner, during that time, has nothing to do with the appointment of her officers and crew or with the working or management of her, that is called a "demise" or letting of the ship, and the charterer becomes responsible for her navigation. *Bramble v. Culmer* (U. S.) 78 Fed. 497, 501, 24 C. C. A. 182.

#### **DEMISED PREMISES.**

A statute which allows distress by landlord upon the goods and chattels on the demised premises refers to the premises occupied by the tenant, as delivered to him to be used for specified purposes, and does not authorize a levy upon a piano standing upon the street in front of the house. *Robelen v. National Bank of Wilmington & Brandywine* (Del.) 41 Atl. 80, 82, 1 Marv. 346.

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#### **DEMISI.**

At common law a covenant for title was implied from the word "demisi" in a lease. *Koch v. Hustis*, 87 N. W. 834, 835, 113 Wis. 599.

The words "dedi," "concessi," and "demisi," when used in a conveyance of real estate at common law, imported a covenant in law. *Kinney v. Watts* (N. Y.) 14 Wend. 38, 40.

#### **DEMOCRATIC.**

In a will providing that testator's property should be used for the special benefit of the worthy, deserving, poor, white, American, Protestant, Democratic orphans residing in such town, the term "Democratic orphans" means, when applied to an orphan not of sufficient age to have acquired a character, one who had a Democratic father, for children in common speech are not said to have Democratic or other political principles. *Beardley v. Selectmen of Bridgeport*, 3 Atl. 557, 558, 58 Conn. 489, 55 Am. Rep. 152.

#### **DEMOLISH.**

Beginning to demolish, see "Beginning."

#### **DEMONSTRATION.**

"Demonstration" has several meanings. It is an expression of the feeling by outward signs; a manifestation; a show. "Effort" means an exertion of strength; strenuous endeavors; laborious attempts; struggle directed to the accomplishment of an object. There is no word in the English language, we think, better understood by the people generally than "effort," and when told that a person threatened to kill the defendant, and at the time of the killing made such an effort and demonstration as to induce the defendant to believe that he intended to execute such threat, the jury must have understood the court to mean an attempt to execute them. This means something more than a demonstration or an act manifesting an intention, and where the threats were to take the life of the defendant, an "effort" means an attempt to kill defendant. *Miles v. State*, 18 Tex. App. 156, 171.

#### **In proof.**

"Demonstration," as used in Code Civ. Proc. § 1828, declaring that the law does not require demonstration of the truth of facts, means such degree of proof as excludes the possibility of error or produces absolute certainty; moral certainty only being required, or that degree of proof which produces conviction in an unprejudiced mind. *Treadwell v. Whittier*, 22 Pac. 266, 268, 80

Cal. 574, 5 L. R. A. 498, 13 Am. St. Rep. 175.

The amount of proof required in an action for negligence need not be of that high degree called "demonstration," which excludes all possibility of error. It must be of sufficient cogency to make it appear that defendant did or omitted to do some act amounting to a breach of duty. *Boetgen v. New York & H. R. Co.*, 50 N. Y. Supp. 331, 332.

## DEMONSTRATIVE LEGACY.

Specific legacy distinguished, see "Specific Legacy."

A legacy is demonstrative when the particular fund or personal property is pointed out from which it is to be taken or paid. Civ. Code S. D. 1908, § 1071; Rev. St. Utah 1898, § 2802. If such fund or property fails, in whole or in part, resort may be had to the general assets, as in case of a general legacy. Civ. Code Mont. 1895, § 1820, subd. 2; Civ. Code Cal. 1903, § 1357, subd. 2.

A demonstrative legacy is a legacy made payable out of a particular fund, named or demonstrated in the will. *Chester County Hospital v. Hayden*, 34 Atl. 877, 878, 83 Md. 104; *Adair v. Adair* (N. D.) 90 N. W. 804, 806; *Harper v. Bibb*, 47 Ala. 547, 554; *Tanton v. Keller*, 47 N. E. 376, 378, 167 Ill. 129.

The term "demonstrative legacies" is used to designate legacies in which the sum given is to be made good out of the general estate, upon the failure of a particular fund which is primarily holden for its satisfaction. *Boomhower v. Babbitt's Adm'r*, 81 Atl. 838, 839, 67 Vt. 327.

A demonstrative legacy is in the nature of a general legacy, with a certain sum pointed out for its payment, as a gift of \$1,000 to be paid out of the fund due by A.; and, if the fund thus designated fails, the legatee is entitled to be paid out of the general assets belonging to the estate. *Giddings v. Seward*, 16 N. Y. 365, 367; *Appeal of Welch*, 28 Pa. 363, 366.

A demonstrative legacy is a bequest of a sum of money payable out of a particular fund or thing. It is a pecuniary legacy given generally, but with a demonstration of a particular fund as a source of its payment. It is therefore equivalent to or in the nature of a devise or bequest of so much or such a part of a fund or thing specified. *Roquet v. Eldridge*, 20 N. E. 733, 734, 118 Ind. 147.

A legacy of quantity is ordinarily a general legacy; but there are legacies of quantity in the nature of specific legacies, as of so much money, with reference to a particular fund for payment. This kind of legacy is

called by the civilians a "demonstrative legacy," and it is so far general, and differs so much in effect from one properly specific, that, if the fund be called in or fail, the legatee will not be deprived of his legacy, but be permitted to receive it out of the general assets; yet the legacy is so far specific that it will not be liable to abate with general legacies upon a deficiency of assets. *Kenaday v. Sinnott*, 21 Sup. Ct. 233, 237, 179 U. S. 606, 45 L. Ed. 339; *Gelbach v. Shively*, 10 Atl. 247, 67 Md. 498; *Morris v. Garland's Adm'r*, 78 Va. 215, 223; *Darden v. Orgain*, 45 Tenn. (5 Cold.) 211, 215; *Johnson v. Conover*, 35 Atl. 291, 293, 54 N. J. Eq. 333; *Crawford v. McCarthy*, 54 N. E. 277, 278, 159 N. Y. 514; *Appeal of Armstrong*, 63 Pa. (13 P. F. Smith) 312, 316; *Merriam v. Merriam*, 83 N. W. 162, 164, 80 Minn. 254; *Florence v. Sands* (N. Y.) 4 Redf. Sur. 206, 209.

A demonstrative legacy is a bequest of money or other fungible goods, charged upon a particular fund in such way as not to amount to a gift of the corpus of the fund, or to evince an intention to relieve the general estate from liability in case the fund fail, and so described as to be indistinguishable from other things of the same kind. *Kelly v. Richardson*, 13 South. 785, 790, 100 Ala. 584.

A demonstrative legacy is one which partakes so far of the nature of a specific legacy that the security referred to in the bequest, if in existence and belonging to the testator at the time of his death, is set apart as a primary fund for the payment of the legacy. *Dunning v. Dunning*, 31 N. Y. Supp. 719, 722, 82 Hun. 462.

A demonstrative legacy is a bequest of a certain sum of money, stock, or other like thing payable out of a particular fund or security. A demonstrative legacy partakes of the nature of a general legacy by bequeathing a specified amount, and also of a specific legacy by pointing out the fund from which the payment is to be made, but differs from a specific legacy in the particular that, if the fund pointed out for the payment of the legacy fails, recourse will be had to the general assets. *Baptist Female University of North Carolina v. Borden*, 44 S. E. 47, 51, 132 N. C. 476.

A demonstrative legacy is where the thing or money is not specified or distinguished from all others of the same kind, but a particular fund is pointed out for its payment. Under this definition a bequest of a certain sum "in Confederate state bonds," is not a demonstrative, but a general, legacy. It designates the article from which payment is to be made, not the source or fund from which the means of payment are to be derived. Had it been a legacy of a certain sum "out of my Confederate state bonds," or "to be paid from my Confederate state

bonds." the rule might have been different. *Gilmer's Legatees v. Gilmer's Ex'rs*, 42 Ala. 9, 16.

A demonstrative legacy is the bequest of a certain sum of money, with the direction that it shall be paid out of a particular fund. It differs from a specific legacy in this, that if the fund out of which it is to be paid fails, for any reason, it is nevertheless entitled to come on the estate as a general legacy; and it differs from a general legacy in this, that it does not abate in that class, but in the class of specific legacies. A bequest of \$2,000 of the "South Ward Loan of Chester, Pa.," by a person owning \$10,000 worth of bonds known by that designation, is a demonstrative legacy, and is therefore not adeemed by the payment of the bonds before the testator's death. *Ives v. Canby* (U. S.) 48 Fed. 718, 721.

A legacy of quantity is ordinarily a general legacy; but there are legacies of quantity in the nature of specific legacies, as of so much money with reference to a particular fund for payment. This kind of legacy is called by the civilians a "demonstrative legacy," and it is so far general, and differs so much in effect from one properly specific, that, if the fund be called in or fail, the legatee will not be deprived of his legacy, but be permitted to receive it. The giving to each of two sons of a certain portion of the fund, and to both the whole, is indicative of a specific legacy, and where the testator added, "providing the said amount and interest is collected" from the fund designated, there can be no doubt that the legacies were specific, and not demonstrative. Appeal of Smith, 103 Pa. 559, 561.

A legacy of money is demonstrative when the gift is so made as clearly to show the testator's intention that the legatee shall certainly receive the amount bequeathed. *Methodist Episcopal Church in Center of Stanford v. Hebard*, 51 N. Y. Supp. 546, 549, 28 App. Div. 548 (citing *Watrous v. Smith* [N. Y.] 7 Hun, 544, and cases cited therein).

Where a testator provided a fund to furnish a certain income for his wife, and that securities be selected sufficient to secure the result, the selection of such securities would not constitute a specific legacy, the income of which must be necessarily diminished upon diminution of the producing capacity of such fund, but it is a demonstrative legacy. *Merriam v. Merriam*, 83 N. W. 162, 164, 80 Minn. 254.

#### **Bonds or stock.**

A gift in a will of money in government bonds is not sufficient to make the legacy demonstrative, for the reason that it is not pointed out in the will that the money is to be taken out of any particular fund belonging to the estate. This latter qualifica-

tion is an essential element of a demonstrative legacy. In *re Van Vliet*, 25 N. Y. Supp. 722, 723, 5 Misc. Rep. 169.

Where a will directed that a legatee be paid a certain amount out of the proceeds of certain property, and in addition, out of such proceeds, bank stock, and other personal property, a sum sufficient to make such person equal in amount to another person, the legacy was a demonstrative one. Appeal of *Armstrong*, 63 Pa. (13 P. F. Smith) 812, 816.

Where a testator directed the setting apart of \$50,000 worth, at par value, of his bank and other paying stocks, interest and dividends therefrom to be devoted to the support of a certain person, such a legacy is a demonstrative one. *Morris v. Garland's Adm'r*, 78 Va. 215, 223.

#### **Proceeds of land.**

A legacy of a certain sum of money, to be paid out of the proceeds of the sale of certain land, which the executor was directed to sell, was a demonstrative legacy, and drew interest only from the time of the receipt of the purchase money by the executor. *Darden v. Orgain*, 45 Tenn. (5 Cold.) 211, 215.

#### **Share of estate.**

Where a will bequeathed to testator's brother and sister legacies of \$1,000 each "out of the portion or share of my father's estate that may come to me," such legacies are demonstrative legacies. *Gelbach v. Shively*, 10 Atl. 247, 67 Md. 498.

## **DEMURRAGE.**

Every improper detention of a vessel may be considered a demurrage, and compensation in that name be obtained for it. Demurrage is only an extended freight or reward to the vessel in compensation of earnings she is improperly caused to lose. *Sprague v. West* (U. S.) 22 Fed. Cas. 970, 972; *Donaldson v. McDowell* (U. S.) 7 Fed. Cas. 887, 888; *The J. E. Owen* (U. S.) 54 Fed. 185, 186; *Neilsen v. Jesup* (U. S.) 30 Fed. 138, 139; *Hawgood v. 1,810 Tons of Coal* (U. S.) 21 Fed. 681, 686; *Jesson v. Solly*, 4 Taunt. 52, 55; *Falbenburg v. Clark*, 11 R. I. 278, 283. Where, however, demurrage had been earned before the execution of a bottomry bond, it could not be held to be freight, within the meaning of a clause in the bond covering the vessel, tackle, and freight as per charter party. *Brett v. Van Praag*, 31 N. E. 761, 768, 157 Mass. 182.

To say that "demurrage is only an extended freight" is incorrect, for it includes also compensation for the hazard of all such injuries and losses as may be caused by departure in point of time from the regular course of the intended voyage. Under a contract of affreightment containing no previ-



sion that the payment of demurrage should depend upon the earning of freight, demurrage for extra detention at an intermediate port of an entire voyage became absolutely due at such port, and recoverable, though the vessel was lost in the return voyage. *Caroline A. White* (U. S.) 5 Fed. Cas. 94, 95.

Demurrage is the compensation provided for in a contract of affreightment for the detention of a vessel beyond the time agreed on for loading or unloading. *Fisher v. Abeel* (N. Y.) 44 How. Prac. 432, 440.

In the popular sense, "demurrage" covers not only what is strictly known to the law as such, but also damages for detention when such damages are recoverable. *Donnell v. Amoskeag Mfg. Co.*, 118 Fed. 10, 11, 55 C. C. A. 178.

"Demurrage" means a sum of money due by express contract for the detention of a vessel in loading or unloading one or more days beyond the time allowed for that purpose by the charter party. As it is a certain sum due by force of an express contract, general assumpsit will lie for it. Damages in the nature of demurrage are recoverable for detention beyond a reasonable time in unloading only, and, where there is no express stipulation to pay demurrage, they are for a breach of the implied contract of the shipper. *Wordin v. Bemis*, 32 Conn. 268, 273, 85 Am. Dec. 255.

Demurrage, as is remarked by Heath, J., in *Jesson v. Solly*, 4 Taunt. 53, is only an extended freight, and the liability for freight and for demurrage stands upon the same grounds. Damages in the nature of demurrage, observes Butler, J., in *Wordin v. Bemis*, 32 Conn. 268, 273, 85 Am. Dec. 255, are recoverable for detention beyond a reasonable time in unloading only, and when there is no express stipulation to pay demurrage. They are in the nature of demurrage because they are for the detention of the vessel, and measured by a debt, like demurrage, and are damages because they are recoverable for a breach in an implied contract of the shipper that he will receive the goods in a reasonable time. *Hall v. Barker*, 64 Me. 339, 343.

Demurrage is merely an allowance for compensation for the delay or detention of a vessel. It is often a matter of contract, but not necessarily so. The very circumstance that in ordinary commercial voyages a particular sum is deemed by the parties a fair compensation for delay is a reason why it is and should be adopted as a measure of compensation in cases *ex delicto*. *The Apollon*, 22 U. S. (9 Wheat.) 362, 378, 6 L. Ed. 111.

Demurrage is a charge payable to a vessel or carrier in compensation of the earnings she is improperly caused to lose either by delay or other act of the charterer. *Two Hundred and Seventy-Five Tons of Mineral Phosphates* (U. S.) 9 Fed. 209, 210.

The merchant usually covenants to load and unload the ship within a limited number of days after she is ready to receive the cargo and after arrival at the destined point. Frequently, also, it is stipulated that the ship shall, if required, wait a further time to load and unload, or to sail with convoy, for which the merchant covenants to pay a daily sum. This delay, and the payment to be made for it, are both called "demurrage." *Brown v. Ralston* (Va.) 4 Rand. 504, 510.

It is usual in charter parties to insert an agreement that a specified number of days shall be allowed for loading and unloading, or for one of those operations, and that it shall be lawful for the freighter to detain the vessel for these purposes a further specified time on the payment of a daily sum. A contract to the same effect is often inserted in the bill of lading where goods are sent in a general ship. This delay and the payment agreed on are called "demurrage." *Cross v. Beard*, 26 N. Y. 85, 88, 89.

Demurrage is a loss of profits or of the use of a vessel pending repairs or other detention arising from a collision or maritime tort. *The Conqueror*, 17 Sup. Ct. 510, 516, 166 U. S. 110, 41 L. Ed. 937.

## DEMURRER.

See "General Demurrer"; "Speaking Demurrer"; "Special Demurrer."  
Demurrer as trial, see "Trial."

A demurrer is an allegation of the defendant, which, admitting the matters of fact alleged by the bill to be true as they are therein set forth, insists that they are insufficient for plaintiff to oblige defendant to answer. *Hopkins v. Wainwright's Ex'r* (S. C.) 1 Desaus. 302; *Parish v. Sloan*, 38 N. C. 607, 609.

A demurrer is an allegation that, admitting the facts of the preceding pleading to be true as stated by the party making it, he has yet shown no cause why the party demurring should be compelled by the court to proceed further; and the import of the demurrer is that the objecting party will not proceed, but will wait the judgment of the court whether he is bound so to do. *Reid v. Field*, 1 S. E. 395, 397, 83 Va. 26.

A demurrer in law is the tender of an issue in law on the facts which have been established by the pleadings. *Hall v. Browder's Adm'rs*, 5 Miss. (4 How.) 224, 225; *Goodman v. Ford*, 23 Miss. (1 Cushman) 582, 595.

A demurrer raises a question of law, and is directed to the sufficiency of the complaint. *Hostetter Co. v. E. G. Lyons Co.* (U. S.) 99 Fed. 734, 735.

A demurrer is in effect a declaration that the party demurring will go no further

because the other has shown nothing against him. *Webb v. Vanderbilt*, 89 N. Y. Super. Ct. (7 Jones & S.) 4, 10.

A demurrer to an answer searches the record, and requires the court to examine into the sufficiency of the facts stated in the petition to constitute a legal cause of action against the answering defendant. *Boggs v. Wann* (U. S.) 58 Fed. 681, 683.

A demurrer in equity is similar to one in law, and is an appeal to the court whether defendants should be compelled to answer the bill, where the demurrer is for cause apparent on the face of the bill. *Martin v. McBryde*, 38 N. C. 531, 533.

A demurrer is a demand of the judgment of the court whether the defendant is bound to set forth any defense. *McMasters v. West Chester Normal School*, 18 Pa. Co. Ct. R. 481, 487.

The office of a demurrer is to sweep away a defective pleading. *Morrell v. Ball*, 45 App. Div. 584, 585, 61 N. Y. Supp. 405, 406 (citing *Standard Fashion Co. v. Siegel-Cooper Co.*, 157 N. Y. 60, 68, 51 N. E. 408, 410, 48 L. R. A. 854, 68 Am. St. Rep. 749).

A demurrer addresses itself to a pleading which, however defective or insufficient it may be, is properly in court. *Goodrich v. Alfred*, 43 Atl. 1041, 1042, 72 Conn. 267.

A demurrer is not a pruning hook, and cannot be used to trim out immaterial and irrelevant matter. This must be done by motion. In *re McMurry's Estate*, 78 N. W. 691, 107 Iowa, 648.

Chitty, in his treatise on Pleading, says (volume 1, p. 705): "A 'demurrer' has been defined to be a declaration that the party demurring will go no further because the other has not shown sufficient matter against him, and in point of form no precise words are necessary in a demurrer;" and "a plea, which is in substance a demurrer, though very informal, will be considered as such, and it is a general rule that there cannot be a demurrer to a demurrer." *Davies v. Gibson*, 2 Ark. (2 Pike) 115, 117.

#### As an admission.

A "demurrer" admits the facts stated in a pleading to which it applies, but insists that in law it does not call for the relief which that pleading seeks. It thus raises an issue, not of fact, but of law. The word comes from a Latin word "demorari"—to abide; and "he that demurreth in law is said to abide in law." *Pickens' Ex'rs v. Knisley*, 15 S. E. 997, 86 W. Va. 794 (quoting *Coke*).

Demurrer is the formal mode of disputing the sufficiency in law of the pleading of the other side. In effect, it is an allegation that even if the facts as stated in the

pleading to which objection is taken be true, yet their legal consequences are not such as to put the demurring party to the necessity of answering them or proceeding further with the cause. A demurrer to a pleading admits all the material facts stated therein, but alleges that those facts in law do not constitute a cause of action, and submits that question, and that question alone, to the judgment of the court. A demurrer admits all the allegations, but it admits nothing but what is material and well pleaded. Moreover, a demurrer is only a technical admission, and does not involve any confession. Conclusions of law are never admitted by a demurrer. *Groesbeeck v. Dunscomb* (N. Y.) 41 How. Prac. 302, 321.

A demurrer admits all such facts as are sufficiently pleaded, but is no admission of such as are not sufficiently pleaded. *Coxe v. Gulick*, 10 N. J. Law (5 Halst.) 323, 329.

A demurrer, for the purposes thereof, admits the truth of all the material allegations in the pleading. *Tecumseh State Bank v. Maddox*, 46 Pac. 563, 565, 4 Okl. 583.

A demurrer is said to admit all the allegations of the bill, but that is not for the purpose of a trial upon the merits. It is only for the determination of the sufficiency of the paper demurred to. *Belden v. Blackman*, 83 N. W. 616, 617, 124 Mich. 667.

A demurrer admits the facts set forth, and challenges their sufficiency in law upon which to maintain the action. *First Nat. Bank v. Kingsley*, 84 Me. 111, 113, 24 Atl. 794, 795.

A demurrer is an admission of the fact, submitting the law arising on that fact to the court. *Ex parte Vermilyea* (N. Y.) 6 Cow. 555, 559.

A demurrer admits all facts which are well pleaded. *O'Driscoll v. McBurney* (S. C.) 2 Brev. 451, 452.

A demurrer neither asserts nor denies any matter of fact. It merely, in effect, advances a legal proposition, namely, that the pleading demurred to is insufficient in law to maintain the case of the adverse party; and, under our practice, all demurrers must distinctly specify the reasons why the pleading demurred to is insufficient. *Miller v. Cross*, 48 Atl. 213, 214, 73 Conn. 583.

A demurrer to the declaration is not to be classed among pleas to the action, not only because it may be taken as well to any part of the pleadings as to the declaration, but also because it neither affirms nor denies any matter of fact, and is not, therefore, regarded as strictly a plea of any class, but rather an excuse for not pleading. To demur is to rest or pause. A demurrer merely advances a legal proposition. It forms an issue of law, admitting the facts, so far as

well pleaded, for the purpose of taking the opinion of the court preliminarily. Its language is: "That allowing all that is alleged to be true, there is not anything that calls for an answer, plea, or defense." In *Pease v. Phelps*, 10 Conn. 62, the court said: "A demurrer presents only an issue in law to the court for consideration. The jury have no concern with it; and although it is a rule of pleading that a demurrer admits facts well pleaded for the purpose of determining their legal sufficiency, yet as a rule of evidence it was never supposed that a demurrer admitted anything. A demurrer, then, is not an absolute admission. Its only office is to raise issues of law upon facts stated in the pleadings demurred to; so that a demurrer cannot perform the office of an answer in admitting the facts alleged." *Rice v. Rice*, 10 Pac. 495, 496, 13 Or. 337.

A demurrer only admits facts that are well pleaded. Mere averments or legal conclusions are not admitted by a demurrer until the facts and circumstances set forth are sufficient to sustain the allegation. *Horsford v. Gudger* (U. S.) 35 Fed. 388.

A demurrer admits matters of fact well pleaded and all reasonable inferences to be drawn therefrom, but not mere arguments or conclusions of law as made or drawn by the pleader. *Dennison Mfg. Co. v. Thomas Mfg. Co.* (U. S.) 94 Fed. 651, 654 (citing *United States v. Des Moines Nav. & R. Co.*, 142 U. S. 510, 544, 12 Sup. Ct. 308, 35 L. Ed. 1099; *Chicot County v. Sherwood*, 13 Sup. Ct. 695, 698, 148 U. S. 529, 37 L. Ed. 546).

"Demurred," as used in a court record reciting that the defendant had demurred, construed to comprehend "as much as would be comprehended by the language used in defining the term 'demurrer,' and must be regarded as equivalent to the declaration of a defendant, made in open court and placed upon the record of the court, that he will stay, or go no further in the court, because his adversary has not shown sufficient matter against him." *Davies v. Gibson*, 2 Ark. (2 Pike) 115, 118.

A demurrer denies the right to recovery or relief in whole or in part, admitting a properly pleaded allegation in the petition to be true, and is founded either upon the want of jurisdiction of the court or of the right of the petitioner, or upon the non-joinder or misjoinder of the parties or causes of action, or the absence of liability by defendant to the petitioner. Civ. Code Ga. 1895, § 5048.

#### As an appearance.

See "Appearance."

#### As an answer.

See "Answer."

#### As a defense.

See "Defense."

#### As a pleading.

A demurrer is a pleading. *Rosenbach v. Dreyfuss* (U. S.) 1 Fed. 391, 393.

The term "to plead," when used in a limited and appropriate sense, excludes the idea of a demurrer. *Welsh v. Blackwell*, 14 N. J. Law (2 J. S. Green) 344, 346.

No common-law writer or lawmaker ever confounded a plea or pleading with a demurrer, which implies simply a refusal to plead. *State ex rel. Alexander v. Ryan*, 2 Mo. App. 303, 309.

A demurrer to a declaration is not classed among pleas, not only because it may be taken as well to any other part of the pleadings as to the declaration, but also because it neither affirms nor denies any matter of fact, and is not, therefore, regarded as strictly a plea of any class, but rather as an excuse for not pleading. A demurrer merely advances a legal proposition—it forms an issue in law; admitting the facts, so far as well pleaded, for the purpose of taking the opinion of the court primarily. Its language is: "Allowing all that is alleged to be true, there is not anything that calls for an answer, plea, or defense." *Havens v. Hartford & N. H. R. Co.*, 28 Conn. 69, 89 (citing *Gould*, Pl.).

A demurrer is a legal exception to the sufficiency of the opposing pleading to which it refers, and raises an issue of law, and is a pleading, within the meaning both of the statute and common law; and hence, on a rule to plead, defendants were authorized to file a demurrer. *Mulvey v. Staab*, 12 Pac. 699, 701, 4 N. M. (Johns.) 50.

Though Rev. St. 1894, § 340, denominates a demurrer as a pleading, yet, strictly speaking, a demurrer is not a pleading. In the common-law practice a plea is the defendant's answer to the merits of the declaration as opposed to a demurrer, and to plead is to make allegations of fact which follow and oppose the allegations in the declaration. Hence Rev. St. 1894, § 379, providing for liberality in the construction of pleadings, does not apply to a demurrer. *Merrill v. Pepperdine*, 36 N. E. 921, 922, 9 Ind. App. 416.

#### Exception synonymous.

The word "exception," as used in Pen. Code, § 2036, providing for exceptions to challenges to the jury, is equivalent to a demurrer, for the denial of the sufficiency admits the allegations to be true in point of fact. It is immaterial whether the denial of sufficiency be expressed by the use of the word "exception" or the word "demurrer"; each performs the same office. *State v. Tighe*, 71 Pac. 3, 5, 27 Mont. 327.

**Motion to strike distinguished.**

While it is true that a motion to strike out a pleading is not the equivalent of a demurrer thereto, yet, where the motion has been sustained, it must be held that it, like a demurrer, admits the truth of all the facts well pleaded for the purposes of the motion. *Faylor v. Brice*, 7 Ind. App. 551, 555, 84 N. E. 833.

**DEMURRER TO EVIDENCE.**

A demurrer to evidence arises on an issue in law on the facts established by the evidence, and by necessity involves the admission of the truth of the facts intended to be proved by it. *Goodman v. Ford*, 23 Miss. (1 Cushm.) 592, 595; *Hall v. Browder's Adm'rs*, 5 Miss. (4 How.) 224, 228.

A demurrer to evidence is a pleading admitting the truth of the evidence demurred to, and alleging that the same does not constitute in law a cause of action, or does not sustain the burden of proof placed on the plaintiff. It admits the truth of the facts proved, together with the conclusion fairly inferable therefrom, and asks the judgment of the court as to their legal effect. *Pharr v. Bachelor*, 3 Ala. 237, 242.

A demurrer to evidence is a proceeding by which the court is called on to declare what the law is on the facts shown in evidence. It withdraws from the jury the application of the law to the facts, the truth of which it, of course, admits. *Patteson v. Ford* (Va.) 2 Grat. 18, 28.

A demurrer to evidence is a proceeding by which the court in which the action is pending is called on to decide what the law is on the facts shown in evidence, and it is regarded, in general, as analogous to a demurrer on the facts alleged in the pleading. When a party wishes to withdraw from the jury the application of the law to the facts, he may, by consent of the court, demur in law upon the evidence, the effect of which is to take from the jury and refer to the court the application of the law to the facts; and thus the evidence is made a part of the record, and is considered by the court, as in the case of a special verdict. *Suydam v. Williamson*, 61 U. S. (20 How.) 427, 436, 15 L. Ed. 978; *Van Stone v. Stillwell & Bierce Mfg. Co.*, 12 Sup. Ct. 181, 183, 142 U. S. 128, 35 L. Ed. 961. "In the case of *Nelson v. Whitfield*, 82 N. C. 46, 54, the court held that a demurrer to the evidence withdraws a case from the jury; and it is laid down in *Tidd*, Prac. 865, that, when the evidence is in writing, the adverse party will be required to join in the demurrer, but, when the parol evidence is loose and indeterminate or circumstantial, he will not be required to do so, unless the party demurring will admit upon the record every fact and every conclusion

which the evidence offered conduces to prove. The demurrer to the evidence is still preserved in seventeen of the states. The practice has not been repudiated in the other states, as obnoxious to their constitutions, but it has been superseded by a less cumbersome and more radical procedure, to wit, ordering a nonsuit and directing a verdict." *Hopkins v. Nashville, C. & St. L. R. R.* (Tenn.) 84 S. W. 1029, 1038, 32 L. R. A. 354. The demurrer not only admits the truth of all the evidence adduced by the party against whose evidence it is directed, but admits all the inferences which may be reasonably drawn therefrom. *Summers v. Louisville & N. R. R.*, 96 Tenn. (12 Pickle) 459, 463, 35 S. W. 210 (citing *Hinote v. Simpson*, 17 Fla. 444; *Sawyer v. Fitts* [Ala.] 2 Port. 9); *Edmisson v. Drumm-Flato Commission Co.*, 73 Pac. 958, 960, 18 Okl. 440; *Harwood v. Blythe*, 32 Tex. 800, 804; *Bradbury v. Reed*, 23 Tex. 285; *Pitt v. Texas Storage Co.* (Tex.) 18 S. W. 465, 466, 4 Willson, Civ. Cas. Ct. App. § 295. It admits not only those facts which are directly sworn to and stated on the record, but also all conclusions of fact to which the evidence is admissible, and to which it is properly relevant and applicable. *Duerhagen v. United States Ins. Co.* (Pa.) 2 Serg. & R. 309, 315. Consequently, all the court can decide on a demurrer to the evidence is whether any competent evidence was given or not. *Harwood v. Blythe*, 32 Tex. 800, 803.

A demurrer to the evidence is only a pleading bringing before the court the admitted evidence. *Heald v. Wallace*, 71 S. W. 80, 82, 109 Tenn. 346.

A demurrer to evidence is a proceeding by which the judges, whose province it is to determine questions of law, are called on to declare what the law is on the facts in evidence; and it is analogous to a demurrer on the facts alleged in the pleading. *Mobile & O. R. Co. v. McArthur*, 43 Miss. 180, 185 (citing 1 Phil. Ev. 313).

A demurrer to evidence is analogous to a demurrer in pleading; the party from whom it comes declaring that he will not proceed because the evidence offered on the other side is not sufficient to maintain the issue. A demurrer to the evidence leaves open no question whatever in the law of evidence—that is to say, of the admissibility of evidence—but only, like other demurrers, questions of substantive law. A demurrer to the evidence waives objections interposed to the admissibility and competency of evidence by the party who filed the demurrer. *Southern Ry. Co. v. Leinart*, 64 S. W. 899, 900, 107 Tenn. 635. It also, if not precisely similar, bears a close analogy to a motion for a nonsuit, and the action of a court in granting a nonsuit on the ground that plaintiff has failed to prove a sufficient case for a jury is as much a decision upon a matter of law as its action in sustaining a demurrer to a plead-

ing. *Kleinschmidt v. McAndrews*, 5 Pac. 281, 286, 4 Mont. 8.

Early in its history this court adopted the term "nonsuit" as the appropriate name for that proceeding known to the common-law practice as a "demurrer to the evidence." By a demurrer to the evidence the party demurring declares that he will not proceed because the evidence offered on the other side is not sufficient to maintain the issue. That the nonsuit of our practice is the same as the demurrer to the evidence of the common law is clearly pointed out by Mr. Justice Bleckley in *Anderson v. Pollard*, 62 Ga. 46, 50, where he says: "The want of necessary averments in the declaration is not cause for a nonsuit, for a nonsuit, under our practice, takes place on failure to support the declaration by evidence. We demur to the evidence as insufficient, and move to nonsuit the plaintiff. A motion of nonsuit is aimed at the evidence as compared with what the declaration is, not at the declaration as compared with what it ought to be." *Kelly v. Strouse & Bros.*, 43 S. E. 280, 284, 116 Ga. 872 (citing *Reeves v. Jackson*, 118 Ga. 182, 38 S. E. 814; *Bray v. Chattanooga, R. & S. Ry. Co.*, 113 Ga. 308, 38 S. E. 849; *Barge v. Robinson*, 115 Ga. 41, 42, 41 S. E. 258).

#### **Motion to instruct verdict distinguished.**

"The difference between the demurrer to the evidence and the motion to instruct a verdict for the defendant is technical, but it is still a practical difference, in this: that the defendant does not choose to withdraw his case from the jury, and rely upon the testimony already introduced, but exercises his option of calling for the judgment of the court upon the strength of the plaintiff's case, with the privilege, in case the decision is against him, of proceeding to develop his defense to the plaintiff's action." *Eberstadt v. State*, 45 S. W. 1007, 1008, 92 Tex. 94.

#### **DEMURRER ORE TENUS.**

A ruling on an objection to evidence, although for convenience it is called a "demurrer ore tenus," is not a demurrer, within the meaning of the statute which authorizes an appeal from an order which sustains or overrules a demurrer. *Mandelert v. Superior Consol. Land Co.*, 80 N. W. 728, 104 Wis. 423.

#### **DENIAL.**

See "Conjunctive Denials"; "General Denial"; "Specific Denial."

A denial is not a defense at all, and may not be so designated, since a denial raises an issue, but a defense consists of new matter affirmatively stated. *Flack v. O'Brien*, 43 N. Y. Supp. 854, 855, 19 Misc. Rep. 399;

*Green v. Brown*, 49 N. Y. Supp. 163, 164, 22 Misc. Rep. 279.

A mere negation of an allegation of value is not such a denial as the rules of pleading require. *Dean v. Leonard*, 9 Minn. 190, 198 (Gil. 176, 179).

A statement of facts by way of defense, which are merely inconsistent with those stated by the plaintiff, is in effect a denial, and not new matter. *Mott v. Baxter*, 68 Pac. 220, 221, 29 Colo. 418.

There is a "denial" of plaintiff's allegation in an action for divorce that he left the defendant because of certain acts committed by her, when the defendant alleges that the plaintiff left her without cause. A statement of facts by way of defense, which are merely inconsistent with those stated by the plaintiff, is in effect a denial. *Sylvia v. Sylvia*, 17 Pac. 912, 919, 11 Colo. 319 (citing *Bliss*, Code Pl. § 333).

A "denial," with regard to freehold rent, sufficient to work a disseisin, is when the rent, being lawfully demanded, is not paid; for denial is a disseisin of a rent charge. *Farley v. Craig*, 11 N. J. Law (6 Halst.) 262, 272.

#### **DENIZEN.**

A "denizen" is in a middle state between an alien and a natural-born citizen, and although subject to some of the disabilities of the former, is entitled to many of the privileges of the latter. He may take lands by purchase or devise, which an alien may not, but cannot take by inheritance; for his parent, through whom he must claim, being an alien, has no inheritable blood, and therefore could convey none to the child. From a like defect of hereditary blood the issue of a denizen born before denization cannot inherit from him, but his issue born after may. *McClenaghan v. McClenaghan* (S. C.) 1 Strob. Eq. 295, 319, 47 Am. Dec. 532.

#### **DENOMINATION.**

In an indictment charging the larceny of national bank bills, the number and denomination of which are to the grand jury unknown, "denomination" refers to the value or number of dollars the several bills represented, as the denomination of \$500, etc. *Duval v. State*, 68 Ala. 12, 17.

#### **As a religious sect.**

Religious denomination, see "Religious Sect."

A "denomination" is a religious sect having a particular name. *Hale v. Everett*, 53 N. H. 9, 92, 16 Am. Rep. 82.

A "denomination" is defined by Webster as "A class or collection of individuals called

by the same name; a sect." *Wilson v. Perry*, 1 S. E. 802, 804, 814, 29 W. Va. 169.

A "sect or denomination of Christians" should be construed to include a company of persons denominated Shakers, who have formed themselves into a community as a religious society, and entered into covenant relations with each other as a church, according to their faith and tenets, and have chosen deacons and a clerk, appointed their deacons, and their successors in office, to hold the church property and have the management of its temporal concerns. *Lawrence v. Fletcher*, 49 Mass. (8 Metc.) 153, 162.

A "denomination of religious persons," as used in a statute which appropriated a certain fund held in trust for the purposes of religion, meant a sect or denomination of religious persons having a common system of faith, written or traditional. *State v. Trustees of Township 9, Range 15, Ohio Co.'s Purchase*, 7 Ohio St. 58, 64.

## DENOUNCED.

An act or thing is "denounced" when the law declares it a crime and provides a punishment for it. *State v. De Hart*, 83 South. 605, 606, 109 La. 570.

## DENOUNCEMENT.

"Denouncement" was a term used in Mexican law to denote a judicial proceeding by which an alien who acquired property in fraud of the law—that is, without observing its requirements—might be deprived of it by such proceeding, which, in its substantive characteristics, was equivalent to "inquest of office found" at common law. *Williams v. Bennett*, 20 S. W. 856, 859, 1 Tex. Civ. App. 498; *De Merle v. Mathews*, 26 Cal. 455, 477.

A "denouncement," in Mexican mining law, is the delation or accusation which one who desires to rehabilitate an old mine makes of the default which the former owner has committed, and by which the previous title has been lost. It has no application to anything connected with the title of a new mine. *Castillero v. United States*, 67 U. S. (2 Black) 17, 109, 17 L. Ed. 860.

The "denouncement" of a new work being a proceeding to restrain the erection of some new work, as, for instance, a building which may, if completed, injuriously affect the property of the complainant, is of a character similar to the interdict of possession. *Von Schmidt v. Huntington*, 1 Cal. 55, 63 (citing Escribano, Dict.).

## DENTIST.

A "dentist" is a dental surgeon. He performs surgical operations upon the teeth

and jaw, and, as incidental thereto, upon the flesh connected therewith. His sphere of operations is included in the larger one of the physician and surgeon. *State v. Beck*, 43 Atl. 866, 367, 21 R. I. 288, 45 L. R. A. 269.

### As a mechanic.

A dentist, in one sense, is a professional man, but in another sense his calling is mainly mechanical, and the tools which he employs are used in mechanical operations. Dentistry was formerly purely mechanical, and instruction in it scarcely went beyond manual dexterity in the use of tools, and the knowledge of the human system generally, and of the diseases which might affect the teeth and render an operation important, was by no means considered necessary. Of late, however, as the physiology of the human system has become better understood, and the relation of its various parts and their mutual dependence are more clearly recognized, dentistry has made great progress as a science, and its practitioners claim with much justice to be classed among the learned professions. It is nevertheless true that the operations of the dentist are still for the most part mechanical, and, so far as tools are employed, they are purely so. The ordinary meaning of "mechanical tools" will include the instruments of a dentist, and such instruments would be exempt as "mechanics' tools." *Maxon v. Perrott*, 17 Mich. 332, 387, 97 Am. Dec. 191.

A dentist cannot be properly denominated a "mechanic," so as to be within the provisions of a statute exempting from execution the tools of a mechanic necessary for carrying on his trade. It is true that the practice of the dentist's art requires the use of instruments for manual operation, and that much of it consists in manual operation; but it also involves a knowledge of the physiology of the teeth, which cannot be acquired but by a proper course of study, and this is taught by learned treatises on the subject, and has a distinct, though limited, department of the medical art, in institutions established for the purpose. It requires both science and skill, and dentists cannot be included in the denomination of "mechanics." *Whitcomb v. Reid*, 31 Miss. 567, 568, 66 Am. Dec. 579.

### As a physician or surgeon.

A dentist is one who performs manual or mechanical operations to preserve teeth, to cleanse, extract, insert, or repair them; and a dentist is not a physician within Code, § 1117, prohibiting the sale of liquor on Sunday except on "a prescription from a physician." *State v. McMinn*, 24 S. E. 523, 524, 118 N. C. 1259.

A dentist is one whose profession is to clean and extract teeth, repair them when diseased, and replace them, when necessary,

by artificial ones, and a dentist will not be held to be a surgeon or physician, within the statutes relating to privileged communications. *People v. De France*, 62 N. W. 709, 712, 104 Mich. 563, 28 L. R. A. 139 (citing *State v. Fisher*, 24 S. W. 167, 119 Mo. 344, 22 L. R. A. 799); *City of Cherokee v. Perkins*, 92 N. W. 68, 69, 118 Iowa, 405.

## DENTISTRY.

See "Practicing Dentistry."

Dental surgery, as medicine, see "Medicine."

Dentistry is not a "trade" within the meaning of the statute exempting from execution the tools of a mechanic necessary for carrying on his trade, for it is a pursuit requiring a correct knowledge of the anatomy and physiology of a part of the human body, as well as mechanical skill in the use of the necessary instruments; while Webster defines a "trade" to be the business or occupation which a person has learned, and which he carries on for procuring subsistence or for profit, particularly a mechanical employment, distinguished from the liberal arts and learned professions and from agriculture. *Whitcomb v. Reid*, 31 Miss. 567, 569, 66 Am. Dec. 579.

## DENY.

Wag. St. p. 1017, § 15, requiring plaintiff in his reply to "deny" specifically each allegation controverted by him, is not satisfied by plaintiff's statement in his reply that he does not know whether a certain state of facts exists or not. *Watson v. Hawkins*, 60 Mo. 550, 553.

## DEPART.

The word "depart," in the statute of limitations, being used in connection with the word "return," comprehends all persons who are without the territory, and is not limited to the inhabitants of the territory, and applies as well to persons coming from abroad as to citizens of the country going abroad for a temporary purpose and then returning. *Burnes v. Crane*, 1 Utah, 179, 182.

Code Civ. Proc. § 20, providing that if, after a cause of action accrues against any person, he shall "depart from the state," the time of his absence shall not be computed as any part of the period within which the action must be brought, means such an absence from the state as entirely suspends the power of the plaintiff to commence his action, and not a mere temporary absence from the state while the debtor's usual place of residence was within the state. *Blodgett v. Utley*, 4 Neb. 25, 28.

Under a statute suspending the running of the statute of limitations when a party against whom a cause of action has accrued departs from the state, it is held that a resident of the state who removes his residence to another state, but continues business in the state from which he removed, coming into that state openly, notoriously, and regularly each business day, and remaining there during working hours, has not "departed" from the state within the meaning of the statute. *Webster v. Citizens' Bank (Neb.)* 96 N. W. 118, 119.

Gen. St. 1865, p. 747, § 16, relative to limitations of actions, declaring that, if a debtor "depart" from the state after a cause of action shall have arisen against him, the time of his absence shall not be deemed or taken as any part of the time limited, does not necessarily mean a departure with intent to permanently change the residence of the party. *Johnson v. Smith*, 43 Mo. 499, 501.

Under Code Civ. Proc. § 162, providing that if a cause of action accrues against any one, and he shall "depart from and reside out of the state," limitation shall be suspended during his absence, the statute is not put in motion by a casual visit to the state, but only by a return with a view to residence. *Lee v. McKoy*, 24 S. E. 210, 118 N. C. 518.

A Chinese subject, purchasing a through ticket, and embarking in an American vessel from one American port to another, and who does not leave the vessel when she, having leave to do so, touches at a foreign port, has not "departed" from the United States, within the meaning of the Chinese exclusion act of Congress of October 1, 1888, c. 1064, 25 Stat. 504 [U. S. Comp. St. 1901, p. 1318]. In *re Jack Sen* (U. S.) 36 Fed. 441, 442.

## DEPART FROM PORT.

"Departs from the port," within the meaning of Mechanic's Lien Law, Pub. St. Mass. c. 192, § 4, which provides that such lien shall be dissolved unless the person claiming the same files his claim within four days from the time when the vessel departs from the port at which she was when the debt was contracted, in the office of the clerk of the city or town within which the vessel was at such time, means to go to sea, to leave the harbor and enter on the high seas, whether upon a voyage to another port or in the prosecution of some business on the ocean, such as towing, fishing, rendering assistance, and the like. It is synonymous with "leave port," "go to sea," etc. *The Helen Brown* (U. S.) 28 Fed. 111, 112.

"Depart," as contained in insurance policies upon vessels requiring them to depart before a certain date, means to fairly set

forward upon the voyage, and not merely to break ground. *Moir v. Royal Exch. Assur. Co.*, 6 Taunt. 241.

Where a vessel leaves a port, at which a debt has been contracted on her account for repairs, in pursuit of some business, she "departs from port" within the meaning of the statute relative to proceedings for the collection of demands against ships or vessels. *Rockefeller v. Thompson*, 4 N. Y. Super. Ct. (2 Sandf.) 895.

A vessel does not "depart from port," within the lien laws, by merely moving from one portion of the port to the other, though the place to which the vessel moves is not within the municipal limits of the city at which the port is located. *Young v. The Orpheus*, 119 Mass. 179, 185.

### DEPARTING THE REALM.

It is a "departing the realm" and an act of bankruptcy within St. 18 Eliz. c. 7, § 1, if a natural-born subject of England, domiciled abroad, comes to England for a temporary purpose, and leaves it sooner than he intended, to avoid an arrest. *Williams v. Nunn*, 1 Camp. 152, 155.

### DEPARTING THIS LIFE WITHOUT ISSUE.

"Departing this life without issue," as used in a will by which testator provided that his real estate should be held sacred for the support of those to whom it was given during their natural lives, and that the same should descend to their children at their death, but, in the event of any of such children departing this life without issue, that the property so willed should descend to the brothers and sisters who may survive, should be construed as importing a failure of issue at the time of the death of the first devisee, and not an indefinite failure. *Armstrong v. Armstrong*, 53 Ky. (14 B. Mon.) 333, 340.

## DEPARTMENT.

See "Appropriate Department"; "Executive Department"; "Fire Department"; "Head of Department"; "Land Department"; "Legislative Department"; "Military Departments"; "Principal Department"; "Public Department."

One of the significations of "department" is a province or business assigned to a particular person. The business assigned to a particular person is, according to this definition, in his "department." The business belonging to the post office is in a "department" of the post office, and a person employed in that business is a person em-

ployed in a "department" of the post office. If, then, the carrying of the mail be a part of the business of a post office, it would seem that the person who carries it is a person employed in a "department" of the general post office, within Act April 30, 1810, regulating the post office establishment. *United States v. Belew* (U. S.) 24 Fed. Cas. 1079, 1080.

It has sometimes been found difficult, if not impossible, to describe a "department" of a person's business in language which will fit all cases, and furnish a sure test by which to determine in every instance if a person in charge of what is claimed to be a department is so in fact, and for that reason is a vice principal, or is merely a fellow servant. Much depends on the magnitude and character of the work that is done in that subdivision of the business which one has been appointed to superintend, and upon the further question whether the work is of such a nature as requires intelligent and careful supervision on the part of the master. In *Central R. Co. v. Keegan*, 160 U. S. 259, 264, 16 Sup. Ct. 269, 40 L. Ed. 418, the remark made concerning the doctrine of departmental control was, in substance, that while the court recognized that the head of a department might, in a proper case, be regarded as a vice principal, yet this must not be understood to mean that every separate piece of work was a separate "department"; and where a wrecking company had purchased buildings used for an exposition, and placed the general superintendent in charge of the work of tearing down the buildings, the tearing down being separate from the selling of the materials, which was in charge of different men, such tearing down was a separate "department," and the superintendent thereof was, as to the men employed, not a fellow servant, but a vice principal. *Chicago House Wrecking Co. v. Birney*, 117 Fed. 72, 77, 54 C. C. A. 458.

"Departments," as used in the charter of Denver, art. 2, § 23, conferring on the city council the power to provide for the employment of clerks in any of the departments in the city government, is not used in a technical sense; so that wherever, in any branch or portion of the city government, services are necessary for which provision has not been made, the want may be supplied by the authority of that section. *Morgan v. City of Denver*, 59 Pac. 619, 622, 14 Colo. App. 147.

"Department," as used in a proviso to Laws 1893, p. 120, § 2, reciting that nothing therein contained should be so construed as to make employes fellow servants with other employes engaged in any other department or service, mean a subdivision of business, as running a train, clearing away a wreck, repairing a track, etc. *Gulf, C. & S.*



F. Ry. Co. v. Warner, 35 S. W. 364, 366, 89 Tex. 475.

## DEPARTURE.

### In pleading.

A "departure," in pleading, is defined to be when a party quits or departs from the case or defense which he has first made, and has recourse to another. *White v. Joy*, 13 N. Y. (3 Kern.) 83, 89; *Allen v. Watson* (N. Y.) 16 Johns. 205, 206; *Burr v. Baldwin* (N. Y.) 2 Wend. 580, 581; *Kimberlin v. Carter*, 49 Ind. 111, 112; *Schneider v. Oregon Pac. Ry. Co.*, 25 Pac. 391, 392, 20 Or. 172; *Tappan v. Harwood* (S. C.) 2 Speers, 536, 547; *Neve v. Allen*, 41 Pac. 966, 968, 55 Kan. 638; *Rosby v. St. Paul, M. & M. Ry. Co.*, 33 N. W. 698, 699, 37 Minn. 171; *Bishop v. Travis*, 53 N. W. 461, 51 Minn. 183; *Logiodice v. Gannon*, 21 Atl. 100, 101, 60 Conn. 81; *United States v. Morris* (U. S.) 28 Fed. Cas. 1836, 1847.

A departure in pleading is not allowed because the record would by such means be spun into prolixity. Where defendant, in an action on the penal part of the bond, pleaded performance, he could not, in reply to plaintiff's replication, attempt to show a justification of the failure to perform, this being a departure from the plea. *Warren v. Powers*, 5 Conn. 373, 379.

It is not a "departure" to set up new matter by way of replication, or additional facts not inconsistent with those averred in the complaint. *Sweetser v. Odd Fellows' Mut. Aid Ass'n*, 117 Ind. 97, 99, 19 N. E. 722, 723 (citing *Fanning v. Hibernia Ins. Co.*, 37 Ohio St. 344). Where the reply, in a quo warranto proceeding, sets up the particular facts which it is claimed show that defendant company is now exercising franchises and privileges which it may once have had, and which it does not now possess, such reply does not constitute a "departure" from the petition, but supports and fortifies it. *State v. Walnut Hills, M. & P. Road Co.* (Ohio) 7 O. C. D. 453, 455.

A departure, under the Code, admits the groundlessness of the complaint, abandons the case made by it, and makes a new one. *Louisville, N. A. & C. Ry. Co. v. Herr*, 35 N. E. 556, 557, 135 Ind. 591. This does not in any sense avoid the answer, but confesses it without avoiding it; otherwise it would not be a departure at all. *McAroy v. Wright*, 25 Ind. 22, 29.

The term "departure," as used in the law of pleading, is used to designate a pleading, filed by the plaintiff after the declaration, which does not support the declaration. The term is applicable to a replication of set-off to a plea of set-off, as the set-off so pleaded in the replication should have been

pleaded in the declaration. *Heath v. Doyle*, 27 Atl. 833, 335, 18 R. I. 252.

The term "departure," in pleading, supposes a good complaint, and a departure is an abandonment of the cause of action as stated in some essential particular, and the substitution of something materially different. Where a complaint does not state a cause of action, the replication cannot be a departure. *Denver & R. G. R. Co. v. Cahill*, 45 Pac. 285, 287, 8 Colo. App. 158.

Where the pleader deserts in his replication the ground in point of law upon which the account rested the cause, there is as much a departure as if he had changed his ground in point of fact. Thus, where a plaintiff in bringing his action relied on the statute of one state, but in his replication changes his ground and relies on the statute of another state, there is a departure. *Midland Steel Co. v. Citizens' Nat. Bank*, 59 N. E. 211, 214, 28 Ind. App. 71.

"When a man in his former plea pleadeth an estate made by the common law, in the second plea regularly he shall not make it good by an act of Parliament. So when, in his former plea, he intituleth himselfe generally by the common law, in a second plea he shall not enable himselfe by a custome, but should have pleaded it first." Co. Litt. 304a. A "departure" may be either in the substance of the action or defense, or the law on which it is founded, as, if a declaration be founded on a common law, and the replication attempt to maintain it by a special custom or act of Parliament. Steph. Pl. pp. 412-414, thus discusses "departure": "These, it will be observed, are cases in which the party deserts the ground in point of fact that he had first taken; but it is also a departure if he puts the same facts on a new ground in point of law." In Saund. Pl. & Ev. pp. 806, 807, it is said a departure in pleading is said to be when a party quits or departs from the case or defense which he first made, and has recourse to another. It is when his replication or rejoinder contains matter not pursuant to the declaration or plea, and which does not support and fortify it. A departure may be either in the substance of the action or defense, or the law on which it is founded. *Union Pac. Ry. Co. v. Wyler*, 15 Sup. Ct. 877, 880, 158 U. S. 285, 39 L. Ed. 983.

Matter which merely explains or fortifies the previous pleading is not a departure. Moreover, a variation in immaterial matter is not a departure. Thus, in an action against the maker of a note, the complaint in which alleged the execution of a promissory note to the payee and the indorsement and transfer of it by the payee to the plaintiff, and the answer alleged payment of the note to the payee and a redelivery of it by him to the maker, but the reply admitted the fact of the redelivery of the note, and

alleged that the maker had subsequently for value transferred it to one C., who in turn transferred it to the plaintiff, it was held that the reply was not a departure from the complaint. *Bishop v. Travis*, 58 N. W. 461, 51 Minn. 183.

A reply which alleges that the contract was just as alleged in the complaint, that the writing set up in the answer is not the contract in fact made, and that the plaintiff was induced to sign it by the false and fraudulent representations of defendant as to its contents, is not a departure. On the contrary, it fortifies and supports the allegation of the complaint by avoiding the new matter set up in the answer. *Rosby v. St. Paul, M. & M. Ry. Co.*, 33 N. W. 698, 699, 37 Minn. 171.

Where a complaint in ejectment demands possession of the whole of the premises, and the plaintiff in the replication, to avoid a plea of jurisdiction, prays only a part of the premises and nominal damages, such replication constitutes a departure. *Logiodice v. Gannon*, 21 Atl. 100, 101, 60 Conn. 81.

Where, in an action on account for merchandise sold, the answer sets up as a defense that defendant conveyed an interest in a mining claim to plaintiff in full satisfaction of his debt, a replication alleging that plaintiff was induced through false and fraudulent representations to accept the conveyance, such representation is not a departure. *Jamieson House Furnishing Co. v. Brainerd* (Colo.) 68 Pac. 675, 676.

A test of departure in a reply is the question whether evidence of the facts alleged in it would be, if received, contradictory of the allegations of the petition. Thus, where the petition alleges ownership, positive and unqualified, in the plaintiff, and the reply admitted the ownership to be that of a mortgage, which is ownership qualified and special, there was a departure. *Johnson v. State Bank*, 52 Pac. 860, 861, 59 Kan. 250.

#### Of vessel.

"Departure," when applied to a vessel, is a word of different meaning than "sail." It imports an effectual leaving of the place behind. If the vessel be detained or driven back, though she may have sailed, there is no "departure." *Union Ins. Co. v. Tysen* (N. Y.) 3 Hill, 118, 126.

Under Pub. St. Mass. c. 192, § 15, requiring a claim to be filed within four days after "the departure" of a vessel from the port at which she was when the debt was contracted, a departure of the vessel from the port on a pleasure excursion is included. *The Huron* (U. S.) 29 Fed. 183, 184.

The taking of a vessel from the city of New York to the dock in New Jersey for a single day for the process of repairing her

was not a "departure" within the meaning of the statute of New York giving a lien for debts contracted within such state. *The John Farron* (U. S.) 13 Fed. Cas. 670, 672.

#### DEPENDENCE.

The word "dependence," as used in connection with the liability to support a family, is not restricted to support and maintenance, food and clothing, but it is intended, where a claim to a homestead is made by an aunt because of the dependence of her nephews and nieces upon her, to include moral and mental training, and that care and nurture which would be prompted by the feelings of affection which existed between her and the children of her sister. *American Nat. Bank v. Cruger*, 71 S. W. 784, 789, 81 Tex. Civ. App. 17 (citing *Barry v. Hale*, 21 S. W. 783, 2 Tex. Civ. App. 668).

#### DEPENDENCY.

The word "dependency," as used in St. 1786, c. 68, regulating licensed houses, means some building detached from the house, and a part of the same property. Thus any building used for the common purpose of an inn, and situated within its curtilage is a "dependency" of such inn within the statute. *Goff v. Fowler*, 20 Mass. (8 Pick.) 300, 301; *Commonwealth v. Estabrook*, 27 Mass. (10 Pick.) 298, 294.

#### Of nation.

"Dependencies," as used in the nonimportation law of March 2, 1812 (2 Stat. 651), which revived the act of March, 1809, the provisions of which extended to the possessions as well as the colonies and dependencies of Great Britain, implied some civil and political relation borne by one country to another as its superior, different from that of a mere possession. *United States v. The Nancy* (U. S.) 27 Fed. Cas. 69, 71.

#### DEPENDENT.

##### See "Wholly Dependent."

The phrase "person or family dependent on him," in the constitution of a life association providing that the benefits were to be paid on behalf of a member to such member or members of his family, or person or persons dependent on him, as he should direct and designate by name, was construed not to include any persons who were not actual relatives or standing in place of relatives in some permanent way, or in some actual dependence on the member. *Supreme Lodge Knights of Honor v. Narin*, 26 N. W. 826, 828, 60 Mich. 44.

Within the meaning of the constitution and by-laws of a mutual benefit association,

which designates as a class who may receive the benefits of the society persons dependent on deceased members, means those sustained by or who rely for support on the aid of deceased members. *Alexander v. Parker*, 33 N. E. 183, 184, 144 Ill. 355, 19 L. B. A. 187; *Nye v. Grand Lodge A. O. U. W.*, 36 N. E. 429, 436, 9 Ind. App. 131.

A law of a beneficial association required applicants to enter on their applications the name or names of the members of their family or those dependent on them to whom they desired the benefit paid. It also provided that members in good standing might surrender their certificates and have new ones issued payable to such beneficiary or beneficiaries dependent on them as they might direct. Held, that the word "dependent" as used in the second clause was employed to describe all who might be beneficiaries, and did not restrict the right of substitution to persons wholly dependent on the member for support. *Marsh v. Supreme Council American Legion of Honor*, 21 N. E. 1070, 1072, 149 Mass. 512, 4 L. R. A. 382.

"Dependent," as used in the constitution of the Ancient Order of United Workmen, section 5, which provides that each member shall designate the person or persons to whom the beneficiary fund due at his death shall be paid, who shall in every instance be one or more members of his family, some one related to him by blood, or who shall be dependent on him, means some person or persons dependent for support in some way upon the deceased. Citing *Ballou v. Gile*, 50 Wis. 614, 7 N. W. 561. It is not restricted to those whom the deceased may be legally or morally bound to support, but the term should be restricted to those whom it is lawful for him to support. *Supreme Lodge A. O. U. W. v. Hutchinson*, 33 N. E. 816, 819, 6 Ind. App. 399 (citing *Keener v. Grand Lodge A. O. U. W.*, 38 Mo. App. 543).

"Dependence" is defined to be the state of deriving existence, support, or direction from another; the state of being subject to the power and operation of extraneous force; and such is its use in a statute giving a right of action for death in favor of those dependent on the deceased. It will include an aged mother, a minor sister, and a niece whom decedent had supported for some years. *Duval v. Hunt*, 15 South. 876, 888, 34 Fla. 85.

The term "person dependent on such injured person," in an act authorizing a recovery against a person unlawfully furnishing spirituous liquors for injuries resulting therefrom to any person who shall be in any manner dependent on such injured person, does not apply to one upon whom the injured person becomes dependent in consequence of intoxication produced by liquor unlawfully furnished, and who was not previously dependent upon such injured person. A municipal corporation is not a "person"

within the meaning of the statute, though by reason of the illegal sale the person becomes a pauper and is supported by the municipality. *Hollis v. Davis*, 56 N. E. 74, 83.

Children who were provided a home with their mother, and supported during the life of the insured by the insured, were "dependents" of the father. *Hanley v. Supreme Tent Knights of Maccabees*, 77 N. Y. Supp. 246, 88 Misc. Rep. 161.

#### As any one not self-supporting.

A man whose earnings are sufficient to adequately support himself is not "dependent," though he may by law be chargeable with the maintenance of others, for the support of whom and himself such earnings are insufficient, within Code, § 2858, providing that a mother, or, if no mother, a father, may recover for the homicide of the child, minor or sui juris, upon whom she is dependent. *Georgia R. & Banking Co. v. Spinks*, 86 S. E. 855, 111 Ga. 571.

The word "dependent" usually has reference to the quality of being conditioned on something else, as the covenant of the purchaser of land to pay for it is usually so expressed in the contract of purchase as to be dependent on performance of the vendor's covenant to convey. As used in a statute giving a right of action for death caused by wrongful act to persons "dependent" on the deceased, the term means an incapacity on account of age, mental or physical infirmity or inability by reason of opportunity, to provide means for support, and whether or not one was dependent upon a person whose death has been wrongfully caused is a question to be determined by the facts and circumstances of each case. *Duval v. Hunt*, 15 South. 876, 888, 34 Fla. 85.

The term "dependent persons" includes minors who do not own property in their own right, although they have been earning their own living. *Woods v. Perkins*, 9 South. 48, 43 La. Ann. 347.

The provision of Rev. St. § 1691, for the homestead in favor of a debtor having family or mother or father, or persons "dependent on him for support," means persons dependent for actual and necessary support, and not persons able to earn a living. In this connection the court remarks that the law does not contemplate the case of a debtor who supports in idleness persons, even children, male or female, who are not minors, cripples, imbeciles, infirm of constitution or health, or otherwise disabled in making a living for themselves. It was consequently held that the dependency of healthy, robust adult daughters was neither actual nor necessary, and that, as there was no reason why they should not support themselves, they could not be regarded as persons de-

pendent for support. *Decuir v. Benker*, 88 La. Ann. 320, 321.

#### **Affianced wife.**

"Dependent," as used in a by-law of an insurance company requiring that the beneficiaries should be persons dependent on the member, means persons who rely on the member's ability for pecuniary aid, such as clothing, lodging, food, or education, and does not include the affianced wife of the insured who remains such until after the member's death, since the only obligation imposed by his engagement to marry was an obligation to carry out his contract. Their mutual promises to marry did not in any sense, by itself, make her dependent on him. *Parke v. Welch*, 33 Ill. App. 188. As used in Rev. St. 1877, c. 204, authorizing certain associations to provide in their by-laws for the payment by each member of a fixed sum to be payable at his death to his widow, orphans, or other dependents, it means some person or persons "dependent for support in some way on the deceased." It does not include a girl to whom he is engaged to be married. *Supreme Council American Legion of Honor v. Perry*, 5 N. E. 634, 636, 140 Mass. 580.

#### **Creditor.**

An association was organized under Pub. St. c. 115, authorizing the organization of insurance corporations for the purpose of assisting the widows, orphans, or other persons dependent on deceased members. Held, that the word "dependent" as there used meant a person relying on the insured for support and sustenance, and could not be construed to include a person whose only relation to the deceased member was that of creditor, and a benefit certificate in a company organized under such act, payable to the member's creditor, was void. *Skillings v. Massachusetts Benefit Ass'n*, 15 N. E. 566, 568, 146 Mass. 217.

#### **Widow.**

"Dependent," as used in the by-laws of a mutual benefit order providing for payment of the benefits to those "dependent" on the member, should be construed to mean some person or persons dependent for support in some way on the deceased, and, where it appears that there is no other person so dependent on the deceased except the widow, the benefits should be paid to her, and not to the administrator of the deceased, by whom the money would be used to pay creditors of such deceased. *Ballou v. Gile*, 7 N. W. 561, 562, 50 Wis. 614.

"Dependent," as used in a statute giving a right of action to one "dependent" on a person whose death was caused by intoxicating liquors, should be construed to mean a legal dependency only, the same as though it read "to any one legally dependent." If

it is given greater scope, there would be great difficulty in administering it. There would seem to be no stopping place short of including all possible cases of actual dependency, whatever the relation of the parties, and notwithstanding the absence of even a moral obligation to support. The law cannot determine what moral obligations are, and takes no cognizance of them, and, where an action is brought by one claiming to be the widow of such person, it is incumbent on her to prove that her marriage was lawful. *Good v. Towns*, 56 Vt. 410, 415, 48 Am. Rep. 799.

Under Rev. St. § 4707 [U. S. Comp. St. 1901, p. 3246], providing that if a soldier has died entitled to a pension, and leaves neither widow nor minor children, his mother, father, or orphan sisters and brothers, if "dependent" on him at the time of his death, shall be entitled to the pension, a mother is dependent upon her son when she requires for her support the use of a farm in which he has an interest as heir. *United States v. Purdy* (U. S.) 38 Fed. 902.

#### **DEPENDENT COVENANT.**

"Dependent covenants" are covenants in which the performance of one depends on the prior performance of another. *Chouteau v. Rice*, 1 Minn. 106, 115 (Gil. 83, 98).

A "dependent covenant" is a covenant depending on the prior performance of some act or condition, and until the condition is performed the other party is not liable to an action on his covenant. *Bailey v. White*, 3 Ala. 330, 331.

A "dependent covenant" is an agreement to do or omit to do something which respects the thing on which it depends, and in contemplation of law it then forms a part of or appurtenance to the premises. It enters into their value if the covenant be on the side of the lessor, or the amount of the rent, which is itself a part of the land. *Norman v. Wells* (N. Y.) 17 Wend. 186, 149.

A "dependent covenant" is one which it is not the duty of the covenantor to perform until some other covenant contained in the same agreement has been performed by the opposite party. Where a person contracted to sell land for a certain sum in cash, and certain other land to be taken in part payment, the covenants in such contracts are dependent, the performance by one being the consideration of the performance by the other. *Gray v. Smith* (U. S.) 76 Fed. 525, 534.

Covenants are either dependent and concurrent, or mutual and independent. The first depends on the prior performance of some act or condition, and, until the condition is performed, the other party is not liable to an action on his covenant. In the

second, mutual acts are to be performed at the same time, and if one party is ready and offers to perform his part, and the other neglects or refuses to perform his, he who is ready and offers has fulfilled his engagement, and may maintain an action for the default of the other's, though it is not certain that either is obliged to do the first act. The third sort is where either party may recover damages from the other for the injury he may have received for a breach of the covenants in his favor, and it is no excuse for the defendant to allege a breach of the covenant on the part of the plaintiff. *Bailey v. White*, 3 Ala. 330, 331.

The only cardinal rule in determining whether covenants are dependent or independent is to construe them according to the meaning of the parties and the good sense of the case. To ascertain that intention, the following general rules have been deduced from adjudged cases: (1) If a day be appointed for the performance of an act, and such day is to happen or may happen before the performance of the act which is the consideration for the first-mentioned act, then the covenants are considered mutual and independent, and an action may be brought without averring performance of the consideration; and so it is when no time is fixed for the performance of the consideration. (2) But when the day appointed for the payment of money or performance of an act is to happen after the thing which is the consideration is to be performed, no action can be maintained before performance of the condition. (3) Where a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be brought for a breach of the covenant without averring performance; and, when a person has received part of the consideration for which he entered into the agreement, the law obliges him to perform the agreement on his part, and leaves him to his remedy to recover damages for not receiving the whole consideration. (4) But where the mutual covenants go to the whole consideration on both sides, they are mutual conditions and dependent. (5) Where two acts are to be done at the same time, neither party can maintain an action without showing performance, or an offer to perform his part. Under these principles, where one party agreed to have certain land cleared and fenced as fast as the other party should require it to sow, and to have the bushes cleared off the land, and that if he failed to so clear and fence he should pay damages therefor, and the other agreed to pay a sum of money on a time fixed, action could be brought for the sum of money, although the land had not been cleared as fast as required for sowing, since it did not appear that the sowing was all to take place prior to the payment, since the covenant for dam-

ages showed an intention to rely on the covenants, and since a part of the consideration had been already received. *Tompkins v. Elliot* (N. Y.) 5 Wend. 496, 497.

## DEPONENT.

A "deponent" is a witness; one who gives information, on oath or affirmation, respecting some fact known to him, before a magistrate; he who makes a deposition. 1 Bouv. Law Dict. 406. Richardson defines "depose," or, as the Scotch say, "depone," "to give evidence; bear witness or testimony." He defines "deponent" as "one who gives evidence, bears witness or testimony, so called, because the witness depones (deponit), places his hand upon the book of the Holy Evangelists, while he is bound by the obligation of an oath." It is thus seen that the word "depone," from which is derived "deponent," has relation to the mode in which the oath is administered, and not as to whether the testimony is delivered orally or reduced to writing. The word "witness" is a broader term, including deponents as well as affiants. *Bliss v. Shuman*, 47 Me. 248, 251, 252.

A deposition relating to a claim against a bankrupt, reciting that the members of a firm made oath that a bankrupt was justly and truly indebted to the "deponent" in a certain sum, and which was signed by one of the firm only, should be construed as referring to the person, and to that person alone, who makes the deposition; hence such deposition does not prove a firm debt. *Meltzer v. Doll*, 91 N. Y. 365, 371.

## DEPORTATION.

Strictly speaking, "transportation, extradition, and deportation," although each has the effect of removing a person from a country, are different things and for different purposes. Transportation is by way of punishment of one convicted of offense against the laws of the country; extradition is the surrender to another country of one accused of an offense against its laws, there to be tried, and, if found guilty, punished; deportation is the removing of an alien out of the country simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent, or under those of the country to which he is taken. *Fong Yue Ting v. United States*, 18 Sup. Ct. 1016, 1020, 149 U. S. 698, 87 L. Ed. 906.

## DEPOSE.

An indictment for perjury charging that the defendant did "depose" and swear does not imply that the defendant was sworn. To "depose" is merely to state or affirm

some matter of fact in an affidavit or deposition, and this may be done as well before an oath is administered to the deponent as afterward. *United States v. McConaughy* (U. S.) 33 Fed. 168, 169.

Every written statement under oath or affirmation is embraced in the term "depose." Civ. Code Cal. 1903, § 14; Pol. Code Mont. 1895, § 16; Code Civ. Proc. Cal. 1903, § 17; Rev. Codes N. D. 1899, § 5135; Civ. Code S. D. 1903, § 2469; Pen. Code Cal. 1903, § 7; Code Civ. Proc. Mont. 1895, § 8463; Rev. St. Okl. 1903, § 2808; Pen. Code Mont. 1895, § 7; Civ. Code Mont. 1895, § 4662; Rev. St. Utah 1898, § 2498.

## DEPOSIT.

"Deposit," as used in 1 Stat. 254, § 2, providing that it shall be the duty of every master or commander of a ship or vessel belonging to citizens of the United States, on his arrival at a foreign port, to deposit his register, sea letter, and Mediterranean passport with the consul, etc., carries with it something more than the mere delivery of the papers to the consul for redelivery in a few hours. This word is not usually employed except when the thing is intended to remain with the depository for some time, and when the deposit is made for some specific object beyond that of mere inspection or examination. The papers should remain in the custody of such officer as long as the vessel remains in port. *Toler v. White* (U. S.) 24 Fed. Cas. 3, 5.

Where an insurance policy prohibited certain articles from being "deposited," stored, or kept in the insured building, the mere temporary presence of the articles was not a violation of its terms, a keeping of such goods permanently and for purposes of sale or storage being contemplated. *Phoenix Ins. Co. v. Lawrence*, 61 Ky. (4 Metc.) 9, 11, 12, 81 Am. Dec. 521.

"Deposited," as used in a bill of lading providing that the goods shall be taken from alongside by the consignee immediately after the vessel is ready to discharge, and, if not, they will be landed by the master and "deposited," at the expense of the consignee, on the dock or wharf or in the warehouse provided for that purpose, means placed either on the dock or in the warehouse, and not deposited in a warehouse on the dock. Goods may be deposited on the dock as well as in a warehouse. The meaning is that, if any expense attends either, the consignee is to pay it. *The Egypt* (U. S.) 25 Fed. 320, 323.

Intrusted or "deposited," as used in Rev. St. c. 109, § 4, providing that every person having any goods, effects, or credits of the principal defendant intrusted or deposited in his hands or possession may be summoned

as trustee, means something more than mere possession. The mere possession of property by a party having no claim to hold it against the owner does not render him liable therefor as trustee. *Staniels v. Raymond*, 58 Mass. (4 Cush.) 314, 316.

The term "deposit" in Act Feb. 28, 1803, § 2, providing that it shall be the duty of every master of a ship or vessel belonging to citizens of the United States, on his arrival at a foreign port, to deposit his register, sea letter, and Mediterranean passport with the consul, carries with it the idea of something more than the mere delivery of the papers to the consul for inspection, to redeliver in a few hours. This word is not usually employed except in cases where the thing is intended to remain with the depository for some time, and when the deposit is made for some specific object beyond that of mere inspection and examination. *Toler v. White* (U. S.) 24 Fed. Cas. 3, 5.

### As expose.

Rev. Laws, § 4191, makes it an offense for any one to maliciously expose any poisonous substance with the intent that the same shall be taken by any animal. Held that, where an indictment charged defendant with having deposited a poisonous substance, etc., the same was insufficient, the word "deposit" not being equivalent to "expose." The words are not synonymous. They not only do not mean the same thing, but are often used to express opposite ideas. Things are often deposited so as not to be exposed, and one word scarcely suggests the other. *State v. Pratt*, 54 Vt. 484, 485.

### As file.

"Deposited," as used in Pen. Code, § 94, providing that a person who willfully and unlawfully removes, mutilates, destroys, conceals, or obliterates a record, map, book, paper, document, or other thing filed or "deposited" in a public office or with any public officer by authority of law, is punishable, etc., is not synonymous with or equivalent to "filed." "A paper is said to be 'filed' when it is delivered to the proper officer and by him received to be kept on file. And the derivation and meaning of the word, as defined in the dictionaries, carry with them the idea of permanent preservation, becoming part of the permanent records of the public office where it is filed. 'Deposit' does not carry with it the same meaning. It may or may not mean a permanent disposition of the thing placed or deposited. It may mean a mere temporary disposition or placing of the thing. And, the words of the statute being coupled together by the conjunction 'or,' the same meaning is not to be given to each, but that meaning or signification which distinguishes it from the other." *People v. Peck*, 22 N. Y. Supp. 576, 579, 67 Hun, 580.

**As intrust.**

"Deposited," as used in Rev. St. § 5468, declaring that the fact that a letter has been deposited in any authorized depository for mail matter, or in charge of any postmaster, or of any clerk, carrier, agent, or messenger of the postal service, shall be evidence that it was intended to be conveyed by mail, should be construed in the sense of "intrusted," and refers to mail matter left in any way for official transmission with an employé in the course of his employment. *Walster v. United States* (U. S.) 42 Fed. 891, 895.

**DEPOSIT (Noun).**

See "Affidavit of Deposit"; "Bank Deposit"; "Call Deposits"; "Certificate of Deposit"; "General Deposit"; "Gratuitous Deposit"; "Individual Deposits"; "Judicial Deposit"; "Naked Deposit"; "Necessary Deposit"; "On Deposit"; "Special Deposit"; "Specific Deposit."

"Deposit" is the delivery of a thing for custody, to be redelivered on demand without compensation, such as a deposit of securities or valuables in a bank for safe-keeping. *National Bank of Ft. Edward v. Washington County Nat. Bank* (N. Y.) 5 Hun, 605, 607.

A "deposit" is an act by which a person receives the property of another, binding himself to preserve it and return it in time. Civ. Code, art. 2926. In re *Louisiana Savings Bank & Safe Deposit Co.*, 4 South. 301, 303, 40 La. Ann. 514.

Act June 4, 1879, providing that if any banker shall receive any deposits, when insolvent, whereby the deposit so made shall be lost to the depositor, the banker so receiving such deposit shall be deemed guilty of embezzlement, is broad enough to include, and does include, not only the total sum deposited, but also the constituent parts of such sum. *Meadowcroft v. People* (Ill.) 45 N. E. 991, 997.

Act June 16, 1836, § 22, providing that "deposits of money" belonging to a judgment debtor in any bank or with any person or body, corporate or politic, shall be liable to execution, should not be construed as applicable solely to transactions in which the relation of debtor and creditor between the depository and the depositor arises, but includes money left with a third person for safe-keeping, to be returned to the owner, not in money of like amount, but in the identical money left with him. *Rozelle v. Rhodes*, 9 Atl. 160, 162, 116 Pa. 129, 2 Am. St. Rep. 591.

A "deposit" is a receipt of money by a banker upon an engagement to repay the sum at the banking house when payment shall be called for there. It is not the bank's duty, as it is that of an ordinary debtor, to seek the creditor and pay him wherever found, but it

is a condition precedent to its duty to repay that the depositor shall call upon it to do so at its banking house, and there is no default of the bank until such call is made. *Tobias v. Morris*, 28 South. 517, 520, 126 Ala. 535 (citing *Downes v. Phoenix Bank*, 6 Hill, 297, 299; *Branch v. Dawson*, 23 N. W. 552, 33 Minn. 399).

The terms of an auction sale of land calling simply for a "deposit" by the purchaser of a stated amount as earnest money are complied with by the delivery of a check satisfactory to the vendor or auctioneer. *White v. Dahlquist Mfg. Co.*, 60 N. E. 791, 792, 179 Mass. 427.

The term "deposits," in Act March 25, 1824, providing that banks shall make a return of their condition to the Legislature, in which, among other things, shall be set forth their deposits, means money, current money received by the bank as such, and not old clothes or earrings, or, as in this case, a bundle sealed up and containing tide-water canal notes, the issuing of which had been interdicted, and in relation to which it would be a violation of duty of the bank to countenance and aid in their circulation. *Lloyd v. West Branch Bank*, 15 Pa. (3 Har.) 172, 175, 53 Am. Dec. 581.

Rev. St. § 3408, as amended by Act March 1, 1879, c. 125, provides that "deposits in \* \* \* savings banks \* \* \* shall be exempt from the tax on so much thereof as they have invested in securities of the United States \* \* \* and on all deposits not exceeding \$2,000." Held, that the meaning of the word "deposits," as last used, was equivalent to the terms "sums deposited," or "sums," the meaning being that neither deposits invested in United States securities, nor sums not exceeding \$2,000 deposited in the name of any one person, should be taxed. *German Sav. Bank v. Archbold*, 104 U. S. 708, 709, 28 L. Ed. 901 (reversing [U. S.] 10 Fed. Cas. 260).

"Deposit" is a word of large and varied signification, and its meaning depends largely upon the character in which it is used. The word, as used in Pub. Laws, 145, defining embezzlement, prohibiting the receiving by a bank of money from a depositor, with knowledge that the bank is at the time insolvent, and providing that one guilty of so doing shall be guilty of embezzlement, has reference to such deposits as the banks are authorized to receive. *Commonwealth v. Darlington*, 8 Pa. Dist. R. 237.

The word "deposit," as used in Acts 17th Gen. Assem., c. 155, amending Code, § 912, allowing county treasurers to deposit county funds in the banks in the state, includes both special and general deposits, and, the latter being the more common, there is no sufficient ground for concluding that the Legislature intended to exclude them from the operation

of the act. *Caldwell v. King*, 50 N. W. 975, 976, 84 Iowa, 228.

V. S. 582-584, requires savings banks and trust companies to pay a certain state tax on their individual deposits exceeding in the aggregate a certain sum. Held, that the word "deposit" did not mean deposits in the ordinary sense, but included securities held as a part of the trust fund by such bank. *Montpellier Sav. Bank & Trust Co. v. City of Montpeller*, 50 Atl. 1117, 73 Vt. 364.

As used in Tenn. Acts 1879, c. 166, § 1, entitled "An act to prevent the sale of cotton between sunset and sunrise," and providing that it shall not be lawful to sell, buy, barter or exchange, or receive on deposit any cotton between the hours of sunset of one day and the hours of sunrise of the next day, the phrase "or receive on deposit" is used in connection with sale, barter, and exchange, and signifies a step in their accomplishment. The phrase means to receive on deposit with a view to sell, and, as a step taken, to put the article on the market, so that the usual definitions of "deposit" cannot control. *Truss v. State*, 81 Tenn. (13 Lea) 311, 313.

A deposit, in general, is an act by which a person receives the property of another, binding himself to preserve it and return it in kind. Civ. Code La. 1900, art. 2926.

#### As assets.

Pub. St. c. 13, § 20, provides for the imposition of a tax on savings banks, to be paid semiannually on the average amount of deposits for the six months preceding. Held, that the word "deposits" as there used was not synonymous with "assets," but meant the amounts with which the bank was charged on its books as received from depositors, and did not include any particular part of the investments of the bank; hence it could not be said that the bank was taxable as on deposits for a guaranty fund and for undivided profits. *Suffolk Sav. Bank v. Commonwealth*, 23 N. E. 728, 729, 151 Mass. 103.

When a deposit is made, the ownership of the money passes to the bank and becomes part of its assets. In exchange therefor there accrues to the depositor, by force of the contract of deposit, an indebtedness against the bank to the extent of the amount deposited. So that, in a statute exempting from taxation the deposits in any bank for savings which he had deposited, the word "deposit" will not be held to mean the money received by the bank, or the securities into which it has been converted; so that an exemption extends to the bank alone, and will be held to mean the debt which is due the depositor under the contract of deposit. *People v. Dederick*, 54 N. Y. Supp. 518, 520, 35 App. Div. 29.

#### As a bailment.

A "deposit" is defined to be a naked bailment of goods, to be kept without recom-

pense, and to be returned when the bailor shall require it. *Bellows Falls Bank v. Rutland County Bank*, 40 Vt. 377, 380; *Payne v. Gardiner*, 29 N. Y. 146, 167; *Wilson v. Prosser* (Pa.) 5 Kulp, 471. In the case of deposits with a banker, the relation of the banker with the depositor is that of debtor and creditor, and does not partake of a fiduciary character. In re Cobb (U. S.) 96 Fed. 821, 824.

A "deposit" is a form of bailment in which the principal object of the parties is the custody of the thing bailed, and the services and labor to be performed in connection therewith are a mere accessory thereto. *Thompson v. Woodruff*, 47 Tenn. (7 Cold.) 401, 407.

A "deposit" is defined to be a bailment of goods to be kept by the bailee without reward, and delivered according to the object or purpose of the original trust. *Montgomery v. Evans*, 8 Ga. 178, 180.

When chattels are delivered by one person to another, to keep for the use of the bailor, it is called a "deposit." Civ. Code Ga. 1895, § 2921.

#### As capital stock.

The term "deposits," as used in a statute providing that every institution for savings incorporated under the laws of the commonwealth should pay a tax of  $\frac{1}{2}$  of 1 per cent. per annum on the amount of its deposits, means the sums received by the institution from depositors, without regard to the nature of the funds. They are not capital stock in any sense, nor are they even investments. *Provident Institution v. Massachusetts*, 73 U. S. (6 Wall.) 611, 627, 18 L. Ed. 907; *Home Ins. Co. v. State of New York*, 10 Sup. Ct. 593, 597, 134 U. S. 594, 33 L. Ed. 1025.

#### Commercial deposit.

A savings bank was allowed to receive money on deposit or in trust at such rate of interest or on such terms as may be agreed upon, the rate of interest to be allowed for the deposits not to exceed the legal rate. It kept deposits for savings and investment, and in addition thereto it kept with business men commercial deposits, which are strictly commercial accounts, such as are kept by national banks. Such deposits are subject to be withdrawn at sight, and the depositor receives no interest thereon. By V. S. 583, it was provided that every trust company or savings bank shall pay a certain tax upon the average amount of its deposit, and it was contended that the amount "deposited," as used in the charter, did not have reference to the commercial deposits, but referred solely to deposits of savings, or to such as are interest-bearing, and, as used in tax laws, it did not include commercial deposits as a basis of taxation. But it was held that under the provisions of the charter the rate of interest and terms on which the bank may



agree to receive money on deposit are within its discretion, and that this language is broad enough to permit the rest of the money on deposit upon terms as to interest from the legal interest down to without interest, and upon such terms regarding payment as the parties may expressly and impliedly agree, and hence the word, "deposit" would include commercial deposits as well. *State v. Franklin County Sav. Bank & Trust Co.*, 52 Atl. 1069, 1070, 74 Vt. 246.

#### General and special deposit distinguished.

Deposits of money in a bank are either general or special. A "general deposit" is one which is to be repaid on demand in money, and the title to the money deposited passes to the bank; a "special deposit" is one in which the depositor is entitled to the return of the identical thing deposited, and the title remains in the depositor. *Bank of Blackwell v. Dean*, 60 Pac. 226, 9 Okl. 626.

All deposits made with banks may be divided into two classes, namely, those in which the bank becomes bailee of the depositor, the title to the thing remaining with the latter, and that other kind of deposit of money, peculiar to banking business, in which the depositor for his own convenience parts with the title to his money and loans it to the bank, and the latter, in consideration of the loan of the money and the right to use it for its own profits, agrees to refund the same amount, or any part thereof, on demand. *Shipman v. Bank of the State of New York*, 13 N. Y. Supp. 475, 486, 59 Hun. 621. See, also, *Montagu v. Pacific Bank (U. S.)* 81 Fed. 602, 604 (citing *Marine Bank v. Fulton County Bank*, 69 U. S. [2 Wall.] 252, 256, 17 L. Ed. 785).

A deposit "is an act by which a person receives the property of another, binding himself to preserve and return it. There is a distinction in deposits. Where the very silver and gold deposited is to be restored, the transaction is a 'special' or 'pure' deposit; but where the party is to restore not the identical coin, but only an equivalent on demand, it is a 'loan' or 'irregular deposit.'" *State v. Clark*, 4 Ind. 315, 316.

"A 'deposit,' properly so called, is a naked bailment, and exists where one of the contracting parties gives something to the other to keep, who is to do so gratuitously, and obliges himself to return it in individuo when he shall be requested. When one deposits money with another for safe-keeping, the latter to return, not the specific money, but an equal sum, the transaction is also called a 'deposit,' but it is an irregular deposit." *Rozelle v. Rhodes*, 9 Atl. 160, 162, 116 Pa. 129, 2 Am. St. Rep. 591.

A bank deposit is general unless the depositor makes it special, or deposits it expressly

in some particular capacity. *Brahm v. Adkins*, 77 Ill. 263, 264.

#### As a loan.

Originally a "deposit" of money was made by placing a sum of money in gold or silver with a bank or other depositary, to be returned, when called for, in the same identical coin, and without interest, the depositor paying the depositary a compensation for his care. For more than a century, however, prior to the passage of Laws 1831, c. 178, for the incorporation and establishment of banks, the term "deposit" had come to mean quite a different transaction. It became customary to deposit money for a particular period and on interest, or payable at certain prescribed periods after notice; in short, the term "deposit" became a symbolical word to designate not only a deposit in its original sense, but all that class of contracts where money in any of its forms, as specie or bank bills, was placed in the hands of banks or bankers to be returned in other money on call, or at a specified period, and with or without interest. The transaction, as designated in the figurative use of the term, was in reality the same as a "loan" of money when it occurred between individuals. *Curtis v. Leavitt*, 15 N. Y. 9, 166.

Originally, a "deposit" was a thing delivered for gratuitous safe-keeping, and it remained the property of the owner; but it is now used to designate a certain kind of loan, for money deposited in the ordinary way becomes the property of the bank or banker. Such loans always imply that the money on deposit is lying in the bank on hand ready to meet the demand of the owner, and that it is kept there for convenience. *State Sav. Bank v. Foster*, 76 N. W. 499, 500, 118 Mich. 268, 42 L. R. A. 404.

A "deposit" is where a sum of money is left with a banker for safe-keeping, subject to order, and payable, not in the specific money deposited, but in an equal sum. It may or it may not bear interest, according to the agreement. While the relation between the depositor and banker is that of debtor and creditor, the transaction cannot in any proper sense be regarded as a loan, unless the money is left, not for safe-keeping, but for a fixed period at interest, in which case the transaction assumes the characteristics of a loan. *Hunt v. Hopley*, 95 N. W. 205, 206, 120 Iowa, 695 (citing *In re Law's Estate*, 144 Pa. 499, 22 Atl. 831, 14 L. R. A. 103; *State v. McFetridge*, 84 Wis. 478, 54 N. W. 998, 20 L. R. A. 223). A "deposit" is a temporary disposition of money for safe-keeping, and this temporary nature makes it distinguishable from an investment, which carries with it a greater or less degree of permanency. *In re Law's Estate*, 22 Atl. 831, 832, 144 Pa. 499, 14 L. R. A. 103. There is a distinction between a general deposit

of money in a bank, payable at any time on demand, and an investment of such money. By such a deposit the depositor does not lose control of the money, but may reclaim it at any time. He loses control of the specific coin or currency deposited, but not of an equal amount of coin or currency having the same qualities and value; but if funds are invested in United States or state bonds, or in loans on time to counties, cities, etc., control thereof is lost, and the same cannot be replaced until such bonds are paid or sold, or such loans become due and are collected by due course of law. The retention of substantial control over the funds in the one case, and the loss of such control in the other, mark the leading distinction between a mere "deposit" of the funds of a state in the hands of its treasurer, and an "investment" thereof, as those terms are used in the statutes relating thereto. *State v. McFetridge*, 54 N. W. 1, 11, 84 Wis. 473, 20 L. R. A. 223. Where a state treasurer places state funds in a national bank subject to check, the bank giving security therefor and agreeing to pay interest on daily balances, the transaction is a deposit, and not a loan. *Nebraska v. First Nat. Bank (U. S.)* 88 Fed. 947, 948.

A deposit made by one bank with another is a loan. It is well known that country banks keep on deposit in New York with bankers and merchants a considerable amount of money for their own convenience, for which they receive more or less interest. But whether interest be obtained or not, these deposits are, equally with paper discounted over the counter of the bank, loaned money. The banker is accountable for the deposits he receives as a debtor, and the individual borrower of money from the bank sustains no other relation to it. In both cases money is borrowed to be returned in a greater or less period of time, according to the contract of the parties. *First Nat. Bank v. Lanier*, 78 U. S. (11 Wall.) 369, 375, 20 L. Ed. 172.

A "deposit" was originally a thing delivered to a person for gratuitous safe-keeping, which remained the property of the owner. The word, however, is now used to designate a certain kind of loan. For money deposited in the ordinary way becomes the property of the bank, and the deposit is a debt. In *re Patterson (N. Y.)* 18 Hun, 221, 222.

Deposits are regarded as loans to the bank without interest, and the money goes into the general fund, and is used by the bank for its own benefit in its usual financial operations. The bank thus gets the benefit of the loan of the depositor's money, and, as a compensation to the depositor, there is an implied obligation on the part of the bank to honor and pay on presentation the checks and drafts of the customer until

his deposit is exhausted. The deposit creates a debt, which is discharged pro tanto by the payment of the depositor's checks. *Neal v. First Nat. Bank*, 60 N. E. 164, 168, 28 Ind. App. 503 (citing *Boyden v. Bank of Cape Fear*, 65 N. C. 13; *Himstedt v. Bank*, 46 Ark. 537; *Perley v. Muskegon County*, 32 Mich. 132, 20 Am. Rep. 637; *McLain v. Wallace*, 103 Ind. 562, 5 N. E. 911).

A "deposit" was clearly defined in *Payne v. Gardiner*, 29 N. Y. 146, 163, and Pothier was quoted with approval as follows: "Where a man deposits money in the hands of another to be kept for his use, the possession of the custodian ought to be deemed the possession of the owner, until an application and refusal or other denial of right." It is further said that a distinction exists between a mere "loan" and a "deposit." They are governed by different rules. Thus, where a wife received money as proceeds of a sale of her separate property, and paid the proceeds over to her husband, and there was evidence that he had made statements that she had given him the money to care for, such transaction constituted a "deposit." *Dorman v. Gannon*, 38 N. Y. Supp. 659, 661, 4 App. Div. 458.

An administrator is chargeable with money of his decedent deposited in a bank then solvent, taking therefor a certificate of deposit payable after one year, with interest, and which money was lost by the subsequent insolvency of the bank, as the transaction is a loan, and not a deposit subject to be withdrawn at any time. *Appeal of Baer (Pa.)* 18 Atl. 1.

#### As money.

See "Money."

#### As property.

See "Personal Property"; "Property."

#### Surplus.

Laws 1896, c. 908, § 4, subd. 14, exempting the "deposits" in any bank for savings which are due depositors, means the total amount received for which the bank is accountable, and not merely the identical moneys received from particular depositors, and includes the surplus which has accumulated, it being a fund which represents the original deposits, and its creation being authorized in contemplation that it may be used to repay to the depositors the amounts put in by them. *People v. Peck*, 51 N. E. 412, 414, 157 N. Y. 51.

#### DEPOSIT IN COURT.

"Deposited in court," as used in 1 St. 625, c. 119, providing that in all cases of admiralty jurisdiction the clerk of the District Court shall be entitled to a certain percentage on all moneys deposited in court, means

money which is deposited subject to the order of the court, whether it be in the actual possession of the court or a bank, or of an officer of the court. It is not limited to money brought in and deposited, *sedente curia*, in the actual manual possession of the court. It includes money deposited in the bank subject to the order of the court. *ex parte* Prescott (U. S.) 19 Fed. Cas. 1283, 1285.

### DEPOSIT FOR EXCHANGE.

A "deposit for exchange" is one in which the depositary is only bound to return a thing corresponding in kind to that which is deposited. Civ. Code Cal. 1903, § 1818; Rev. Codes N. D. 1899, § 4005; Civ. Code S. D. 1903, § 1357; Rev. St. Okl. 1903, § 2829.

### DEPOSIT FOR HIRE.

A deposit not gratuitous is called "storage." A deposit in such case is called a "deposit for hire." Civ. Code Cal. 1903, § 1851.

### DEPOSIT FOR KEEPING.

A "deposit for keeping" is one in which the depositary is bound to return the identical thing deposited. Rev. St. Okl. 1903, § 2828; Rev. Codes N. D. 1899, § 4004; Civ. Code S. D. 1903, § 1356; Civ. Code Cal. 1903, § 1817.

### DEPOSIT SLIP.

A "deposit slip" made out by the cashier of a bank is considered merely a note to help the memory. First Nat. Bank v. City Nat. Bank, 76 S. W. 489, 102 Mo. App. 357.

### DEPOSITARY.

See "Legal Depositary."

A voluntary deposit is made by one giving to another, with his consent, the possession of personal property, to keep for the benefit of the former or a third party. The person giving it is called the "depositor," and the person receiving it the "depositary." Civ. Code S. D. 1903, § 1353; Rev. St. Okl. 1903, § 2825; Rev. Codes N. D. 1899, § 4001.

### DEPOSITARY FOR HIRE.

The depositary in the case of a deposit which is not gratuitous is called a "depositary for hire." Civ. Code Mont. 1895, § 2490.

When chattels are delivered by one person to another to keep for the use of the bailor, the depositary receiving or expecting a reward or hire is called a "depositary for hire." Civ. Code Ga. 1895, § 2921.

A deposit not gratuitous is called "storage." The depositary in such case is called a "depositary for hire." Rev. St. Okl. 1903,

§ 2849; Rev. Codes N. D. 1899, § 4024; Civ. Code S. D. 1903, § 1376.

A voluntary deposit is made by one giving to another, with his consent, the possession of personal property to keep for the benefit of the former or of a third party. The person giving is called the "depositor," and the person receiving the "depositary." Rev. Codes N. D. 1899, § 4001; Civ. Code S. D. 1903, § 1353.

## DEPOSITION.

A "deposition" is the testimony of a witness, put or taken down in writing, under oath or affirmation before a commissioner, examiner, or other judicial officer, in answer to interlocutory and cross-interlocutory, and usually subscribed by the witness. *Lutcher v. United States* (U. S.) 72 Fed. 968, 972, 19 C. C. A. 259.

The word "deposition," in common parlance, is often used to designate the document containing the interrogatories, answers, and certificate of the magistrate; while, again, it more appropriately designates the narrative of the witness made under the sanction of an oath and reduced to writing. *Fuller v. Hodgden*, 25 Me. (12 Shep.) 243, 246.

The ordinary and usual meaning of the word "deposition" is confined to written testimony. *United States v. Clark* (U. S.) 25 Fed. Cas. 441, 442.

Depositions are species of evidence, in suits at law, altogether unknown to the common law. They are not used in England and many of our sister states. They are, moreover, a species of evidence of a most unsatisfactory character, and should always be received with the utmost caution. *Winoskie Turnpike v. Ridley*, 8 Vt. 404, 405, 30 Am. Dec. 476.

Depositions are at best an inferior kind of evidence, and not to be encouraged beyond the limits of absolute necessity. Where, therefore, a party desiring to avail himself of this sort of evidence might have had it taken in a way more conducive to fairness as respects his adversary, the court ought to require a better excuse for the admission than attention to his own convenience. *Gordon v. Little* (Pa.) 8 Serg. & R. 533, 556, 11 Am. Dec. 632.

Code Cr. Proc. art. 774, declares that the "deposition" of a witness taken before an examining court or a jury of inquest, and reduced to writing and certified according to law, in cases where the defendant was present and had the privilege of cross-examining the witness, may be read in evidence, as is provided for the reading of "depositions." Held, that the word "deposition" in the beginning of such section was a mani-

fest error, and should be construed to mean "testimony" or "evidence." *Kerry v. State*, 17 Tex. App. 178, 182, 50 Am. Dec. 122.

Primarily, a "deposition" is simply written testimony. It is testimony that is deposited or laid down in writing. A legal deposition, according to Bouvier, is the testimony of a witness reduced to writing, in due form of law, by virtue of the commission or other authority of a competent tribunal, or, according to the provision of some statute law, to be used on the trial of some question of fact in a court of justice. In *Troy Iron & Nail Factory v. Corning* (U. S.) 24 Fed. Cas. 236, it was said by Nelson, J., that it is testimony taken out of court under an authority which will entitle it to be read as evidence in court, and has no relation to oral testimony taken in court or before a master. *Indianapolis Water Co. v. American Strawboard Co.* (U. S.) 65 Fed. 534, 535.

The term "deposition," although sometimes used as synonymous with "affidavit" or "oath," in its strict and appropriate sense is limited to the written testimony of a witness given in the course of a judicial proceeding, either at law or in equity. *State v. Dayton*, 23 N. J. Law (3 Zab.) 54, 53 Am. Dec. 270. In jurisprudence, says Abbot, the principal use of the term is to signify the testimony of a witness when given in answer to interrogatories propounded by a person authorized for the purpose, and officially taken down in writing. *The Sallie P. Linderman* (U. S.) 22 Fed. 557, 558.

At a preliminary examination for a magistrate, the justice appointed the plaintiff to report in shorthand the proceedings at the preliminary investigation, and, in an action to recover for his services and for transcribing the evidence, it was contended that the county was liable, in that the statute made it the duty of the magistrate to indorse in writing his order of discharge upon the "depositions" taken, etc., and hence such depositions were necessary, and a part of the legitimate costs of the preliminary examination; but the court held that the name "deposition" is used to designate the testimony taken by the magistrate when the complaint is presented to him before the issuance of the warrant, as well as the testimony of witnesses taken upon the examination of the accused after arrest, and that the order of discharge may properly be indorsed upon the former. Thus Pen. Code, § 811, provides that, when an information is laid before a magistrate, he must examine the informant and any witnesses, and take their depositions in writing. Then section 812 prescribes what the deposition as taken must set forth. The term "deposition" is also given to the testimony taken upon the examination of the accused, and section 870 speaks

of depositions on the information or on the examination. *Mattingly v. Nichols*, 65 Pac. 748, 133 Cal. 332.

The testimony of a witness taken by a judge in the form of a deposition, and reduced to writing by a stenographer, but not read over to or corrected or signed by the witness or certified by the judge, does not constitute a "deposition" within the requirements of the Code. *Thomas v. Black*, 23 Pac. 1037, 1038, 84 Cal. 221.

An affidavit that on a certain page of a bill of exceptions a space was left for depositions, and "such depositions" were placed inside of said bill of exceptions at said point, but not otherwise fastened, will be construed to mean the original depositions, and not copies. *Pennsylvania Co. v. Sears*, 36 N. E. 353, 354, 136 Ind. 460.

"Deposition," as used in Code Cr. Proc. 1879, art. 774, providing that the deposition of a witness taken before an examining court or a jury of inquest, and reduced to writing and certified, may be read in evidence, authorizes the use only of depositions taken in such cases, and does not authorize the reading in evidence by the state of testimony given by a witness before such examining court. *Cline v. State*, 36 Tex. Cr. R. 320, 369, 36 S. W. 1099, 61 Am. St. Rep. 850.

On the taxation of costs in an equity case in the federal court, the fee of \$2.50 on each deposition taken and admitted in evidence on the hearing before the court is taxable under Rev. St. § 824, providing a fee, for each deposition taken and admitted in a cause, in favor of the party recovering costs, and it is immaterial before what officer the deposition was taken, whether examiner, master, or otherwise. *Ferguson v. Dent* (U. S.) 46 Fed. 88, 90, 91.

Under Rev. St. § 824, allowing fees for "depositions" taken, the testimony of each witness is a deposition, especially where the testimony of each witness is taken separately. *Broyles v. Buck* (U. S.) 37 Fed. 137, 138.

A deposition is a written declaration under oath, made upon notice to the adverse party. *Bates' Ann. St. Ohio 1904*, § 5262; *Rev. St. Wyo. 1899*, § 3704.

A deposition is a written declaration under oath, made upon notice to the adverse party, for the purpose of enabling him to attend and cross-examine. *Code Civ. Proc. Cal. 1903*, § 2004; *Ann. Codes & St. Or. 1901*, § 816.

A deposition is a written declaration under oath, made on notice to the adverse party, for the purpose of enabling him to attend and cross-examine, or upon written

interrogatories. Ann. St. Ind. T. 1899, § 2027; Gen. St. Kan. 1901, § 4790; Rev. Codes N. D. 1899, § 5667; Code Civ. Proc. S. D. 1903, § 505; Rev. St. Okl. 1903, § 4529.

#### Affidavit.

Deposition, "in its proper technical sense, is limited to the written testimony of a witness in the course of a judicial proceeding either at law or in equity." Bouvier. It is, however, sometimes used, both in common parlance and legislative enactments as synonymous with "affidavit" or "oath," and is thus defined by Webster. State v. Dayton, 23 N. J. Law (8 Zab.) 49, 54, 53 Am. Dec. 270.

The word "deposition" may be used in two senses. In its restricted and technical sense it is usually limited to the written testimony of a witness given in the course of a judicial proceeding at law or in equity, but it is also a generic expression, which embraces all written evidence verified by oath, and thus includes affidavits; and, as used in the Political Code of Georgia, authorizing a commissioner of the state, residing in another state, to administer oaths and to take certified acknowledgments of depositions under commission or otherwise, the word "deposition" will be held to include affidavit, this being rendered the more proper construction owing to the fact that he is authorized by the language to certify acknowledgments of depositions not taken under a commission by the use of the words "or otherwise." Baker v. Magrath, 32 S. E. 370, 371, 106 Ga. 419.

The word "deposition" includes affidavits, and is so used in the provision that the making of a deposition or certificate is deemed to be complete, within the provision of the chapter relating to perjury, from the time when it is delivered by the accused to any other person with intent that it be ut-

tered or published as true. People v. Robles, 49 Pac. 1042, 117 Cal. 681.

An "affidavit" is a written declaration under oath, made without notice to the adverse party. Civ. Code Proc. § 3321. A "deposition" is a written declaration on oath, made upon notice to the adverse party, for the purpose of enabling him to attend and cross-examine. Both affidavit and deposition are declarations under oath, and a distinction recognized by the court between the two is simply for the purpose of preserving the right of cross-examination. So that in a probate proceeding, where there is no adverse party, an affidavit will be treated as a deposition. In re Liter's Estate, 48 Pac. 753, 756, 19 Mont. 474.

"Deposition" is a generic term, embracing all written evidence verified by oath, and thus includes affidavits; but in legal language a distinction is maintained in courts of law and chancery between 'depositions' and 'affidavits.' A 'deposition' is evidence given by a witness under interrogatories, oral or written, and usually written down by an official person; while an 'affidavit' is the mere voluntary act of the party making the oath, and may be, and generally is, taken without the cognizance of the one against whom it is used." Stimpson v. Brooks (U. S.) 23 Fed. Cas. 100.

An affidavit is a voluntary *ex parte* statement, formally reduced to writing, and sworn to or confirmed before some officer authorized by law to take it. The distinction between an "affidavit" and a "deposition" is that the former is *ex parte* voluntary, and the latter is made after notice, and is compulsory. If the witness is subpoenaed, sworn, and required to answer, his evidence, reduced to writing, is his "deposition." Crenshaw v. Miller (U. S.) 111 Fed. 450, 452; Woods v. State, 33 N. E. 901, 903, 134 Ind. 35.

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